



REPUBLIC OF KENYA



**Agengo v Mwiti (Land Case Appeal E203 of 2024)
[2025] KEELC 4588 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 4588 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND CASE APPEAL E203 OF 2024**

JG KEMEI, J

APRIL 24, 2025

BETWEEN

ALFRED AGENGO APPLICANT

AND

LLOYD MURITHI MWITI RESPONDENT

RULING

(In respect of the Applicants motion dated the 28/11/24 seeking stay of execution of the judgement delivered on 7/11/24 in Rent Restriction Tribunal Case No 88 of 2019)

1. Vide a motion dated the 28/11/24, the Applicant moved this court seeking a single relief which is, orders of stay of execution of the judgement delivered on the 7/11/24 and all its consequential orders issued in Rent Restriction Tribunal Case No 88 of 2019 pending the hearing and determination of the appeal
2. The application is based on the grounds annexed thereto and the Supporting affidavit of Alfred Agengo, the Applicant herein.
3. He deposed that he is aggrieved with the judgement of the Tribunal hence the filing of the appeal vide the Memorandum of Appeal dated 28/11/24.
4. That he has occupied the house for the last 9 years and impugned the summary manner in which he was ordered to vacate the premises with no regard to his acquired interest in terms of business ventures in the locality. He also challenged the short notice given in view of the hefty bill that he is required to settle before vacating the premises.
5. Finally, that his appeal is arguable with a high chance of success and if the orders are not granted the appeal filed therein risks being rendered nugatory.



6. The application is opposed by the Replying affidavit of Lloyd Muriithi Mwiti, the Respondent herein. He contends that the arguments made by the Applicant are speculative in nature with no legal basis. That the head landlord issued a notice on 2/12/22 in accordance with Section 14(1)(h) of the Rent Restriction Act expressing her intention to reclaim her premises which notice was brought to the attention of the applicant. That the Applicant had the liberty to negotiate and enter into an agreement with the landlord. That he also notified the Applicant about the judgement of the court and the timelines within which he was to vacate the premises and that he had handed over possession of the premises to the landlord. In response he averred that the Applicant sought more time till December 2024 to enable him seek alternative accommodation which the head landlord accepted before the area chief and in his presence. That consequently, he stopped receiving rent from the Applicant and that currently he is unaware of any of the arrangements the Applicant may have made with the landlord
7. He added that having relinquished the premises to the owner he has no capacity authority or obligation to deal with the said premises any more. He urged the court to dismiss the application on account that it is frivolous and unmeritorious.
8. The Applicant also filed a further supporting affidavit sworn on 10/3/25 which by and large reiterates the contents of the previous affidavit.
9. Counsel for the Applicant submitted that to the contrary the Respondent received rent from the Applicant in the month of December and in addition his relative continues to occupy the adjacent premise and refuted the respondent's assertion that he has relinquished possession to the landlord.
10. On substantial loss, counsel for the Applicant submitted that the Applicant stands to suffer substantial loss if evicted because he has no alternative residence in Nairobi to house his children and moreso, the rent for the available houses is costly and beyond his ability and reach. That the costs of transporting his household items to Kisumu, his rural home is also costly. Further he added that his school going children will be disrupted. That he has health issues for which he receives constant medical care from Kenyatta National Hospital.
11. On security of costs, counsel for the Applicant submitted that the Applicant is willing to offer security in the matter. That the application has been brought without delay in any event.
12. Counsel for the Respondent submitted that the appeal has been overtaken by events as he has stopped receiving rent and handed over possession of the premises to the owner as can be explained by the owner's notice demanding the Applicant to vacate the suit premises. That as it stands now, the Respondent cannot be forced into a contractual relationship with the applicant. The court was urged to dismiss the application with costs.
13. Having considered the application and the affidavit evidence alongside the rival submissions the key issue for determination is whether the Applicant is entitled to orders of stay of execution.
14. The guiding principles in considering an Application for stay of execution were set out by the Court of Appeal in the case of Butt –vs- Rent Restriction Tribunal {1979} eKLR (Madan Miller and Porter JJA) thus: -
 - a. The power of the Court to grant or refuse an Application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - b. 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 that appeal Court reverse the judge's discretion.



- c. 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. The Court in exercising its discretion whether to grant or refuse an Application for stay will consider the special circumstances of the case and its unique requirement.
15. Generally, stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules. Sub-rule (1) and (2) provides as follows:
- “6.
- (1) No appeal or second appeal shall operate as a stay of execution or proceedings 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 undue 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.
16. The burden of proving that substantial loss would occur unless stay is granted rests upon and must be discharged accordingly by the Applicant. It is not enough to merely state that loss will be suffered, the Applicant ought to show the substantial loss that it will suffer in the event the orders sought are not granted.
17. On whether or not the appeal is arguable, I have perused the grounds of appeal as set out in the memorandum of appeal and find that the judgment has been impugned on various fronts including the burden of proof. In my considered view the appeal is not one that can be termed as idle.
18. It is trite that the duty of the court in considering an application for stay of execution is to balance the rights of the parties in the appeal. The successful party has a right to enjoy the fruits of the judgement while the appellant has the right to proffer his appeal so that he may be heard on merits.
19. In this case the Applicant has submitted that he will suffer substantial loss if he is evicted from the suit land. He has raised the issues of school disruption of the children, the costly rents for alternative



accommodation and his health condition. The court while appreciating the reasons advanced notes that the grounds cannot form substantial loss in my view. Substantial loss is something that cannot be reversed. The grounds adduced by the Applicant cannot fall in the category. For example, a tenant can always move house and schools as well depending on their preferences and circumstances. There is nothing fixed about it. The suit arises from a contractual relationship with the sublessor which is determinable in accordance with the law. I find that the Applicant has not proven substantial loss that he is to suffer if the orders are not allowed.

20. That said, I find that it is in the interest of justice that the orders of stay are granted so that the appeal may be heard on merits and in that way balance the rights of the parties in the appeal.
21. The Applicant has alluded that it is prepared to meet the security conditions as set by the court. I will make the appropriate orders in the end.
22. In the end the application is allowed on terms as follows;
 - a. The Applicant is ordered to pay the sum of Kshs 100,000/- (Kenya Shillings One Hundred Thousand Only) being security for the due performance of the decree within the next 15 days into court.
 - b. The Applicant to file the record of appeal within the next 45 days from the date hereof
 - c. Parties to expediently list the appeal for directions.
 - d. In default of a) above the orders allowed herein shall stand dismissed
 - e. Costs shall abide the outcome of the appeal
23. Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF APRIL 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the presence of:

1. Mr Wara for the Appellant
2. Mr Kemboi for the Respondent
3. CA- Ms Catherine

