



**Kerario v Masero (Environment & Land Case 9 of 2017)  
[2025] KEELC 3576 (KLR) (29 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3576 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT & LAND CASE 9 OF 2017  
FO NYAGAKA, J  
APRIL 29, 2025**

**BETWEEN**

**ROMAN GABERI KERARIO ..... PLAINTIFF**

**AND**

**ROBERT NYAITATI MASERO ..... DEFENDANT**

**RULING**

1. The DefendantApplicant filed the instant application dated 3<sup>rd</sup> December, 2024 seeking the following orders:
  - a. Spent
  - b. That the Honourable Court be pleased to grant stay of execution of judgment delivered on 20<sup>th</sup> February, 2024 in Migori ELC No. 9 of 2017 (OS) in the present suit pending the hearing and determination of Kisumu Court of Appeal No. e221 of 2024.
  - c. Spent.
  - d. That costs of this application be in the cause
2. The Application was based on grounds set out and supported by the Affidavit of R Oman Gaberi Kerario the Applicant herein sworn on 3<sup>rd</sup> December, 2024 He stated that subsequent to the judgment delivered in the present suit on 20<sup>th</sup> February, 2024, he filed a Record of Appeal. He further stated he stood to suffer substantial loss unless an order of stay of execution of the judgment was made preserving the status quo of the matter. He added that the appeal had high chances of success and that if the said orders are not granted, the Respondent will proceed to execute rendering the appeal nugatory. He also stated that the appeal was filed without delay. He urged the court to allow the application as prayed.



## Response.

3. The Respondent filed his replying affidavit dated 13<sup>th</sup> January, 2025 where he averred that he had indeed obtained judgment against the Applicant on 20<sup>th</sup> February, 2024. He added that the Applicant filed his appeal on 9<sup>th</sup> September, 2024 a period over 7 months after lodging the notice of appeal. He also averred that the present application was filed over 10 months after the delivery of judgment. He averred that the orders sought in the instant application are an afterthought meant to frustrate the execution process. He further averred that the Applicant had failed to meet the legal provisions for grant of orders for stay of execution as the same has been made with inordinate delay. He urged the court to dismiss the application with costs.

## Submissions.

4. Counsel for the Applicant filed his submissions dated 13<sup>th</sup> January, 2025 where he identified two issues for determination. The first issue was whether the application was merited. He relied on the case of *RWW V EKW* (2019) eKLR and submits that it was imperative to establish that the Applicant had satisfied the threshold for stay of execution pending appeal. He cited the case of *Kenya Power & Lighting Company Ltd V Esther Wanjiru Wokabi* [2014] eKLR and *Butt V Rent Restriction Tribunal* [1982] KLR 417. He also relied on Order 42 Rule 6(2) of the *Civil Procedure Rules* that set out the three conditions to be met before grant of the orders.
5. On the first condition of delay, he submits that judgment and decree was delivered on 20<sup>th</sup> February, 2024 while the memorandum of appeal dated 5<sup>th</sup> September, 2024 was filed and the present application filed on 3<sup>rd</sup> December, 2024. He submits that the Applicant moved with speed to file the memorandum of appeal thus filed without unreasonable delay. He adds that the Applicant showed his willingness to conduct the case to its conclusion.
6. The second condition of substantial loss, it was counsel's submission that the suit property was the Applicant's home as well as his ancestral land where his parents had been buried. He submits that no monetary compensation would be adequate to replace the sentimental value the land held. He cited the case of *James Wangalwa & Another V Agnes Naliaka Cheseto* [2012] eKLR.
7. The third condition on security, he submits that the same as discretionary upon the court to determine. He relied on the case of *Arun C Sharma V Ashana Raikundalia ta Raikundalia & Co. Advocates & 2 Others* [2014] eKLR and *HE V SM* [2020] eKLR.
8. On the second issue of costs, counsel relied on Section 27 of the *Civil Procedure Act*.
9. Counsel for the Respondent on the other hand filed his submissions dated 9<sup>th</sup> January, 2025 where he identified only one issue for determination being whether the application for stay of execution should be granted to the Applicant. He relied on Order 42 Rule 6 of the *Civil Procedure Rules* that stipulated the three conditions to be met before grant of the said orders.
10. On the first condition of whether the appeal had high chances of success, he submits that the Applicant failed to demonstrate to what extent the appeal was meritorious. He relied on the case of *Michael Chesikaw v Kenya Anti-Corruption Commission* CA No. E537 2023. Going to the second condition on substantial loss, it was his submission that the Applicant failed to show the loss he was likely to suffer in the event the orders of stay of execution were not granted. He further submits that the Respondent ought not be denied his opportunity to enjoy the fruits of his judgment. On the third issue of delay, he submits that judgment was delivered on 20<sup>th</sup> February, 2024 whereas the present application dated 3<sup>rd</sup> December, 2024 was filed over 10 months after. He submits that the Applicant failed to give reasons



for the delay. On the condition of security, it was his submission that the same was discretionary and argued that the Applicant did not offer any terms of security to warrant grant of the stay.

11. He submits that the Applicant has therefore failed to satisfy the conditions for grant of stay of execution orders. He added that litigation ought to come to an end and that the present application was merely an afterthought and only brought in bad faith. Counsel relied on the case of *Samvir Trustee Limited V Guardian Bank Limited* [2007] eKLR He relied on a number of cases including the case of *MS Portreitz Maternity V James Karanga Kabia*, Civil Appeal No. 63 of 1997, He urged the court to dismiss the application with costs.

### **Determination.**

12. This court has considered the application and is of the view that the issue for determination is whether the Applicant has met the threshold for stay of execution pending the hearing and determination of appeal.
13. The grant of stay of execution pending appeal is anchored on Order 42 Rule 6 of the *Civil Procedure Rules* which provides as follows: -
  1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.
  3. ...
  4. For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
  5. ...
  6. Notwithstanding anything contained in sub-rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
14. It is trite law that the purpose of stay of execution is to preserve the substratum of the case. In the case of *Consolidated Marine V Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi), the Court held that: -

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.



15. The Applicant contends that he would suffer substantial loss if stay is not granted as he risks losing his ancestral and residential home.
16. This Court appreciates that it has to balance the interests of the Applicant seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgment.
17. Regarding the second condition, the issue of whether the application was filed within reasonable time, it is a fact that the impugned judgment was delivered on the 20<sup>th</sup> February, 2024 while the Applicant filed the instant application dated 3<sup>rd</sup> December, 2024. I find that 10 months is inordinate delay, because the Applicant ought to have moved the soonest possible. Any slight delay should be explained. This Court would on that account alone dismiss the application. However, in interest justice this Court will, as an exception to the rule, gloss over the issue of delay and consider the merits of the application.
18. On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that he must furnish security.
19. On the issue of security for the due performance of the decree, the court held in the case of Kenya Commercial Bank Limited V Sun City Properties Limited & 5 Others [2012] eKLR

“in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced in a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal. I do not see, why the same should not be applicable in this case.”

20. It is not in contention that the Applicant has not provided any security for due performance or shown any willingness to do so.
21. This court maintains that a grant of stay of execution remains a discretionary order that must consider the fact that the court ought not to make a practice of denying a successful litigant the fruits of their judgment.
22. I find that in the interest of justice, it would be prudent to grant an order of stay with a condition that the Applicant deposits Kshs. 350,000 in a joint interest earning account of the advocates for the Applicant and the Respondent within the next 30 days, in default the stay of execution lapse.
23. It is so ordered.
24. The costs of the application to be borne by the applicant.

**RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 29<sup>TH</sup> DAY OF APRIL 2025.**

**HON. DR. IUR NYAGAKA,  
JUDGE**

