



**Odotte v Aggarwal t/a Farm & Transport Technical Services & 3 others
(Land Case 172 of 2015) [2025] KEELC 4176 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4176 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
LAND CASE 172 OF 2015**

**E ASATI, J
MAY 29, 2025**

BETWEEN

MICHAEL KOJIEM ODOTTE PLAINTIFF

AND

**ATIN KUMAR AGGARWAL T/A FARM & TRANSPORT TECHNICAL
SERVICES 1ST DEFENDANT**

GAURI MEHTA 2ND DEFENDANT

DISTRICT LAND REGISTRAR, KISUMU 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion application dated 26th November, 2024. The application brought by the 1st and 2nd Defendants/Applicants pursuant to the provisions of Section 63(e) of the *Civil Procedure Act*, Order 42 Rule 6 of the *Civil Procedure Rules* and Articles 50 and 159 (2) of *the Constitution* of Kenya, 2010, seeks for an order that pending the hearing and determination of the intended appeal, there be stay of execution of the judgement and decree of the court dated 23rd February, 2022.
2. The application was supported by the averments in the Supporting Affidavit sworn by Atin Kumar Aggarwal (the 1st Defendant) on 26th November, 2024 and the annexures thereto.
3. The application was opposed vide the contents of the Replying Affidavit sworn by Amos Ochieng Odotte on 23rd December, 2024.
4. I have considered the application, the grounds in support and the grounds raised in opposition thereof in the Replying Affidavit.



5. The Application is brought pursuant to the provisions of order 42 Rule 6(1) Civil Procedure Rules 2021 which provides that:

“No appeal or second appeal shall operate as a stay of execution or proceedings 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 of execution 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.”

6. The grounds for grant of orders of stay of execution of decree/judgement are provided for in Order 42 Rule 6(2) of the *Civil Procedure Rules* 2010 it as follows:

“No order for stay of execution may 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.”

7. Firstly, the court must be satisfied that the Applicant will suffer substantial loss if the order of stay of execution is not granted. Substantial loss has been described in Dr. *Daniel Chebutuk Rotich -v- Morgan Kimaset Chebutuk Nakuru H.C.C.C No.368 of 2001* as:

“Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an Applicant is likely to suffer if stay of execution is not granted and the Applicant is therefore forced to pay the decretal sum.”

8. In the case of *Rhoda Mukuma v John Abuoga* [1988]eKLR the court held that the issue of substantial loss is the cornerstone of both the jurisdiction under order 42 rule 6 Civil Procedure Rules and Rule 5 of the Court of Appeal of Appeal Rules. That substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

9. In the case of *Shell Kenya Ltd v Benjamin Karuga Kibiru & Another* [1986] eKLR 410 the court stated that;

“if it is shown that execution would render a proposed appeal nugatory then a stay can properly be granted.”

10. In this case, the grounds upon which the application is brought are that following the judgement dated 23rd February, 2022 the Applicant filed an application for setting aside of the judgement so as to have the chance to be heard.

11. That the application was dismissed on 3rd October, 2024. That the Applicant has lodged a Notice of Appeal having been aggrieved by the said Ruling. That subsequent to the ruling, the Plaintiff has taken out a Notice to show cause against the Applicants. That the result of Notice to Show Cause would be



- that the Applicants would be committed to civil jail if they fail to show cause as to why they cannot pay the decretal sum.
12. That the Applicants have an arguable appeal which has very high chances of success. That the Applicants stand the risk of losing their liberty and suffer substantial loss if the orders sought are not granted.
 13. The Respondent/Plaintiff's case is that the intended appeal is against the ruling dated 3rd October, 2024 dismissing the Applicant's application dated 14th September, 2023 and awarding costs to the Respondent/Plaintiff which costs are yet to be taxed and in respect of which no execution has commenced.
 14. That the Notice to Show Cause relates to the decree dated 23rd February, 2022 which is approximately 34 months old.
 15. That application to stay execution of the judgement and decree dated 23rd February, 2022 is guilty of extreme and inordinate delay and laches. That nothing has been exhibited by the Applicant to show the institution of the appeal proper including payment for the same and/or follow up letter in pursuit of typed proceedings. That the Applicant was given a chance to be heard.
 16. That to the extent that the Applicants are not providing security for the due performance of the decree the application fails the test for grant of the orders sought.
 17. That the estate of the deceased judgement creditor is vast and can easily refund the decretal sum, costs and interest herein should the same be paid to the Respondents and then required back if the intended appeal succeeds.
 18. The Applicants have exhibited a Notice of Appeal dated 16/10/2024 and Memorandum of Appeal dated 25/11/2024 to demonstrate existence of the appeal. Under Order 42 Rule an appeal to the Court of Appeal is deemed to be filed when under the Rules of that Court Notice of appeal has been given.
 19. The applicants have in paragraph 11 of the further affidavit undertaken to provide security and abide by any conditions that the court may give.
 20. In the circumstances and in the interest of justice and to enable the Applicants to exercise their right of appeal, the court hereby allows the application on the following terms;
 21.
 - a. An order of stay of execution of the judgement herein is hereby granted pending hearing and determination of the appeal on condition that the Applicant deposits the decretal sum of Kshs.2,344,567.98 (as shown in the Notice to Show Cause dated 22/11/2024) in an interest earning account in the joint names of Counsel for the Applicants and Counsel for the Respondent within 45 days hereof . In default the stay of execution order hereby granted shall lapse.
 - b. Costs of the application to the Respondent/Plaintiff.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 29TH DAY OF MAY, 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

**E. ASATI
JUDGE.**



In the presence of:

Maureen: Court Assistant.

Siwolo holding brief Odongo for the 1st and 2nd Defendants/Applicants

Ouma Njoga for the Plaintiff/Respondent.

