



**Kaposhi v Maweu & 4 others (Environment & Land Case
386 of 2017) [2025] KEELC 3456 (KLR) (23 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3456 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 386 OF 2017**

MD MWANGI, J

APRIL 23, 2025

BETWEEN

JONATHAN KAPOSHI PLAINTIFF

AND

COLLETA MBATHA MAWEU 1ST DEFENDANT

MUTHANI MUNYUA 2ND DEFENDANT

ONESMUS KALI 3RD DEFENDANT

SAMUEL MULWA 4TH DEFENDANT

JOYCE KAVII 5TH DEFENDANT

RULING

(In respect of the notice of motion dated 22nd October 2024 seeking an order of stay of execution of the judgment delivered on 11th March 2024 pending the hearing and determination of an appeal before the court of appeal)

Background.

1. The application under consideration is the notice of motion dated 22nd October 2024 brought under the provisions of Order 42 rule 6 of the Civil Procedure Rules. The Applicant prays for an order of stay of execution of the judgment/decree of this court delivered on 11th March 2024 pending hearing and determination of an appeal before the Court of Appeal.
2. The Applicant avers that being aggrieved by the decision of this court, he lodged a notice of appeal against the judgment. However, he states that he filed the record of appeal in the wrong court instead of the Court of Appeal and therefore has to seek leave to file the record of appeal in the right Court.



3. The Applicant further asserts that his appeal raises arguable grounds and has high probability of success. The Respondents have commenced execution of the judgment of the court by instructing surveyors to resurvey the Applicant's property and take out titles. He states that he stands to suffer substantial loss and irreparable damage should the Respondents continue with the execution of the judgment.
4. The Applicant finally asserts that this application has been filed without unreasonable delay. Further that the Respondents will not suffer any prejudice since they are still in possession of the land.

Responses by the Respondents

5. The 2nd, 3rd and 4th Respondents responded to the Plaintiff's application by way of a replying affidavit sworn by one Samuel Mulwa on 5th December 2024. The deponent, who is the 4th Defendant/Respondent in this matter deposes that as per the evidence on the court record, the Defendants/Respondents have been in actual occupation of the suit property for 3 decades. Allowing the Plaintiff's application would therefore certainly cause injustice and substantial loss to them more than it would cause the Plaintiff/Applicant. Granting the application would amount to sanctioning the Plaintiff's intention of continuing to frustrate them.
6. The deponent further asserts that the Plaintiff's appeal in the circumstances of this case would be unmerited. The suit property has already been subdivided, mutations prepared and the Defendants are simply waiting for the issuance of titles in compliance with the judgment and decree of this court. In any event, the purported appeal is non-existent, as the Plaintiff has not filed any application seeking extension of time to file the appeal out of time; nine (9) months after the decree was issued.
7. It is the 2nd, 3rd and 4th Respondents case that the application has not met the threshold for the grant of the orders sought.
8. The 1st Defendant/Respondent too filed a replying affidavit in opposition to the Plaintiff's application for stay of execution pending appeal. The replying affidavit is dated 9th December 2024. The 1st Respondent reiterates the averments by the 2nd, 3rd and 4th Respondents. She deposes that the Plaintiff/Applicant has been indolent and has not filed an appeal since 11th March 2024 when the judgment in this matter was delivered. The intended appeal is therefore an afterthought. The Plaintiff has further not demonstrated the loss he is likely to suffer if the orders sought are not granted. In the absence of an appeal, the court has no jurisdiction to grant the orders.
9. The 5th Respondent did not participate in the application.

Directions by the court.

10. The directions by the court were that the Plaintiff's application be canvassed by way of written submissions. The Applicant, the 1st, 2nd, 3rd and 4th Respondents filed their respective submissions which the court had occasion to read and consider in writing this ruling.

Issues for determination.

11. Having carefully considered the application, the responses thereto and the submissions by the parties, the sole issue for determination is whether the application meets the threshold for the grant of an order of stay of execution pending appeal.



Analysis and determination.

12. The jurisdiction of the court to grant an order of stay of execution pending hearing and determination of an appeal is invoked by the filing of a competent appeal. In the absence of a competent appeal, the court would have no basis for entertaining an application for stay of execution. Indeed as the 1st Respondent pointed out in her replying affidavit, the court would be devoid of jurisdiction.
13. The Applicant on his own volition has disclosed to the court that he requires to seek leave to file a fresh record of appeal since as he stated, he filed a record of appeal in the wrong court; he is yet to do so. This is in essence an admission of the averment by the 1st, 2nd, 3rd and 4th Respondents that the notice of appeal filed herein lapsed by operation of the law after the Applicant failed to file the record of appeal within sixty (60) days as required under Rule 85 of the Court of Appeal Rules, 2022. The Applicant is yet to file an application seeking leave to file a fresh appeal out of time; over one (1) year after the judgment of this court.
14. Consequently, the court finds and holds that the application by the Plaintiff dated 22nd October 2024 is incompetent.
15. Even if I were wrong on the above holding, the law on stay of execution pending appeal is well settled. As spelt out in the case of Jason Ngumba Kagu & 2 others –vs- Intra Africa Assurance Company Limited (2014) eKLR, the possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting an order of stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules. The court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondents to the fruits of their judgment and the right of the Applicant on the prospects of his appeal.
16. In this case, there is no competent appeal filed anyway. Secondly, the Applicant has not demonstrated the substantial loss he is likely to suffer if the order of stay is not granted.
17. Kimaru J (as he then was) in Century Oil Trading Company Limited –vs- Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007, stated that;

“Substantial loss” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the code expressly prohibits stay of execution as an ordinary rule. It is clear the words “substantial loss” must mean something in addition to all, different from that.....”
18. Without evidence of substantial loss to be suffered by the Plaintiff/Applicant, it is difficult to see why the Respondents should be kept away from the fruits of their judgment.
19. Consequently, the Plaintiff’s application dated 22nd October 2024 is devoid of merit and is hereby dismissed with costs to the 1st, 2nd and 4th Respondents.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 23RD DAY OF APRIL 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:



Ms. Wangui Kabuu for the 1st Defendant/Respondent

Mr. Achillah for the Plaintiff/Applicant

N/A by the 2nd to the 5th Defendants/Respondents

Court Assistant: Mpoye

M.D. MWANGI

JUDGE

