



**Cherono v Kahama (Environment and Land Appeal E191 of 2024)
[2025] KEELC 4321 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4321 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E191 OF 2024**

JG KEMEI, J

MAY 29, 2025

BETWEEN

JAMES KIMUTAI CHERONO APPELLANT

AND

ANNETTE WANJIRU KAHAMA RESPONDENT

RULING

In respect of the Appellant's application dated 25/11/24)

1. By a Notice of Motion dated 25/11/24 the Applicant moved this Court under Order 42 Rule 6 of the Civil Procedure Rules seeking orders of stay of execution of the judgement delivered on the 24/10/24 and all other consequent orders arising therefrom.
2. The application is based on the grounds on the face of it and supported by the Applicants Affidavit sworn on even date. The Applicant avers that Judgment was entered on 24/10/24 by the trial court in the sum of Kshs 1,600,000/- in favour of the respondent.
3. That he is aggrieved by the judgement and in furtherance thereof has proffered an appeal to this Honourable court. That in order not to render his appeal which has high chances of success nugatory, he urges this court to allow the application. In addition, he states that the application has been brought without delay, no prejudice will be visited upon the respondent and that it is in the best interest of justice that it be allowed.
4. The application is opposed by the respondent vide the replying affidavit sworn on 27/1/25 where he deponed that she is entitled to the fruits of the judgement delivered in the trial court and that the applicant has not demonstrated any substantial loss that he will suffer if execution proceeds since the judgement is premised on cogent evidence of breach of contract by the applicant. That to the contrary the appeal stands no chance of success and the appeal is merely intended to delay justice. She was emphatic that the applicant stands to suffer no loss since she is well capable of refunding the decretal



sum in the unlikely event that the intended appeal was to succeed. That the applicant has not offered security as obligated under the provisions of Order 42 Rule 6 of the Civil procedure Rules. She added that should the court be inclined to allow the application; the applicant should be ordered to deposit the full decretal sum of Kshs 1,826,161.29 in a joint interest earning account held by the advocates of both parties as security within the next 14 days and in default the orders granted shall automatically lapse. Lastly the court was urged to dismiss the application for lack of merit.

Court's Directions

5. The court, directed that the application be canvassed by way written submissions. Both parties have filed their written submissions which I have read and considered.

Analysis & Determination

6. Having considered the application, the affidavit in support, the response thereto as well as the rival submissions, the issues for determination, in my considered view are;
 - a. Whether this court should grant stay of execution of the Judgment/Decree as prayed for.
 - b. Who bears the Costs of this Application?

Whether this court should grant stay of execution of the Judgment/Decree as prayed for.

7. Stay of Execution is provided under Order 42 Rule 6 of the Civil Procedure Rules 2010 as follows;

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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.”

8. Flowing from the above provisions, the three conditions to be fulfilled before the Court grants orders of stay of execution may therefore be summarized as follows;
 - a. that substantial loss may result to the applicant unless the order is made
 - b. application has been made without unreasonable delay
 - c. security as the court orders for the due performance



9. These principles were enunciated in the case of *Butt -vs- Rent Restriction Tribunal* [1979] where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -
- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 - b. Secondly, 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 the appeal court reverse the judge's discretion.
 - c. Thirdly, 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. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.
10. In the case of *RWW -vs- EKW* [2019] eKLR, the Court addressed its mind to the purpose of an order for stay of execution pending appeal. In so doing, it stated as follows:
- “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”
- Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however must balance the interests of the Appellant with those of the Respondent.”
11. It is not disputed that judgement was delivered on the 24/10/and the instant application was filed on 25/11/25, a period of 30 days and for that reason the court finds that the delay in filing the application is not inordinate.
12. Has the applicant demonstrated substantial loss? In the case of *Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 the court stated that:
- “Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”
13. In the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR the Court expressed itself as hereunder:
- “... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”



14. In this case the applicant has begrudged the court for delivering a judgement in favour of the respondent when he was not to blame for the delay in completing the transaction. In his view the delay arose from the lengthy digitization process at the Land Registry for which he was not to blame. He therefore opines that he was blameless and the court held him responsible for processes that were beyond his ability and or capacity.
15. In the end I find that no substantial loss has been established
16. 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 an allegation of failing to consider the evidence of one party in the contest. In my considered view the appeal is not one that can be termed as idle.
17. 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. The successful party has a right to enjoy the fruits of the judgement while the appellants has the right to proffer his appeal so that he may be heard on merits.
18. For that reason, I am inclined to allow the application but on terms;
 - a. The applicant shall within 15 days from the date of this ruling, give such security as shall be approved by the court but in any case, not less than Kshs 800,000/- for the due performance of the decree appealed from. The sums shall be deposited in a joint interest earning account in the names of the advocates of both parties or in court.
 - b. The applicant is directed to file the Record of Appeal at least within the next 30 days from the date of the ruling.
 - c. In default of either of the above thereof the orders granted shall automatically lapse.
 - d. The costs shall be borne by the applicant but shall abide the determination of the appeal.
19. Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF MAY,2025 VIA MICROSOFT TEAMS.

J.G. KEMEI

JUDGE

Delivered Online in the presence of:

Mr Mbithi for the Applicant/Appellant

Mr Kipkoech for the Respondent

CA – Ms. Yvette

