



Mwangi (Suing as the Administrator of the Estate of Stephen Mwangi Maina - Deceased) v Ndungu & another (Environment & Land Case 174 of 2019) [2025] KEELC 3331 (KLR) (24 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3331 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 174 OF 2019**

CG MBOGO, J

APRIL 24, 2025

BETWEEN

TERESIA NJERI MWANGI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF STEPHEN MWANGI MAINA - DECEASED) PLAINTIFF

AND

JAMES MUSOMBA NDUNGU 1ST DEFENDANT

CHARITY WAKO KAGWI 2ND DEFENDANT

RULING

1. Before this court for determination is the notice of motion dated 14th October, 2024, filed by the plaintiff/ applicant, and it is expressed to be brought under Order 42 Rule 6, Order 22 Rule 22 of the [Civil Procedure Rules](#) and Sections 3A and 63e of the [Civil Procedure Act](#), seeking the following orders: -
 1. Spent.
 2. Spent.
 3. That the execution of the judgment delivered on 16th September, 2024, and the decree therefrom be stayed pending hearing and determination of the filed appeal.
 4. That the costs of this application be in the cause.
2. The application is premised on the grounds *inter alia* that being dissatisfied with the judgment of this court delivered on 16th September, 2024, the plaintiff/applicant has lodged an appeal, which has overwhelming chances of success.
3. The application is supported by the affidavit of the plaintiff/applicant sworn on even date. The plaintiff/applicant deposed that she has filed a notice of appeal and that there is sufficient cause that



- the memorandum of appeal is arguable with high chances of success. The plaintiff/applicant deposed that she has applied for typed proceedings, and paid for the same, and that she is keen on prosecuting the appeal. She deposed that she stands to suffer substantial loss unless execution of the orders is stayed.
4. Further, that the appeal will be an illusory and academic exercise as the defendants/respondents can proceed to revoke the title and dispose the suit property to third parties. The plaintiff/applicant deposed that she is willing to abide by any orders or conditions imposed by this court including depositing security for costs.
 5. The 1st and 2nd defendants/respondents filed grounds of opposition dated 9th December, 2024, challenging the application on the following grounds: -
 1. That the application is fatally incompetent, vexatious, hopeless, and only fit for dismissal.
 2. That the applicant is not deserving of the orders sought as she has not demonstrated nor attached evidence demonstrating that she has or is willing to fulfil the mandatory requirements of Order 42 Rule 6 of the Civil Procedures. Specifically:-
 - a. The applicant has not demonstrated that substantial loss may result unless stay orders are granted.
 - b. The applicant has not demonstrated she is ready to give security for due performance of the decree or order as may ultimately be binding on her at the end of the determination of the appeal.
 3. That following the above, the applicant has not demonstrated a worthy case and should be granted the orders sought.
 4. That no proof has been tabled by the plaintiff to show that the suit is in danger of being damaged, alienated or disposed, hence no substantial loss will be suffered by the applicant if the orders sought are not granted.
 5. That it is important for this court to uphold and protect the rights of not only the applicant, but as well as the respondents herein who unlike the plaintiffs have tabled before this court actual evidence of ownership, that resulted in dismissal of the applicant's case.
 6. That the application is mala fides, devoid of any merit, and an abuse of the court process.
 7. That the said application does not meet the necessary grounds for grant of the orders sought.
 8. That in the interest of justice and fairness the instant application be dismissed with costs to the respondent.
 6. The 1st defendant/respondent filed a replying affidavit in response to the application sworn on 24th January, 2025. While reiterating the issues raised in their grounds of opposition, the 1st defendant/respondent deposed that the plaintiff/applicant seeks to unjustly delay them from enjoying the fruits of their judgment, and frustrate the legitimacy of their ownership of the suit property i.e. LR. No. 12672/79. Further, that the plaintiff/applicant has not provided any justification for the issuance of a stay of execution. He deposed that they planned to sell the suit property at Kshs. 38,000,000/-, and should the court be inclined to grant a stay of execution, a deposit of Kshs. 38,000,000 would be required to be deposited in a joint interest earning account, as security for the due performance of the decree.
 7. The application was canvassed by way of written submissions. The plaintiff/applicant filed her written submissions dated 3rd February, 2025. While relying on the cases of Butt v Rent Restriction Tribunal



- [1979] eKLR, [Samvir Trustee Limited v Guardian Bank Limited](#), HCCC 795 of 1997, and [Jason Ngumba Kagu & 2 Others v Intra Africa Assurance Co. Limited](#) [2014] eKLR, the plaintiff/applicant submitted that the application has been brought without delay, and further since the judgment ordered a cancellation of the title, the defendants/respondents would be at liberty to utilize the property including disposing it to third parties, demonstrating substantial loss.
8. On deposit of security for costs, the plaintiff/applicant submitted that this is an issue for the court to determine, and not to be dictated by defendants/respondents. Further, that it can only be given in various forms, and not necessarily as the defendants/respondents would prefer. Further, that it must be in a way that least disadvantages the appeal. That in as much as she is willing to provide security in terms of a bank guarantee, she considers the proposal by the defendants/respondents as untenable and an attempt to derail the appeal. Further, that it is to be noted that the defendants/respondents have been in possession of the suit property, and will not be prejudiced in any way if the application is allowed.
 9. The 1st and 2nd defendants/respondents filed their written submissions dated 11th February, 2025, where they raised three issues for determination as listed below: -
 - i. Whether the applicant has demonstrated substantial loss that would result if the stay is not granted.
 - ii. Whether security has been offered.
 - iii. Whether the balance of convenience favors dismissing the application.
 10. On the first issue, and while relying on the case of [Butt v Rent Restriction Tribunal](#) [1979] eKLR, the defendants/ respondents submitted that in considering whether or not to grant stay, the court should aim to minimize the risk of injustice, and weigh the competing interest of both parties. They submitted that the plaintiff/ applicant has failed to meet the threshold required under Order 42 Rule 6 of the [Civil Procedure Rules](#) in order to obtain the orders sought.
 11. On whether she will suffer substantial loss, the defendants/respondents submitted that the plaintiff/ applicant has failed to provide evidence to substantiate the claim of potential loss. Further, that the plaintiff/applicant is not in occupation, and does not conduct any business operations on the suit property. Further, that considering that the plaintiff/applicant does not derive any livelihood from the suit properties, it is evident that the alleged substantial loss is speculative. To buttress on this submission, the defendants/respondents relied on the cases of [Rhoda Mukuma v John Abuoga](#) [1988] eKLR, [Wellington Lusweti Barasa & 47 Others v Lands Limited & Another](#) [2015] eKLR, [Charles Wabome Sethi v Angela Wairimu Gethi](#) [2008] eKLR, and [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR.
 12. On the second issue, the defendants/respondents submitted that they had a genuine opportunity to sell the property at Kshs. 38,000,000/-, and that the potential loss underscores the necessity for the plaintiff/applicant to provide security equivalent to this amount. Further, that the plaintiff/applicant has failed to disclose her financial capability, and that although she refers to a bank guarantee, no such guarantee has been tendered for the court's consideration. Reliance was placed in the case of [Michael Ntouthi Mitheu v Abraham Kivondo Musau](#) [2021] eKLR.
 13. On the third issue, the defendants/respondents urged the court to not only consider the interests of the plaintiff/applicant, but also weigh fairly their rights which they have been unjustly denied their fruits of judgment. Further reliance was placed in the case of [Machira t/a Machira & Co. Advocates v East African Standard](#) [2002] eKLR.



14. I have considered the application, the reply thereto and the written submissions filed by both parties. The issue for determination is whether the plaintiff/applicant is entitled to the orders of stay of execution pending appeal.

15. Order 42 Rule 6 of the [Civil Procedure Rules](#) provides as follows:

“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 1st 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 1st applicant.”

16. There are three conditions for grant of stay order pending Appeal under Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) to which:-

- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
- ii. The application is brought without undue delay and
- iv. 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.

17. In the case of [Masisi Mwita v Damaris Wanjiku Njeri](#) [2016] eKLR, the Court of Appeal held that: -

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & Another v Thornton & Turpin Ltd.* where the Court of Appeal Gicheru JA, Chesoni & Coker Ag JA held that:

“The High Court’s discretion to order stay of execution of its order or decree is fettered by three (3) conditions namely:- sufficient cause, substantial loss would ensue from a refusal to grant stay the applicant must furnish security, the application may be made without unreasonable delay. In addition the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is



not granted as was held in *Hassan Guyo Wakolo v Straman E.A. Ltd.*[2013] as follows:-

“In addition the appellant must prove that if the orders sought are not granted and his appeal eventually succeeded then the same shall have been rendered nugatory”.

These twin principles go hand in hand and failure to prove one dislodges the other. The court notes with great humility the plaintiff/applicant agrees with it by citing the case of *Visbram Rouji Halal v Thornton & Turpour* Civil Appeal No. 15 of [1990] KLR 365,”

18. It is not disputed that the instant application has been made without delay. The plaintiff/applicant being dissatisfied with the decision of this court intends to appeal and in doing so, has sought for stay of execution pending appeal. In applying the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, it is undoubtedly clear, that one must demonstrate substantial loss, ensure that the application has been made without delay, and provide security for the costs.
19. In the instant case, the plaintiff/applicant merely stated that she will suffer substantial loss if stay is not granted. The reasons advanced that the defendants/respondents are likely to dispose the suit property to third parties is not sufficient reason and neither is it persuasive. There is no evidence whatsoever of any actual and real loss to be suffered in the event that the orders are not granted.
20. This court is alive to the fact that in deciding whether or not to grant stay of execution, the rights of each party ought to be carefully weighed. On the one hand, there is the party that feels aggrieved and has a right to appeal, and on the other hand, there is the party that is entitled to the fruits of their judgment. In balancing the interests of the parties, the court has to be satisfied that sufficient evidence has been produced to grant the orders of stay.
21. In my view, the plaintiff/applicant has failed to meet the conditions set out under Order 42 Rule 6 of the *Civil Procedure Rules*, and she does not qualify to be granted the orders sought. Having seen that substantial loss has not been proved, there would be no need to discuss the security for costs.
22. Arising from the above, the notice of motion dated 14th October 2024, lacks merit and it is hereby dismissed with costs to the defendants/respondents. Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 24TH DAY OF APRIL, 2025.

HON. MBOGO C.G.

JUDGE

24/04/2025.

In the presence of:

Mr. Benson Agunga - Court assistant

Mr. Njonjo for the Plaintiff/Applicant – present

Ms. Achola for the 1st and 2nd Respondents – present

