



**Kirigwi v Githiri & 5 others (Environment and Land Appeal
E052 of 2024) [2025] KEELC 3459 (KLR) (23 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3459 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E052 OF 2024
MD MWANGI, J
APRIL 23, 2025
IN THE MATTER OF AN APPEAL**

BETWEEN

DAVID KIRIGWI APPELLANT

AND

MARY NYAMBURA GITHIRI 1ST RESPONDENT

MARY MWIHAKI MUNGAI 2ND RESPONDENT

AGNES NDUTA KAMAU 3RD RESPONDENT

KAJIADO DISTRICT LAND REGISTRAR 4TH RESPONDENT

KAJIADO DISTRICT SURVEYOR 5TH RESPONDENT

ATTORNEY GENERAL 6TH RESPONDENT

*(Being an appeal against the judgment and decree of the Chief Magistrates Court at
Kajiado (Jane Kamau) delivered on 13th November 2024 in MCELC CASE NO. E084/2023)*

RULING

Background

1. The application before me, dated 11th December 2024 seeks an order of stay of execution of the judgment of the subordinate court in Kajiado MCELC/E084/2023 delivered on 4th November 2024, pending the hearing and determination of the appeal before this court. The application is premised on the grounds on the face of it and on the supporting affidavit of David Gakobo Kirigwi.
2. The Applicant asserts that the trial court in Kajiado MCELC/E084/2023 delivered a judgment on 14th November 2024 ordering the cancellation of his title deed in respect of the parcel of land



known as KJD/Kaputiei-north/97828 (hereinafter referred to as ‘the suit property’). The said decision according to the Appellant/Applicant was based on an erroneous finding that the person who had sold the land to the him, one Simon Kinyanjui, was not the registered proprietor neither was he authorized to sell the suit property.

3. The Applicant asserts that the said Simon Kinyanjui was not joined as a party in the suit despite him being a crucial party to the suit who could have provided crucial evidence regarding the land transaction. The Applicant states that from the documents attached, Simon Kinyanjui was only an agent of the registered owner. He indeed bought the suit property from its registered owner.
4. The Applicant being dissatisfied with the judgment of the trial court has lodged an appeal with this court vide the memorandum of appeal dated 2nd December 2024. He pleads that the suit property is his matrimonial home and unless the order of stay is granted, he stands to suffer irreparable loss and damage since the suit property may be transferred or dealt with in a manner that would render him and his family homeless. It is his case that his appeal has high chances of success. The application has additionally been made without unreasonable delay. He opines that no prejudice will be suffered by the Respondents if the orders sought are granted pending the hearing and determination of the appeal.

Response by the Respondents.

5. The application was opposed by the 1st to 3rd Respondents by way of a replying affidavit sworn on 17th January 2025.
6. The 4th to 6th Respondents on their part informed the court that they were not opposed to the application for stay pending appeal.
7. The 1st to 3rd Respondents in their replying affidavit sworn by Mary Nyambura Githiri termed the application a non-starter filed with the sole intention of delaying the finalization of the matter between them and the Applicant. The process leading to the delivery of the judgment by the trial court was lawful and procedural and all the parties had their day in court to ventilate their issues.
8. The deponent deposes that the Appellant had indeed listed and lined up the said Simon Kinyanjui as his witness but he did not call him to testify and present the crucial evidence that he alludes to in his application. Consequently, the deponent affirms that the issues raised in the Applicant’s memorandum of appeal are frivolous and not arguable.
9. The deponent asserts that in any event, the Applicant is also a beneficiary of the impugned judgment under Order (f) of the judgement which directed the Land Registrar and the District Surveyor to visit and determine the boundary of his land LR No. Kjd/Kaputiei-North/97828 which was as a result of the subdivision of title no. Kjd/Kaputiei-North/3255 which is separate from parcels No. Kjd/Kaputiei-North/3248, 3249 and 3251 which the court reinstated to the Respondents.
10. The deponent therefore asserts that the Applicant has not demonstrated the loss he is likely to suffer in the event that the orders of stay of execution sought are not granted.

Directions by the court.

11. The directions by the court were that the application be canvassed by way of oral submissions. The parties through their advocates submitted before court on 24th February 2025. The record of the proceedings of the day form part of the record of this court. I need not replicate them in this ruling.



Issues for determination

12. Having carefully considered the application as well as the response thereto and the submissions by the parties, the court is of the considered view that the sole issue for Determination is whether the application meets the threshold for the grant of orders of stay of execution pending appeal.

Analysis and Determination

13. The law on stay pending appeal is Order 42 rule 6 (2) of the [Civil Procedure Act](#). It provides that;

“No orders 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 has been given by the Applicant.”

14. As early as 1990, the Court of Appeal in the case of [Visbram Ravji Halai v Thornton and Turnip](#) Civil Application No. Nairobi 15 of 1990 (1990) KLR 365, held that whereas its (Court of Appeal) discretion to grant an order of stay is unfettered, that of the High Court under Order 41 rule 6 (now order 42 rule 6 of the [Civil Procedure Rules](#)) is fettered by three conditions, namely establishment of sufficient cause, satisfaction of substantial loss and the furnishing of security. Additionally, the application must be made without unreasonable delay.

15. In the case of [Jason Ngumba Kagu and 2 others v Intra Africa Assurance Company Limited](#) (2014) eKLR, the court while agreeing with previous decisions on the subject held that;

“...the possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of the court in granting 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 balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High Court is not that of “the appeal may be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires; he will become a pious explorer in the judicial process.”

16. In addition to the above decisions, I find the sentiments of Odunga J (as he then was) in the case of [Victory Construction v BM \(a minor suing through next friend one PMM\)](#) (2019) eKLR, illuminating. The good judge opined that in addition to the requirements under Order 42 rule 6(2) of the [Civil Procedure Rules](#), the court must also be guided by the provisions of Section 1A and 1B of the [Civil Procedure Act](#); the overriding objective. Under Section 1A (2) of the [Civil Procedure Act](#), the court is enjoined in exercising its power under the [Civil Procedure Act](#) or in the exercise of interpreting of any of its provisions, to give effect to the overriding objective, being the just determination of the proceedings; the efficient determination of the business of the court, the efficient use of the available judicial and



administrative resources; and the timely disposal of the proceedings and all other proceedings before the court at a cost affordable by the respective parties.

17. Odunga J concluded that all the ‘pre-overriding objective’ decisions must now be looked at in the light of the said provisions. They must be interpreted in a manner that gives effect to the overriding objective;

“What is expected of the court is to ensure that the aims and intendment of the overriding objective as stipulated in Sections 1A as read with Section 1B of the *Civil Procedure Act* are attained. In other words, the court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the court an equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the court do not render nugatory the ultimate end of justice. The court therefore in exercising its discretion, should always opt for the lower rather than the higher risk of injustice.”

18. Having carefully considered the application before me and the arguments of the parties, there is no doubt that the application was brought to court without undue delay. Further the Applicant has demonstrated that he is likely to suffer substantial loss unless the order of stay is granted pending appeal. Looking at the grounds of appeal in the memorandum of appeal and the explanations in the supporting affidavit, I am persuaded that the appeal is arguable; not in the sense whether it will probably succeed or not but whether it is an arguable one.

19. It is in the interest of the just determination of the appeal before me that an order of stay of execution be granted. I do not consider it necessary that a security be provided.

20. Consequently, the application dated December 11, 2024 is allowed; an order of stay pending the hearing and determination of the appeal is hereby issued. The costs of the application shall be in the cause.

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:-

Mr. Njuguna for the 1st, 2nd, & 3rd Respondents

Ms. Kerubo h/b for Mr. Achach for Applicant

N/A by the 4th to 6th Defendants

Court Assistant: Mpoye

M.D. MWANGI

JUDGE

