Kihu v Housing Finance Company (K) Limited & another (Environment & Land Case 176 of 2012) [2025] KEELC 4215 (KLR) (29 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4215 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 176 OF 2012

OA ANGOTE, J

MAY 29, 2025

BETWEEN

MUTUA KIHU ..... PLAINTIFF

AND

HOUSING FINANCE COMPANY (K) LIMITED ..... 1ST DEFENDANT

KENNEDY ONGUYI ..... 2ND DEFENDANT

RULING

1. Before this Court for determination is the Plaintiff's/Applicant's Notice of Motion dated 20th December, 2024 brought pursuant to the provisions of Order 9 Rule 9 and Order 42 Rule 6 of the Civil Procedure Rules seeking the following reliefs:

    i. That this Honourable Court be pleased to grant an order to stay the execution of the decree herein pending the hearing and determination of an intended Appeal.

    ii. That the costs of the application be provided for.

2. The Application is based on the grounds on the face set out thereof and supported by the Affidavit of Mutua Kihu, the Plaintiff/ Applicant of an even date, who deponed that on 20th November, 2024, this court delivered a judgment dismissing his suit and allowed the 2nd Defendant/Respondent's Counterclaim with costs.

3. It was his deposition that upon receipt of the judgment, and being aggrieved by the same, he instructed his Counsel to lodge a Notice of Appeal and apply for the typed proceedings with a view to challenging the appeal and that a Notice of Appeal has been duly filed and the grounds upon which he is dissatisfied with the judgment have been enumerated in the Memorandum of Appeal.

4. According to Mr. Kihu, the Motion has been filed timeously and he stands to suffer irreparable financial loss and damage should the judgment herein be enforced against him prior to the

determination of the appeal as he is required to pay the 2nd Respondent over Kshs 30million in mesne profits. He contends that his family has already been destabilized by virtue of the pronouncement of the court which is undesirable for a man of his age.

5. In response to the Motion, the 1st Defendant/Respondent filed Grounds of Opposition dated the 3rd February, 2025 premised on the grounds that:

   i. The Applicant's Application is misconceived, mischievous, unmeritorious, frivolous and vexatious.

   ii. The Notice of Change of Advocates filed by the firm of M/S Kyalo and Associates Advocates offends the provisions of Order 9 Rule 9 of the Civil Procedure Rules.

   iii. The singular motive of the present Application is to stop the Decree Holders from enjoying the fruits of their judgment.

   iv. The Application is clearly an afterthought, an abuse of the court process and is one for dismissal as it is evident that the Plaintiff/Applicant had no intention of appealing the judgment of this court until execution issued.

   v. It is abundantly clear that any discretion must be exercised in favour of the 1st Respondent and as such the Notice of Motion Application dated 20th December, 2024 should be dismissed with costs to the 1st Respondent.

6. The 2nd Defendant/ Respondent filed a Notice of Preliminary Objection on the 27th January, 2025 premised on the grounds that:

   i. The Plaintiff's Application dated 20/12/24 is fatally and incurably defective and incompetent and the same should be struck out with costs to the 2nd Defendant/Respondent.

   ii. As admitted in Ground 7 of the Motion, the Application and Orders sought are premature and cannot be granted or entertained by this Honourable Court prior to either a consent being recorded and filed between the previous firm of Advocates(Andrew Ombwayo & Co) for the Plaintiff and the incoming Advocate (Kyalo and Associates)or an order of leave of court granted and a proper Notice of Change of Advocates filed before the said firm can move the Court on an Application for Stay of Execution.

   iii. The present Application dated 28th/12/2024[sic] cannot therefore be determined in the manner it has been drawn and filed and the orders sought cannot be granted.

   iv. Whereas the Application dated 20/12/24 was filed under Certificate of Urgency and Directions given on 22/12/24, the same was only served electronically on 24/01/25 more than (1) month later with a hearing date fixed for 03/02/25 resulting into an undue and unreasonable delay as a consequence of which the Applicant is not in law entitled to the exercise of this Honourable Court's discretion in his favour under the Doctrine of Laches.

   v. The Application dated 20/12/24 is therefore bad in law and should be struck out with costs to the 2nd Defendant/Respondent.

7. The parties filed submissions and authorities which I have considered.

8. The law on Preliminary Objections is now well settled. Law JA in Mukisa Biscuits Manufacturing Co. Ltd. vs West End Distributors (1969) EA 696 at 700 stated that:

> " ...a 'preliminary objection' consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

9. Newbold, P further held as follows:

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing butt unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop."

10. The Supreme Court in the case of Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others [2014] eKLR re-affirmed the principles as set out in the Mukhisa Case(supra) stating:

> " A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

11. The court has carefully considered the Respondents' objections. Two primary issues arise, whether counsel is properly on record and the question of timeliness of service. As regards representation post judgment, while it is indeed a pure point of law, this question is moot. On the 3rd February, 2025, the court allowed prayer 2 of the present Motion.

12. As regards the contention that the Motion was served late hence disentitling the Applicant the court's discretion and generalized assertions of incompetence of the Motion, they require the court to ascertain facts, consider explanations, and exercise judicial discretion removing them from the ambit of a preliminary objection. The same fails.

13. Vide its Grounds of Opposition, the 1st Respondent contests the legitimacy of the present Motion. It contends that this court is devoid of jurisdiction to entertain the matter on the basis that no appeal has been filed and second that there was no positive order capable of being stayed.

14. Order 42 Rule 6 of the Civil Procedure Rules provides for the grant of stay of execution pending appeal. Indeed, it is envisaged that before such a plea can be sought, there must be a pending appeal. While the 1st Respondent is categorical that no appeal has been filed, the Applicant has adduced into evidence a Notice of Appeal dated 30th November, 2024 and lodged in court on the 3rd December, 2024.

15. Order 42 Rule 6(4) of the Civil Procedure Rules provide as follows:

> " For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given."

16. Similarly, the Court of Appeal in Multipurpose Co-operative Society Ltd vs Serser & 3 Others (Civil Appeal 160 of 2018) [2023] KECA 441 (KLR) (14 April 2023) (Judgment) noted:

> " .....a party who had filed a notice of appeal is permitted to invoke the provisions of Rule 5(2) b of the Court of Appeal Rules; the reason for that is that the said party is deemed to have lodged an appeal. Conversely, a party who had not yet lodged a notice of appeal cannot seek an order either for stay of execution or an injunction, pending the hearing of his appeal, because he would not have instituted the appeal. Accordingly, when the appellant filed a notice of appeal, it is deemed to have instituted an appeal."

17. In the circumstances the court finds that there is indeed an appeal for purposes of the present Motion.

18. The next contention is that a negative order cannot be stayed. This is indeed the position and was explained by the Court of Appeal in the case of Mwanthii & 2 Others vs Mukami (Civil Appeal (Application) E124 of 2024) [2024] KECA 624 (KLR) (24 May 2024) (Ruling) thus:

> " The position taken by this Court in respect of such applications for stay of execution of negative orders is that they cannot be stayed. In other words, for an order of stay of execution to lie, the order or decree sought to be stayed must be positive in nature. In Western College of Arts and Applied Sciences v Oranga & Others [1976-80] 1 KLR 63, the Court of Appeal for East Africa stated thus on the issue:"But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In Wilson v Church, the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in an application for a stay, it is so ordered."

19. The court has considered the judgment. In it, the court dismissed the Applicant's suit but upheld the 2nd Respondent's counterclaim. In so doing, it directed the Applicant to pay the 2nd Respondent mesne profits to the tune of Kshs 204,000/= per month from 6th December, 2012 until he vacates the property, and interests on the said mesne profit at court rates from 6th December, 2012 until he vacates the property.

20. It is therefore evident that the orders issued were not negative in nature, contrary to the 1st Respondent's assertions. While the dismissal of the Applicant's suit may be seen as a denial of the reliefs sought, the 2nd Respondent's Counterclaim was allowed, resulting in positive and executable orders. These orders imposed clear obligations on the Applicant and granted enforceable relief to the 2nd Respondent.

21. In light of the above, the court finds that the present Motion is properly before it.

22. The law with respect to stay of execution pending appeal is to be found under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules which provides as follows:

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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."

24. In Vishram Ravji Halai vs Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal, discussing the High Courts' jurisdiction under this Order stated:

> "The Superior Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay."

25. What arises from the foregoing is that the grant of orders of stay of execution is subject to the court's discretion, the court in this respect being guided by the provisions of Order 42 rule 6 of the Civil Procedure Rules. The question of how the court should exercise this discretion was extensively discussed in Butt vs Rent Restriction Tribunal [1982] KLR 417 thus:

> "1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
>
> 2. 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 that appeal court reverse the judge's discretion.
>
> 3. 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.
>
> 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and

unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. 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 for costs as ordered will cause the order for stay of execution to lapse."

26. Further to the above, the courts are now enjoined to give effect to the overriding objectives as expressed in Section 3 of the *Environment and Land Court Act* and Section 1A of the *Civil Procedure Act*. The court is so guided.

27. Vide the present suit, the Applicant sought, inter-alia, for a declaration that the sale by public auction of the suit property held on the 27th March, 2012 and actions precedent and antecedent to were irregular and therefore null and void, and injunctive orders restraining the Respondents from evicting or otherwise interfering with his use over L.R No Nairobi/Block 82/273 Donholm Estate (suit property).

28. The dispute arose out of the 1st Respondent's sale of the suit property by public auction on account of arrears owed to it by the Applicant. The Applicant asserted that not only did he not owe the 1st Respondent any money, but the auction was irregular.

29. Vide its Defence, the 1st Respondent contended that the Applicant was in arrears which he failed to clear and the sale by auction was conducted in good faith and was above board. The Kshs 10million sale price, it was stated, was in tandem with the valuation report by Crystal Valuers.

30. On his part, the 2nd Respondent stated that he duly purchased the property at an auction after which the Applicant's equity of redemption was extinguished at the fall of the hammer and any claim by the Applicant as against the 1st Respondent could only be brought against the 1st Respondent for damages and not any entitlement over the suit property.

31. He claimed vide the Counterclaim mesne profits from the suit property accruing from 30 days from the date of the public auction on the 27th March, 2012, being 1st May, 2012 until the date the Applicant vacates the suit property in the sum of Kshs 204, 000/= per month.

32. The matter proceeded for hearing and vide the judgment entered on the 20th November, 2024, the court found in favour of the 2nd Respondent's claim as against the Applicant directing the Applicant to pay the 2nd Respondent Kshs 204,000/= per month from 6th December, 2012 until he vacates the suit property, interest on the aforesaid mesne profits at court rates from 6th December, 2012 until he vacates the suit property and costs of the suit and Counterclaim.

33. Aggrieved by this decision, the Applicant intends to appeal to the Court of Appeal. He asks this court to stay the execution of this judgment pending determination of the aforesaid appeal.

34. Beginning with the aspect of sufficient cause, what constitutes the same was explicitly discussed by the court in Antoine Ndiaye vs. African Virtual University [2015] eKLR, which persuasively stated:

> " The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient

cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:

a) The application is brought without undue delay;

b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and

c) 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."

35. The court concurs. In determining whether the sufficient cause has been established, the court will examine whether the Applicant has satisfied the three mandatory prerequisites to the grant of stay pending appeal.

36. The question of what constitutes unreasonable delay was discussed in the case of Jaber Mohsen Ali & Another vs Priscillah Boit & Another [2014] eKLR thus:

> " The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land."

37. The Court in Utalii Transport Company Limited & 3 Others vs NIC Bank Limited & Another [2014] eKLR further stated:

> " Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court's mind on the delay, caution is advised for courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality."

38. The judgment sought to be appealed against herein was delivered on the 20th November, 2024 whereas the present Motion was filed on the 20th December, 2024. This constitutes a period of a month between the date of the delivery of the judgment and the filing of the Motion.

39. The Court has carefully weighed the rival positions. It notes that there is no legal requirement for a party to obtain a certified copy of the judgment prior to filing an application of this nature. That notwithstanding, the court is inclined to exercise its discretion in favour of the Applicant.

40. The explanation offered for the delay is reasonable, and the delay itself is not so inordinate as to occasion prejudice to the Respondents. Accordingly, the court is prepared to excuse the delay and proceed to consider the application on its merits.

41. In Rhoda Mukuma vs John Abuoga [1988] eKLR, the court proffered the following definition of substantial loss:

> " Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory..."

42. Similarly, the court in Century Oil Trading Company Ltd vs Kenya Shell Limited as cited in Muri Mwaniki & Wamiti Advocates vs Wings Engineering Services Limited [2020] eKLR, held:

> " The word 'substantial' 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."

43. The courts have further held that substantive loss must be demonstrated. This position was articulated by the Court of Appeal in Kenya Shell Limited vs Benjamin Karuga Kibiru & Another [1986] eKLR thus:

> " It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an Appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay."

44. The Court in James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR similarly opined that the process of execution alone does not amount to substantial loss. It stated as follows:

> " No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail..."

45. The court is also alive to its duty to balance the interests of an Applicant who is seeking to preserve the status quo so that his appeal is not rendered nugatory, and the interests of the Respondent who is seeking to enjoy the fruits of his judgment.

46. It is the Applicant's deposition that he stands to suffer irreparable financial loss and damage since he has to pay the 2nd Respondent over Kshs 30million if stay is not granted. He opines that should execution ensue; the appeal will be rendered nugatory. This is denied by the 1st and 2nd Respondents who maintain that no substantial loss has been demonstrated.

47. As aforesaid, the judgment of this court mandates the Applicant to pay to the 2nd Respondent mesne profits of Kshs 204,000/= per month from the 6th December, 2012 being when the 2nd Respondent was registered as the owner of the suit property until he vacates and hands over the suit property.

48. It is undisputed that the property was sold to the 2nd Respondent by public auction on the 27th March, 2012 where the 2nd Respondent was declared the highest bidder. Pursuant to the sale aforesaid, the suit property transferred into his names and that of his wife as joint registered owners and a certificate of lease issued to them on the 6th December, 2012. Despite the foregoing, the Applicant remained in possession of the suit property and is earning rental income therefrom.

48. The property having successfully changed hands after the sale, the doctrine of equity of redemption comes into play. This means that the only remedy available to the Applicant even if he were to succeed on appeal on account of the alleged irregular auction is a remedy for damages as against the 1st Respondent and not as against the 2nd Respondent, the registered owner of the property who is entitled to possession and enjoyment thereof.

49. The Court of Appeal in Sema Health Products Limited vs Housing Finance Corporation & Another (Civil Appeal (Application) E492 of 2023) [2024] KECA 245 (KLR) (8 March 2024) (Ruling), determining a motion for stay pending appeal in similar circumstances noted:

> " The suit property was sold by public auction on 24th August 2021. The 2nd respondent was declared the highest bidder at the fall of the hammer. It is not in dispute that what led to the sale of the suit property was the applicant's default in repayment of the funds that had been advanced to it, together with the accrued interest.
>
> Even if the applicant's intended appeal were to succeed, the law is clear that a mortgagor's equity of redemption is extinguished at the fall of the hammer, and the only remedy lies in an action for damages. See section 99(4) of the *Land Act*, 2012."

50. As regards the financial aspect being the mesne profits, the Applicant states that he is required to pay approximately Kshs 30million which will cause him irreparable financial loss. Indeed, this a colossal amount of money which the Applicant may not recover if the appeal succeeds.

51. Ultimately, the court finds that substantial loss has been demonstrated.

52. The purpose of security was discussed by the court in Arun C Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others [2014] eKLR, thus:

> " The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."

53. While in Focin Motorcycle C. Ltd vs Ann Wambui Wangui [2018] eKLR, it was stated that:

> " Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide

security or to propose the kind of security but it is the discretion of the court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground of stay."

54. From the foregoing persuasive judicial decisions, it is evident that the question of whether or not to order security is a matter within the discretion of the court. In exercising this discretion, the court is guided by the circumstances of each case.

55. In the present matter, the Applicant has expressed a willingness to furnish reasonable security for the due performance of the decree. As submitted by the Applicant, he is required to pay the Applicant approximated Kshs. 30M as accrued rent and interest.

56. In the circumstances, and this being a money decree, the Applicant should deposit security to the tune of Kshs. 30M in a joint interest earning account as a condition precedent to the grant of an order of stay of execution of the Judgment.

57. For those reasons, the court allows the Plaintiff's/Applicant's Notice of Motion dated 20th December, 2024 as follows:

    i. A conditional order to stay the execution of the decree herein pending the hearing and determination of an intended Appeal is granted.

    ii. The order of stay of execution of the Judgment is granted on condition that the Plaintiff deposits Kshs. 30 Million in a joint interest earning account opened in the names of the advocates for the Plaintiff and the 2nd Defendant within 60 days of the date of this Ruling.

    iii. Each party shall bear his/its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 29TH DAY OF MAY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Ongocho for Kopere for 2nd Defendant

Ms Mutisya for 1st Defendant

Mr. Mbobu for Plaintiff/Applicant

Court Assistant: Tracy