



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wekesa v Murunga (Environment and Land Appeal E023 of 2021)  
[2025] KEELC 487 (KLR) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 487 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E023 OF 2021  
EC CHERONO, J  
FEBRUARY 6, 2025**

**BETWEEN**

**JOSEPH BARASA WEKESA ..... APPLICANT**

**AND**

**BRAMWEL MURUNGA ..... RESPONDENT**

**RULING**

1. What is before Court for determination is the Applicants' Notice of Motion application dated the 20/10/2024 in which he seeks the following orders:
  - a) Spent.
  - b) Spent.
  - c) That there be stay of execution against the appellant/applicant by the respondent for payment of Kshs.213,000/= pending hearing and determination of the intended appeal in Kisumu Court of Appeal.
  - d) That costs of this application be provided for.
2. The application is premised on the grounds on the face thereof supported by the affidavit of the Applicant where he deposed that he is aggrieved by the court's judgment dated 04/07/2024 which dismissed the suit with costs. That the Respondent filed a bill of costs that was taxed at Kshs. 213,000/= and the Respondent is likely to execute the decree and costs unless stay of execution is granted. He argued that the appeal would be rendered nugatory and superfluous unless the orders sought are granted.
3. The Respondent filed a replying affidavit sworn on 14/11/2024 where he deposed that the Applicant is yet to pay costs n Kimilili MECL 17 OF 2018 accessed at Kshs. 261,975. That despite filing notice of appeal, the Applicant has never filed a substantive appeal to warrant stay of proceedings. That when



the costs for the appeal were taxed, the Applicant was given 30 days stay. That the Applicant has not filed a reference to the taxed costs. That the Applicant has not offered security for the due performance of the decree and or explained how the execution of the said costs will prejudice the appeal. It was argued that the application offends the provisions of Order 42 Rule 1. He stated that he will be highly prejudiced if the application is allowed since he has been litigating since 2018. He urged the court to dismiss the application.

4. When the application came for directions, the parties agreed to canvass the application by way of written submissions. However, neither of the parties filed submissions at the close of the timelines given.
5. Upon consideration of the Notice of Motion application including the respective affidavits, the only issue for determination is whether a stay of execution of the bill of costs should be issued pending hearing and determination of the intended appeal.
6. The relevant law governing applications for stay of execution pending appeal is Order 42 Rule 6(2) of the Civil Procedure Rules which provides as follows:-

- “(2) No order for stay of execution shall be made under subrule (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. In the case of *Halal & Another -vs- Thornton & Turpin* [1963] Ltd [1990] eKLR the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag. JA) held that:

“...thus the superior court’s discretion 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.”

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of *Hassan Guyo Wakalo -vs- Straman EA Ltd* (2013) as follows:

“In addition the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory.”

These two principles go hand in hand and failure to prove one dislodges the other.”

8. From the above provisions of law, it is clear that the Court has discretion to issue an Order of Stay of execution pending appeal. However, the said discretion must be exercised judicially. It is not disputed that the Applicant herein has filed a notice of appeal intimating his intention to appeal against the judgement of this court. It is equally a common ground that the costs awarded to the respondent were duly taxed by the Taxing Officer.
9. The only issue is whether the Applicant has established the requirements for the grant of the orders sought. The first condition is that the application must be filed without unreasonable delay. In



the instant application, the taxing master delivered her ruling on the respondent's bill of costs on 09/10/2024 and a certificate of costs issued on 25/11/2024. A notice of appeal dated 05/07/2024 was endorsed by the Deputy Registrar on 09/07/2024. The present application dated 30/10/2024 was filed on 05/11/2024 which is about a month later. I note that the taxing master had granted the applicant 30 days stay of execution. While considering the timelines as discussed above, it is my view that the application was filed promptly.

10. On the second condition, substantial loss was discussed in the case of *Mukuma v Abuoga* [1988] KLR 645 where the court held as follows: "Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory." While determining an application for stay, the Court is bound to not only consider the interests of the Applicant but those of the Respondent as well. To this end, the Respondent is expected to demonstrate what prejudice would be occasioned if the Application was granted. Having determined the facts surrounding this application, it is my considered view that the Respondent will still have his costs should the pending appeal be dismissed. However, the Applicant may have to seek for a reimbursement of the costs should his appeal succeed. Therefore, I am inclined to hold the view that the element of substantial loss has been proven.
11. The third condition is in regard to the provision of security. In the case of *Aron C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates & 4 Others* [2014] eKLR, the court stated as follows:

"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."
12. The Applicant has not expressed its willingness to deposit any security for the due performance of the decree/order and the Respondents contend as much. This court shall therefore exercise its discretion regarding the security to be offered by the applicant.
13. In this case, I find it appropriate to order a stay of execution but on condition that the Applicant/Appellant provides a security in form of a deposit in an interest earning account. The taxed costs are the basis upon which this court should assess the amount of the security which the Applicant should provide as a condition for the grant of an order of stay of execution. I therefore grant the Applicant an order for stay of execution on condition that he deposits the taxed costs of Kshs. 218,000/= in an interest earning account in the joint names of its advocates for the parties within twenty-one(21) days of this ruling. In default the Respondent shall be at liberty to execute.
14. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 06<sup>TH</sup> DAY OF FEBRUARY, 2025.**

.....

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

1. Mr Okaka for the Respondent and H/B for Mr. Anwar for the I/P.



2. Applicant/Advocate-absent.

3. Bett C/A.

