



**Kalama & 40 others v Two Thirds Investments Ltd & others (Environment & Land Case 232 of 2014) [2025] KEELC 4191 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4191 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 232 OF 2014**

**YM ANGIMA, J  
MAY 29, 2025**

**BETWEEN**

**KATANA SAID KALAMA & 40 OTHERS ..... PLAINTIFF**

**AND**

**TWO THIRDS INVESTMENTS LTD & OTHERS ..... DEFENDANT**

**RULING**

**A. Introduction**

1. By a judgment dated 06.11.2024 in the consolidated suits the court (Hon. Kibunja, J) made the following orders;
  - a. The plaintiffs' claim through originating summons filed in Mombasa ELC No. 232 of 2014, is fatally defective and is struck out.
  - b. That the defendants, who are plaintiffs in Mombasa ELC No. 3 of 2015, have proved their case against the four named defendants. Judgment is therefore entered for the plaintiffs and against the four defendants in terms of prayers (a) and (b) of the plaint dated 20<sup>th</sup> January 2015.
  - c. Each party to bear their own costs in both suits.
2. Being aggrieved by the said judgment the plaintiffs filed a notice of appeal. In the meantime, they filed an application under certificate of urgency seeking a stay of execution of the decree pending appeal.

**B. Plaintiffs' application**

3. By a notice of motion dated 05.12.2024 filed pursuant to Order 42 rule 6 and Order 50 Rule 1 of the [Civil Procedure Rules](#) (the Rules), Sections 1A, 1B, 3A and 75 of the [Civil Procedure Act](#) (Cap 21) and all enabling provisions of the law, the plaintiffs sought a stay of execution of the decree pending the hearing and determination of their intended appeal.



4. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 2<sup>nd</sup> plaintiff, Ali Juma Mwakaneke, on even date. It was pleaded that the plaintiffs stood to suffer substantial loss and great hardship if they were to be evicted from the suit property before their intended appeal was heard and determined. It was their case that if evicted they shall be rendered homeless and that their appeal shall be rendered nugatory.

#### **C. 1<sup>st</sup> defendant's response**

5. The 1<sup>st</sup> defendant filed a replying affidavit sworn by its director, J. K. Wanyoike on 03.02.2025. It was disputed that the plaintiffs stood to suffer substantial loss if they were to be evicted from the suit property. It was contended that according to a survey report filed in court on 01.07.2018 only a few of the plaintiffs were in actual occupation of the land.
6. It was contended that the plaintiffs had not offered any security for due performance of the decree should their intended appeal fail and that they had not demonstrated their financial ability to compensate the 1<sup>st</sup> defendant for any loss which may result from continued occupation. It was further contended that allowing the application may result into illegal developments, environmental degradation and further encroachment on the property by third parties. The 1<sup>st</sup> defendant pleaded that should the court be inclined to grant the stay then it should impose very stringent conditions against the plaintiffs.

#### **D. Issues for determination**

7. The court has perused the plaintiffs' notice of motion dated 05.12.2024, the replying affidavit in opposition thereto as well as the material on record. The court is of the view that the main issues for determination are the following;
  - a. Whether the plaintiffs are entitled to an order of stay pending appeal.
  - b. Who shall bear the costs of the application.

#### **E. Analysis and determination**

##### **Whether the plaintiffs are entitled to an order of stay pending appeal**

8. The court has considered the material and submission on record on this issue. Although the 1<sup>st</sup> defendant filed written submissions dated 17.03.2025, the plaintiffs' submissions were not on record by the time of preparation of the ruling. The conditions to be satisfied in an application for stay pending appeal are stipulated in Order 42 Ruled 6 (2) of the *Rules* as follows;

“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.”



9. In the case of *Butt vs Rent Restriction Tribunal* [1979] KECA 22 (KLR) 5t it was held, inter alia, that;
- “I have of course anxiously considered whether by refusing the application, I, a newly appointed judge might appear to arrogate to myself a notion of infallibility ... I must act on what I see to be the guiding and overriding principle namely that what is the least tortuous path to an end of this litigation and I have come to the conclusion that the appellate path from Section 8(2) and 35(2) of Cap 296 is the shortest way to finality and, more important from the applicant’s point of view, that his position will not be irretrievably changed thereby so that if my decision was wrong, his appeal will not be nugatory.”
10. There is no doubt from the material on record that some of the plaintiffs are still in occupation of the parts of the suit property. The surveyor’s report of 2018 may not be given the most current information on the status of occupation since it was filed about 7 years ago. The court is satisfied that the plaintiffs shall suffer substantial loss within the meaning of Order 42 Rule 6 (2) of the Rules if they were to be evicted during the pendency of their appeal to the Court of Appeal. The court is of the view that the plaintiffs in occupation shall suffer substantial loss by reason of demolition or removal of their structures and disruption of their socio-economic activities.
11. The court is further of the view that the plaintiffs’ application was filed without unreasonable delay. The material on record shows that judgment was delivered on 06.11.2024 and they filed the instant application on or about 05.12.2024. The court is further of the view that given the nature of the reliefs which were granted in the decree, the plaintiffs may still be lawfully evicted in the event of their appeal being dismissed. No further security would be required to guarantee their removal since eviction is a coercive process.
12. In the premises, the court is satisfied that the plaintiffs have met the requirements for granting a stay pending appeal. However, it may be necessary to impose certain safeguards to ensure that the plaintiffs do not expand areas of occupation or undertake further developments on the land. They should also be precluded from extracting natural resources from the suit property or degrading the land.

### **Who shall bear the costs of the application**

13. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. Although the plaintiffs have succeeded in their application for stay of execution, it must be remembered that the defendants were the successful parties in the litigation. The court is thus of the view that costs of the application should be granted to the 1<sup>st</sup> defendant.

### **F. Conclusion and disposal orders**

14. The upshot of the foregoing is that the court finds merit in the plaintiffs’ application for stay pending appeal. As a result, the court makes the following orders for disposal of the notice of motion dated 05.12.2024.
- a. There shall be a stay of execution of the decree dated 06.11.2024 for a period of 2 years from the date hereof, or until the determination of the appeal before the Court of Appeal, whichever comes first.
  - b. The plaintiffs are hereby restrained from the doing the following activities;



- i. Construction of additional structures or undertaking similar development activities;
  - ii. Expanding the area under their actual occupation.
  - iii. Selling, offering for sale, or ceding occupation to third parties or inviting any new occupants into the suit property.
  - iv. Extracting for sale or trade any natural resource on the suit property.
- c. In the event of the plaintiffs' violation of the prohibitions in paragraph (b) above the stay order shall lapse.
  - d. Costs of the application to the 1<sup>st</sup> defendant.

Orders accordingly.

**RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 29<sup>TH</sup> DAY OF MAY, 2025.**

.....

**Y. M. ANGIMA**

**JUDGE**

In the presence of:

Gillian - Court assistant

Mr. Kamunda for the 1<sup>st</sup> plaintiff

Mrs. Chengo for 2<sup>nd</sup> – 32<sup>nd</sup> and 41<sup>st</sup> plaintiffs

Ms. Lilian Fwaya for 33<sup>rd</sup> – 40<sup>th</sup> plaintiffs

Mr. Achoka for the defendants

