



**Ethics & Anti-Corruption Commission v Irungu & 3 others (Environment & Land Case 43 of 2015) [2025] KEELC 3969 (KLR) (22 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3969 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 43 OF 2015**

**YM ANGIMA, J**

**MAY 22, 2025**

**BETWEEN**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**EDWARD MWANGI IRUNGU ..... 1<sup>ST</sup> DEFENDANT**

**MINALOVE HOTEL & RESTAURANT LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**EQUITY BANK LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**WILSON GACANJA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**A. 1<sup>st</sup> and 2<sup>nd</sup> defendants' Application.**

1. By a notice of motion dated 17.12.2024 brought pursuant to Order 42 Rule 6 (1) and (2) and Order 51 Rule 1 of the Civil Procedure Rules, Section 3A of the *Civil Procedure Act* and all other enabling provisions of the law, 1<sup>st</sup> and 2<sup>nd</sup> defendants (applicants) sought a stay of execution of the judgement delivered on 11.12.2024 pending the hearing and determination of the appeal.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Michael Mureithi on 17.12.2024. It was deposed that the applicants had lodged a notice of appeal dated 16.12.2024 against the judgment of this court delivered on 11.12.2024. The deponent, the 2<sup>nd</sup> defendant's director, stated that he lives on the suit property with his family. He further stated that the suit property is charged to the 3<sup>rd</sup> defendant. He argued that the execution of the judgement meant eviction from the suit property. He claimed that they stood to suffer irreparable loss that could not be compensated by damages. It was further argued that the intended appeal had a high probability of success. The court was assured that the deponent was ready and willing to adhere to any conditions set by the court for granting a stay of execution.



## **B. Plaintiff's Response.**

3. The plaintiff filed a replying affidavit sworn by Morlin Odhiambo on 13.01.2025 opposing the application. It was stated that when the suit was filed on 14.03.2015 the suit property had not been fully developed, but the applicants proceeded to develop it while the case was pending thereby assuming all the risk that came with the case being decided against them. It was argued that the orders granted involved rectification of title documents, and there was no evidence on record to show that the plaintiff had initiated any execution by way of eviction for the applicants to claim they stood to suffer irreparable loss.
4. The plaintiff argued that it was apprehensive that if the stay orders were granted, the applicants may take steps to hinder the reversion of the title documents and possession of the suit property to the detriment of the public. The court was urged to order the 2<sup>nd</sup> defendant to deliver the original title document to the plaintiff for safekeeping pending the hearing and determination of the appeal. Further, the applicants were said not to have offered any security for the decretal sum of Kshs 5,000,000, and the court was urged to order them to deposit the said amount in court.

## **C. Applicants' rejoinder.**

5. The applicants filed a supplementary affidavit sworn by Michael Mureithi on 23.01.2025 in response to the plaintiff's replying affidavit. He contended that the 2<sup>nd</sup> defendant's house was complete before the suit was filed, as evident in the Malindi Court of Appeal Civil Application No. 3 of 2015. It was further contended that the title documents were in the bank's custody and that the court could order the registration of a caution against the title. It was argued that the suggestion to deposit the Kshs 5,000,000/= was punitive and that registration of a caveat against the title was enough security for a conditional stay.

## **D. Directions on Submissions.**

6. When the application was listed for inter-partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The plaintiff filed submissions dated 28.02.2025 whereas the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed submissions dated 24.01.2025.

## **E. Issues for Determination.**

7. The court has perused the application dated 12.9.2024, the responses thereto and the material on record. The court is of the view that the following key issues arise for determination herein:
  - a. Whether the applicants have made out a case for the grant of a stay pending appeal
  - b. Who shall bear the costs of the application

## **F. Analysis and Determination**

**a.**

Whether the applicants have made out a case for the grant of a stay pending appeal

8. Order 42 Rule 6 of the Civil Procedure Rules provides for a stay of execution, (1) and (2) of the Rules provide that;



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.
9. The Court of Appeal set out the factors to be considered in an application for a stay of execution pending appeal in the *Butt vs Rent Restriction Tribunal* [1982] KLR 417, as follows:
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.
10. The applicants submitted that execution of the judgement would result in the eviction of the 2<sup>nd</sup> defendant's director from the house, which would amount to irreparable loss that cannot be compensated by way of damages. It was also argued that in case the appeal is successful, it would be difficult to recover the current status of the suit property.
11. On the other hand, the respondent submitted that the applicants' argument that the 2<sup>nd</sup> defendant's director resides on the suit property is not a substantial ground to issue stay orders. It was submitted that the 2<sup>nd</sup> defendant was a separate entity from the said director who was not even a party to the suit. It was further argued that there was no evidence on the current status of the charge over the suit property hence its mere existence posed a risk of loss to the public as the applicants might interfere with its status.



12. The court is of the view that there is no evidence of substantial loss to the 1<sup>st</sup> and 2<sup>nd</sup> defendants since there is no imminent execution facing them. They have not demonstrated by way of evidence that the plaintiff has initiated any process of execution to warrant a stay. The court agrees with the plaintiff that the 2<sup>nd</sup> defendant is a limited company separate from its director and further to that Michael Mureithi, is not a party to the suit. The applicants have not shown how the execution shall affect them and render the appeal nugatory. There is no evidence on record to show that the government intends to dispose of the suit property or that the property shall not be available for restitution should the intended appeal be successful.
13. Regarding the award of general damages of Kshs 5,000,000/= the court is not satisfied that the 1<sup>st</sup> and 2<sup>nd</sup> defendants shall suffer substantial loss by reason of its payment. There is no evidence on record to demonstrate that the defendants shall be financially crippled if they paid the amount pending appeal. There was no allegation that the government shall be unable to refund the said amount should the intended appeal ultimately succeed. In the case of *Kenya Shell Limited v Benjamin Karuga Kibiru and Ruth Wairimu Karuga* [1986] eKLR it was held, inter alia that;
- ‘It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be nugatory...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 a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.’

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

14. Although the 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. The court finds no good reason to depart from the general rule. As a result, the plaintiff shall be awarded the costs of the application.

#### **G. Conclusion and Disposal Order.**

15. The upshot of the foregoing is that the court finds and holds that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have failed to satisfy the requirements set out in Order 42 Rule 6 of the Rules. As a consequence, the court makes the following orders for the disposal of the application;
- a. The notice of motion dated 17.12.2024 be and is hereby dismissed in its entirety.
  - b. The plaintiff is hereby awarded the costs of the application.

Orders accordingly

**RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 22<sup>ND</sup> DAY OF MAY, 2025.**

**Y. M. ANGIMA**

**JUDGE**

