



**Tum v Rono (Environment and Land Appeal E012 of 2024)
[2025] KEELC 366 (KLR) (4 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 366 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E012 OF 2024
JM ONYANGO, J
FEBRUARY 4, 2025**

BETWEEN

JANE CHEROTICH TUM APPELLANT

AND

ROSE CHEPKURGAT RONO RESPONDENT

RULING

1. By Notice of Motion dated 30th October, 2024, the Appellant/ Applicant sought the following orders: -
 - a. Spent.
 - b. That there be stay of execution of the costs in E & L Case no. 318/2018 pending the hearing and determination of this application and thereafter pending the hearing and determination of the appeal herein.
 - c. Costs of this application be provided for.
2. The application is premised on the 4 grounds on its face and supported by the affidavit sworn by the Appellant on even date and a Supplementary Affidavit sworn on 15/12/2024. She avers that she filed a case against the respondent which was dismissed on 18/5/2023 without notice, that she thereafter filed an application seeking to set aside the earlier orders which was also dismissed hence the instant Appeal, which she argues has a high likelihood of success.
3. It is her contention that she requested for typed proceedings for purposes of preparing the record of appeal and as she was waiting for the same, the Respondent filed a bill of costs.
4. It is her claim that she has since been served with a Proclamation Notice and her cows have been attached. She thus contends that she stands to suffer irreparable loss.



5. She stated that she is willing to offer alternative security by depositing her title deed for parcel of land No. Plateau/ Chepkongony Block (Rotuga)/151 in court pending the hearing and determination of the appeal. She thus urged the court to grant the orders sought.
6. In her Supplementary Affidavit, she maintained that it was imperative that costs be stayed pending appeal as she risks being greatly prejudiced if her attached properties are sold due to her inability to pay costs. She further argued that she depends on her cows for her livelihood and reiterated that she stands to suffer irreparable loss if they are sold.
7. The application was opposed. The Respondent filed a Replying Affidavit dated 11th November, 2024. In the Replying Affidavit, she dismissed the application as being frivolous, vexatious and an abuse of court process and urged the court to dismiss the same with costs.
8. It was her contention that the law on costs is well settled that the award of costs cannot be subject to a stay of execution pending appeal or otherwise and that the appeal will not be rendered nugatory.
9. On the elements to be proved in an application for stay of execution, it was her claim that the Applicant had not demonstrated any prejudice or irreparable loss that she will suffer should the order of stay of execution not issue.
10. She contended that there had been an unreasonable and inordinate delay in filing the application after the judgment was issued in the matter on 18/5/2023, and the same is therefore intended to delay, obstruct and/or otherwise defeat the due process of the court.
11. On the issue of providing security for costs, she averred that she has the means to refund the amount of costs paid to her in the event that the appeal succeeds and the court orders for refund. Further, it was her contention that the ownership of the title deed which the applicant wishes to deposit as security has not been ascertained.
12. The Application was canvassed by way of written submissions pursuant to the court's directions issued on the 12.11.2024. The Appellant/Applicant filed her submissions dated 10/12/2024 while the Respondent filed her submissions dated 29/11/2024.
13. I have read and considered the Application, the various Affidavits filed herein and the rival submissions by parties together with the authorities cited in support of their respective claims and I have taken the same into account in arriving at my decision.

Analysis and Determination

14. It is my considered opinion that the main issue arising for determination is:
 - i. Whether an Order for Stay of Execution can issue against the costs issued in E & L Case No. 318 of 2018 pending the hearing and determination of the appeal.
15. It is now well settled that no appeal shall operate as an automatic stay of execution. Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 empowers the court to stay execution, either of its decision or that of a court whose decision is being appealed from, pending appeal. Order 42 Rule 6(2) sets out the grounds to be considered and provides as follows: -
 - (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. (emphasis mine)

16. The three prerequisites for the grant of an Order for stay of execution pending appeal as outlined above are thus:

- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
- ii. The application is brought without undue delay and
- iii. 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.

17. Before delving into the elements for the grant of an order for stay of execution, it is important to first consider whether the order sought is tenable. The Applicant seeks to stay the execution of the costs issued in the trial court in CM E & L Case No. 318 of 2018. The trial court dismissed the Appellant's case with costs to the Respondent. She filed an application for review of the dismissal order which was also dismissed.

18. From a cursory look at the Memorandum of Appeal and the grounds therein, the same is majorly on the application for review which was dismissed and the circumstances that led to the said dismissal, which ideally is a negative order incapable of execution. However, the question that begs for an answer is whether the issue of costs fall within the purview of Order 42 Rule 6(2).

19. Justice W.A. Okwany when faced with a similar situation in the case of Anthony Kiplangat Ngeno & Paul Kiprono Cheruiyot v Jonathan Ole Tankoi, Solomon Ole Tarakwa, Johana Kiptonui Cheruiyot & Joseph Tonui [2016] KEHC 5320 (KLR) held as follows:-

“The above analysis brings me to the question of whether the court can grant an order for stay of execution in respect to costs. The answer to this question is to the negative because orders for stay of execution is generally and ideally granted only in instances where the appeal filed would be rendered nugatory unless the stay sought is granted.....”

20. To this end therefore, I agree with the Respondent and it is my finding that the orders sought by the Applicant are untenable. Be that as it may, I will proceed to determine the essential elements for the grant of an order for stay of execution.

21. The first ground to be established is whether the Appellant will suffer substantial loss unless orders of stay of execution are granted. What amounts to substantial loss was expressed by the Court of Appeal in the case of Mukuma vs Abuoga (1988) KLR 645 where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

22. This position was reiterated in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR where the court held that: -

“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...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.” (emphasis added)

23. I have considered the rival positions taken by both parties in respect to the issue of substantial loss and I am guided by the above case laws on what amounts to substantial loss. It is the Applicant’s claim that she has since been served with a Proclamation Notice dated 16/10/2024 and her cows have been attached. She thus contends that she risks being prejudiced if her attached cows are sold due to her inability to pay costs especially since she depends on her cows for her livelihood.
24. The Respondent on the other hand did not deny the averments made by the Applicant on the Proclamation Notice or the attached cows but only maintained that the Applicant had not demonstrated any prejudice or irreparable loss that she will suffer.
25. As held in the decisions above, substantial loss is a loss which has the potential of rendering the appeal nugatory, an Applicant must establish other factors which show that the execution will irreparably affect the Applicant other than simply stating that she will suffer substantial loss. It is my considered opinion that the Applicant has not demonstrated how the appeal will be rendered nugatory if the orders for stay of execution is not issued. The appeal is on the dismissal of the application for Review, no Reference has been filed contesting the costs as awarded or assessed. Furthermore, the loss the Applicant alludes to, the sale of her cows can be quantified by way of damages.
26. In view of the foregoing, I find and hold that the Applicant has not satisfactorily demonstrated the substantial loss she is likely to suffer, unless an order for stay of execution is granted.
27. On whether the Application has been filed without undue delay, the ruling on assessment of costs in the trial court was issued on 16th July, 2024 whereas this application was filed on 30th October, 2024, that is, over 3 months after the ruling. No explanation has been tendered by the Applicant on the delay in filing this application. This position was raised by the Respondent who maintained that as a result of the inordinate delay, the application should not be entertained.
28. It has been held that a delay of even one day may amount to an inordinate delay where no sufficient and satisfactory explanation has been tendered by an Applicant. No such explanation was given by the Applicant in this case of the over 3 months delay in filing the application.
29. The final element is on the deposit of security for costs as the court may direct. The amount of security to be deposited ought to be balanced against the interests of both the Applicant and the Respondent, the said amount should be adequate and not be disadvantageous to the party depositing the same; See *Rosengerens Ltd –vs- Safe Deposit Centre Ltd* 919840M 3ALLER 198.
30. The court in the case of *Arun C Sharma Vs Ashana Raikundalia T/A Raikundalia & Co. Advocates and 2 others* (2014) eKLR, held that: -

“The purpose of the security under Order 42 is to guarantee 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 applicant 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 a security for



the 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.”

31. The Applicant expressed her willingness to deposit her title deed in respect to parcel No. Plateau/ Chepkongony/ Block 6 (Rotuga)/151 as security for costs. The Respondent on the other hand averred that the proposed title deed is not sufficient since the ownership of the said land is in dispute and further, that the ownership is subject to litigation in the lower court. No case number was provided to enable the court ascertain such averments.
32. The Respondent further contends that she is a woman of means and should the appeal succeed and she is ordered by the court to refund the costs paid to her she is ready and willing to refund the same. She thus insists that the execution of the assessed costs ought not to be stayed.
33. However, having held that the Applicant has failed to demonstrate the substantial loss she is likely to suffer or explain the inordinate delay in filing the application, this court is unable to exercise its discretion on the deposit of security for the due performance of the decree in favor of the Applicant.
34. In view of the foregoing, I find that the Applicant has failed to satisfy the 3-limb test to the required standard.
35. Accordingly, I find that the application dated 5th July, 2024 lacks merit and it is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 4TH DAY OF FEBRUARY, 2025.

J. ONYANGO

JUDGE

Ruling delivered in the presence of: -

No appearance for the Appellant/Applicant

Mr Khaemba for the Respondent

Court Assistant – Hinga

