



**Kariuki v Tofina Rom Builders Limited & another (Environment and Land Case  
Civil Suit 334 of 2015) [2025] KEELC 3533 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3533 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 334 OF 2015**

**AA OMOLLO, J  
APRIL 30, 2025**

**BETWEEN**

**JAMES NGUNJE KARIUKI ..... PLAINTIFF**

**AND**

**TOFINA ROM BUILDERS LIMITED ..... 1<sup>ST</sup> APPLICANT**

**SOCIAN VILLAS LIMITED ..... 2<sup>ND</sup> APPLICANT**

**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants/Defendants filed a Notice of Motion dated 9<sup>th</sup> July 2024 brought under the provisions of order 42 of the [Civil Procedure Rules](#) plus all enabling provisions of the law. They are seeking for the following orders;
  1. Spent.
  2. Spent.
  3. That pending the hearing and determination of the intended Appeal, this Honourable Court be pleased to Order stay of execution of the Judgment delivered by the Lady Justice A. Omollo on 24<sup>th</sup> April 2024 in Environment & Land Court Civil Case No. 334 of 2015 and any Order arising there from.
  4. That the costs of this application be provided for.
2. The application is premised on the grounds as outlined on the motion itself and the supporting affidavit sworn by Lucy Mwendwa Ringera on July 9<sup>th</sup> 2024. The grounds inter alia are that the Plaintiff/Respondent was awarded a judgment on April 24, 2024, for the principal sum of Kshs. 8.7 million, with interest to be calculated at court rates from the notice to terminate until full payment.



3. That the pursuant to the said judgement, the Plaintiff/Respondent prepared and served the Applicants with a draft decree with the following terms;
  - a. Judgment is entered for the Plaintiff against the Defendants for the principal sum of Kshs.8,700,000/= with interest therein at the rate of 14% per annum from 24<sup>th</sup> April 2015 until payment in full, amounting to Kshs. 10,962,000/= as of 24<sup>th</sup> April 2024.
  - b. The Plaintiff is entitled to half of the costs. Annexed hereto and marked as Annexure '1B" is a true copy of the Decree. "
4. The Applicants stated that they have already deposited the sum of Kshs.8,700,000/= into the Plaintiff/Respondent's bank account, however being dissatisfied with the award on interest rate of 14%, which contradicts the prevailing court rate of 12%. Further, that the original agreement between the parties did not specify an interest rate, and that they have filed a Notice of Appeal to challenge the interest awarded.
5. The Applicants seek a stay of execution on the judgment, fearing that if the interest is enforced, they would suffer substantial loss, as the Plaintiff/Respondent may be unable to repay the decretal sum if the appeal is successful.
6. They assert that the appeal has a high chance of success and that granting the stay would not prejudice the Plaintiff/Respondent, as the principal sum has already been paid. Therefore, they request the court to stay the execution of the judgment pending the outcome of their appeal.
7. In opposition, the Plaintiff/Respondent filed grounds of opposition stating inter alia that the Defendants have not established substantial loss under Order 42 Rule 6 of the *CPR*, the execution is a lawful process of which the applicants have not established that the execution will create a state of affairs that will irreparably affect their position on this matter.
8. That Applicants do not have sufficient grounds to justify the appeal filed against the Judgment and it is a gross of abuse of the due process of law being used to delay, procrastinate and frustrate the Plaintiff from rightfully enjoying the fruits of the Judgment. Further, that the Plaintiff is likely to suffer gross injustice and prejudice if the order sought is granted and especially given that the Defendants/Applicants have not secured and/or deposited the decretal amounts.
9. The Plaintiff/Respondent stated that the application has not met the requirements for grant of a stay of execution pending Appeal with grounds raised in Memorandum of Appeal showing no triable issues. That also the Defendants/Applicants have neither offered nor deposited the entire decretal amount either in Court or in an Escrow account.

### **Submissions.**

10. The Applicants and the Respondent each filed submissions dated 20<sup>th</sup> February 2025 and 27<sup>th</sup> February 2025 respectively. The Applicants argue that since the principal sum has been paid, granting an unconditional stay would not prejudice the Plaintiff, citing *Butt v Rent Restriction Tribunal* [1979] to show that the application was made without undue delay.
11. The Defendants/Applicants claim that the interest amount of over Kshs. 10 million constitutes substantial loss, referencing the cases of *Nesco Services Limited v CM Construction (EA) Limited* [2019] eKLR and *Tropical Commodities Suppliers Limited v International Credit Bank Limited* [2004] 2EA to define "substantial loss" as any real loss with value.



12. They further argue that the Plaintiff has not provided evidence of their financial capability to refund the decretal sum should the appeal succeed, relying on the case of *National Industrial Credit Bank v Aquinas Francis Wasike & Another* (2006) eKLR to shift the evidential burden to the Plaintiff.
13. Citing the case of *Gianfranco Manethi & Another v Africa Merchant Assurance Co Limited* (2019) eKLR, which emphasizes that security provisions should not hinder the right to appeal, the Applicants submitted that they are willing to offer a bank guarantee as security.
14. She submitted that the application is guided by the principles set out in Order 42 Rule 6(2) of the *Civil Procedure Rules*, which stipulates that a stay may be granted if the applicant demonstrates substantial loss, that the application is made without undue delay, and that security for the due performance of the decree is provided.
15. Further, that the court also considers the overriding objective of the *Civil Procedure Act*, which seeks to ensure just and efficient determination of proceedings and in support cited the case of *James Wangalwa v Agnes Naliaka Cheseto* [2012] eKLR, where it was held that substantial loss is the cornerstone of stay applications, thus the applicant must show that execution would irreparably affect their ability to pursue the appeal.
16. It is the Respondent's submissions that although the Defendants/Applicants the sum of Kshs. 10.96 million in interest constitutes substantial loss, she has not initiated execution proceedings thus the application is deemed premature. Further, the court in *RWW v EKW* [2019] eKLR emphasized that the purpose of a stay is to preserve the subject matter of the dispute and safeguard the appellant's rights, ensuring that the appeal, if successful, is not rendered nugatory.
17. That the Defendants/Applicants have not presented any evidence of their ability to comply with the security conditions, nor have they shown that the Plaintiff cannot refund the sum if the appeal succeeds. In contrast, the Plaintiff/Respondent has demonstrated their ability to refund the money if needed, as evidenced by their prior payment of the principal amount.

**Analysis and Determination:**

18. The main issue for determination is whether the applicant has demonstrated that the order of stay of execution pending appeal are merited. There is no dispute that the Applicants have filed a Notice of Appeal dated May 3 2024 showing the intention to challenge the interest awarded.
19. In the case of *Ndolo v Asiyo & another* (Environment & Land Case 1295 of 2013) [2023] KEELC 16754 (KLR), Justice Oguttu Mboya espoused;
  - “ 44. Ordinarily and by Law, a Notice of appeal occupies a critical and pivotal position in determining whether or not a sufficient cause or basis has been laid.
  45. In this regard, there is no gainsaying that once a valid Notice of appeal has been filed and lodged in accordance with the Rules of the Court of Appeal, then it is deemed that the Applicant has shown a clear and deliberate intention to pursue an appeal to the Court of appeal.
  46. Consequently and in the premises, it is not lost on this Honourable court that a valid of a Notice of appeal would therefore serve two critical purposes. Firstly, express and document the intention of the Applicant to appeal to the court of appeal.



47. Secondly, the filing or lodgment of a valid and requisite Notice of appeal would confer upon and bestow upon this Honourable court the requisite jurisdiction to grant an order of stay pending appeal, subject to proof of (*sic*) substantial loss in accordance with the provisions of Order 42 Rule 6(2) of the *Civil Procedure Rules*, 2010.”
20. The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:
- “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory... The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”
21. I am satisfied that there has been no inordinate delay in bringing the instant application and the notice of appeal having been filed is sufficient grounds to grant the stay of execution. On balance rights of both parties while considering the issue of substantial loss was, it is noteworthy that the Applicants have deposited the sum of Kshs.8,700,000/= into the Plaintiff/Respondent’s bank account and the amount in question is the interest due. The paying of the principal sum is evidence both of good faith and demonstration of the ability of the Applicants to pay in case their appeal fails. Therefore, I am persuaded that having honored part of the decree, it serves the interest of justice for the stay orders to be granted to allow the Applicants ventilate their appeal.
22. On the question of whether to make an order for security, this Court must consider the overriding objective and balance the interest of the parties to the suit. The law is that where the applicants intend to exercise their undoubted right of appeal, and in the event, that they were eventually to succeed, they should not be faced with a situation in which they would find themselves unable to get back their money.
23. In the persuasive decision of *Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd* [2019] eKLR the court observed: -
- “Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....
- Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”
24. It is clear that the issue of security is discretionary and it is upon the court to determine the same. Notably, in their submissions, the applicants stated that they are willing to offer security if called upon



by this Court to do so by offering a bank guarantee. Flowing from the Applicants' submissions, I do make an order for security in the form a bank guarantee for the amount of Kshs 10,962,000 to be deposited with the Respondent within a period of 45 days from today.

25. In conclusion, the application is allowed in terms of prayer 3 of the motion. The Applicant to deposit with the Plaintiff/Respondent a bank guarantee in the sum of Kshs 10,962,000 within 45 days of today. In default, the order of stay lapses. Costs of the application to the Plaintiff.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF APRIL, 2025.**

**A. OMOLLO**

**JUDGE**

