



**Otiende v Nadida (Environment and Land Appeal E001 of 2025)
[2025] KEELC 3496 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3496 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E001 OF 2025**

JG KEMEI, J

APRIL 30, 2025

BETWEEN

PAUL OTIENDE APPELLANT

AND

WILBERFORCE NADIDA RESPONDENT

(In respect of the Appellant's application dated 3/2/2025)

RULING

1. By a Notice of Motion dated 3/02/2023 the Appellant moved this Court under Order 42 Rule 6 of the *Civil Procedure Rules*. He prays in the main for orders that: -
 - a. There be a stay of execution of the Judgment of the Hon. Hillary K. Korir, the Chairman at Rent Restriction Tribunal at Nairobi, given on 10th December, 2024, pending the hearing and determination of the Appeal herein and/or further directions of the Honourable Court.
 - b. Costs of the application be in the cause.
2. The application is based on the grounds on the face of it and supported by the Appellant's Affidavit sworn on even date. The Appellant avers that Judgment was entered on 10/12/2024 by the Rent Restriction Tribunal being RRT No E090 of 2016 in favour of the Respondent. That being aggrieved by the Court's finding, the Appellant preferred an Appeal evident by the Memorandum of Appeal.
3. The Appellant avers that pursuant to the said Judgment, he is required to vacate the suit property yet he has heavily invested therein. He contends that he risks being evicted there from thus inconveniencing him and his family. He argues that he has an arguable appeal with high probability of success. He states that he continues to pay the monthly rent of Kshs 10,000/= hence the Respondent shall not in any way be prejudiced.



Respondent's Replying Affidavit

4. The Respondent opposed the application vide his Replying Affidavit sworn on 20/2/2025. He contends that the Appellant has not demonstrated sufficient reasons to warrant the stay orders sought. He avers that the Appellant does not have an arguable appeal on the grounds that the Appellant has insisted on the rent payable from the beginning of the tenancy being Kshs 10,000/= despite the passage of time, inflation and the rent payments ceasing in July 2015.
5. Further, that the Appellant has altered the property's structure including adding an entrance without seeking his prior consent. The Appellant is said to have erected semi-permanent structures which he has rented out and is illegally earning an income therefrom. That it will be costly to return the suit property to its original structure. It is for this reason that the Appellant is adamant at vacating the premises.
6. The Respondent states that the current market value of the units is Kshs 50,000/= hence he stands to suffer irreparably should the orders sought herein be granted. He further accuses the Appellant of failing to comply with the Order issued on 19/7/2017 for the payment of rent arrears amounting to Kshs 250,000/= Which arrears have since accumulated to Kshs 962, 000/= as at 31/01/2025. That since 2015 to date, the Appellant has only paid a sum of Kshs 248,000/=.
7. The deponent avers that the 60 days within which the Appellant was granted to vacate from the premises has since lapsed hence he prays that the court directs the Appellant to vacate from the premises and the issue of reconciliation can be dealt with later pending the hearing and determination of the application. That the Applicant has not demonstrated that the appeal will be rendered nugatory unless an order of stay is granted. That the Appellant's continued stay on his premises without paying rent is prejudicial to him as it is his only source of income as retiree. He prays that the application be dismissed with costs.

Appellant's Further Affidavit

8. In response to the Respondent's Replying Affidavit, the Appellant filed a Further Affidavit sworn on 23/2/2025. He avers that the suit before the Rent Restriction Tribunal as contained in the Plaint dated 27/01/2016 for rent arrears of Kshs 40,000/=:, which at trial the Respondent admitted that the Appellant had no arrears. Therefore, the allegations of rent arrears of Kshs 250,000/= is an afterthought and aimed at misleading this Court. He maintains that he proved his claim of Kshs 407, 107/= being the costs for the work done.
9. He avers that he has continued to pay his monthly rent of Kshs 10,000/= hence the Respondent has never been prejudiced. He prays that the Court exercises its discretion in his favour and allows the application.

Court's Directions

10. The court, directed that the application be canvassed by way written submissions. However, despite the lapse of the time for compliance, none of the parties filed their submissions.

Analysis & Determination

11. Having considered the application, the affidavit in support, the response thereto as well as the rival submissions. In my considered view, the issues for determination are;
 - a. Whether this court should grant stay of execution of the Judgment/Decree as prayed for.
 - b. What orders to issue and who to bear the Costs of this Application?



a. Whether this court should grant stay of execution of the Judgment/Decree as prayed for.

12. Stay of Execution is provided under Order 42 Rule 6 of the [Civil Procedure Rules](#) 2010 as follows;

- “(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under sub rule (1) unless –
- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

13. The three conditions to be fulfilled can therefore be summarized as follows;

- a. that substantial loss may result to the applicant unless the order is made
- b. application has been made without unreasonable delay
- c. security as the court orders for the due performance

14. These principles were enunciated in [Butt v Rent Restriction Tribunal](#) [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -

- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
- b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.
- c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the [Civil Procedure Rules](#), can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.



15. In *RWW v EKW* [2019] eKLR, the Court addressed its mind to the purpose of an order for stay of execution pending appeal. In so doing, it stated as follows:

“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. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however must balance the interests of the Appellant with those of the Respondent.”

16. As to whether the Application has been filed without undue delay, judgment was entered on 10/12/2024. The Memorandum of Appeal was filed on 7/01/2025. The instant application was filed on 3/02/2025, which is 1 month 25 days. This court thus finds that the appeal and this application for stay of execution has been filed without undue delay.

17. On the issue of substantial loss, Ogolla, J in *Tropical Commodities Suppliers Ltd & others v International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 stated that:

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”

18. In the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR the Court expressed itself as hereunder:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *Civil Procedure Rules*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

19. In the instant case, the Applicant avers that he is required to vacate the suit Property yet he has heavily invested thereon. He contends that he risks being evicted which will inconvenience him and his family. He argues that he has an arguable appeal with high probability of success. In my view, since the Applicant was in occupation of the land and could be removed if eviction proceeded, he demonstrated the substantial loss he would suffer if stay is not granted.

20. Although the applicant has not expressed whether he is ready to offer security of costs, this Court is of the opinion that the Applicant can be directed by the Court to do so. Thus, this Court shall exercise its discretion regarding the security of costs to be offered by the Applicant and direct that he does so within the time to be stipulated in this ruling if he intends to proceed with the Appeal.



b. What orders to issue and who to bear the Costs of this Application?

21. The upshot is that the Application is allowed and a stay of execution of the decree by the Rent Restriction Tribunal being RRT No E090 of 2016 is granted on the following conditions:
- a. The Applicant is hereby ordered to deposit in a fixed joint interest earning account in the names of both counsel for the parties the sum of Kenya Shillings Fifty Thousand (Kshs 50,000/=) only as security of costs within 14 days from the date of this ruling.
 - b. The applicant/appellant shall compile, file and serve a record of appeal within 45 days and move the Court appropriately towards the finalization of this Appeal within 180 days from the date of this ruling.
 - c. Failure by the Applicants to abide by any of the above stated two conditions within the fixed time lines will lead to an automatic lapse of the stay of execution herein irrespective of whether or not one condition shall have been met earlier than the failure of the latter.
 - d. Costs of the application shall abide the outcome of the appeal.
22. It is so ordered

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF APRIL,2025 VIA MICROSOFT TEAMS.

J.G. KEMEI

JUDGE

Delivered Online in the presence of:

1. NA for the Appellant/Applicant
2. Mr. Kaczeda for the Respondent
3. CA – Ms. Yvette

