



**Gathariki v Iguana House & another (Environment & Planning Appeal
E018 of 2024) [2025] KEELC 1084 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1084 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & PLANNING APPEAL E018 OF 2024
OA ANGOTE, J
MARCH 6, 2025**

BETWEEN

JOHN KIMATHI GATHARIKI APPELLANT

AND

IGUANA HOUSE 1ST RESPONDENT

WILFRED ODUOR ODHIAMBO 2ND RESPONDENT

*(An Appeal against the whole proceedings, ruling and orders made in the National
Environment Tribunal at Nairobi dated 24.09.2024 in Appeal No. 15 of 2024)*

RULING

1. Before this court is a Notice of Motion application dated 27th January 2025 filed by the Appellant pursuant to Order 1 Rule 3 and Order 51 Rule 1 of the [Civil Procedure Rules](#), Section 3A of the [Civil Procedure Act](#), the [Contempt of Court Act](#) (sic) and Articles 23(1), 3(a),(d) and (e), 24(1)(a), (b), (e) & 2(c), 25(c), 42(a) & (b), 69 (1)(d), (f), (g) & (2) and Article 70(1), (2)(c) & (3) of the [Constitution](#) of Kenya 2010. The Appellant, who is acting in person, has sought for several orders which can be summed up as follow:
 - a. Spent- That this application be heard ex-parte in the first instance and as a matter of great urgency on the ground, inter alia, that the Respondents have returned, yet again to the Nairobi Environment Tribunal and have managed to obtain a certificate of costs dated 22/01/2025 which certificate the Appellant prays it be expunged.
 - b. That this court expunge the threats by the Respondents to execute the certificate of costs made through the letter dated 23/01/2025.



- c. That it is tantamount to contempt of court for the Respondents to have continued proceedings in the Nairobi Environmental Tribunal while it was within their knowledge that an appeal at the Milimani Environment and Land court lies against the Tribunal's ruling.
 - d. That the Deputy Registrar Milimani Environmental and Lands Court assign another judge to replace Hon. Lady Justice Ann Omollo from hearing this Appeal.
 - e. That this court stay proceedings at the National Environment Tribunal with immediate effect.
 - f. That the 2nd Respondent stops his metalwork shop at the 1st Respondent's shop as it constitutes a public nuisance;
 - g. That an environmental restoration order be pronounced against the 1st Respondent from renting his premises to business people who conduct activities out of character with surrounding neighborhoods.
 - h. That the Appellant and the Respondents each deposit a sum of KShs, 106,000 with this court until finalization of this appeal.
2. The application is supported by the grounds set forth in the Supporting Affidavit sworn by the Appellant, Prof. Dr. John Kimathi Gathariki, who asserts that he owns the property adjacent to that owned and occupied by the Respondents who operate a metal workshop therefrom.
 3. The Appellant deposed that following several complaints from his tenants on the intrusive levels of noise and light emanating from the workshop, he filed a complaint before the National Environment Tribunal and that the Tribunal entered a ruling against him and directed that he pays the Respondents' costs.
 4. The Appellant deposed that he was then served with a Certificate of Costs dated 22nd January 2025 for Kshs. 106,000 through a letter dated 23rd January 2025 and directed to pay the same within fourteen days to pre-empt execution proceedings and that it is this notice that caused him to file this application.
 5. The Appellant's application is unopposed.
 6. Through submissions dated 17th February 2025, the Appellant submitted that the Tribunal found that it lacked jurisdiction yet proceeded to award costs.

Analysis and Determination

7. Having considered the application and submissions filed, the issues for the determination by this court are:
 - a. Whether this court can 'appoint' another Judge to hear the appeal?
 - b. Whether this court can grant orders to stop the metalwork shop and to issue environmental restoration orders?
 - c. Whether this court should issue orders of stay of proceedings and stay of execution?
 - d. Whether the parties should each deposit Kshs. 106,000 pending determination of this appeal?
8. This is an appeal against the ruling by the National Environment Tribunal dated 24th September 2024, in which the Tribunal dismissed the Appellant's appeal before it.
9. This appeal was before the Honourable Lady Justice Anne Omollo, a Judge in this court. The Appellant, through this application and by way of a letter to the Deputy Registrar, sought that this



matter be transferred to another Judge. Justice Anne Omollo, cognizant that the Deputy Registrar has no authority to transfer a suit to another Judge, directed this matter to be placed before me.

10. The file having been placed before me as the Principal Judge by Omollo J, I will not delve into the issue of whether Omollo J should recuse herself. That prayer has been overtaken by events.
11. The Appellant has approached this court in its capacity as an appellate court. As such, this court is sitting on appeal of the determination of the Tribunal. It can therefore only address the issues that arose before the Tribunal, save in exceptional circumstances.
12. In this case, the Tribunal dismissed the Appellant's claim before it having found that it lacked the requisite jurisdiction to determine the suit. In its ruling dated 29th September 2024, the Tribunal found that the application before it failed to meet the jurisdictional threshold established by Section 129 of the *Environmental Management and Coordination Act* as it was not rooted in any actions or decisions by the National Environmental Management Authority.
13. This appeal is a consequence of that decision. In the current application, the Appellant is seeking for stop orders and environmental restoration orders which are final in nature. The prayers in the application have not been crafted in a way that can be granted pending final determination of the Appeal. This court is bound by the pleadings as drafted by the parties and cannot purport to create reliefs for disputants.
14. Consequently, there is no basis for this court to grant the stop and restoration orders in the form and manner presented in the current application.
15. The Appellant avers that it is aggrieved by the certificate of costs that was served upon him by the Respondents. He further contends that it is tantamount to contempt of court for the Respondents to have continued proceedings in the Nairobi Environmental Tribunal while it was within their knowledge that an appeal at the Milimani Environment and Land court had been filed against the Tribunal's ruling.
16. Appeals are provided under Order 42 Rule 6(1) of the *Civil Procedure Rules*. Filing of an appeal does not operate as an automatic stay of execution or of proceedings of the court or Tribunal appealed from. It is upon a litigant to make an application seeking orders of stay which may or may not be granted. This Rule reads 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 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.”

17. There was therefore no wrongdoing on the part of the Respondents in processing the certificate of costs and serving the same upon the Appellant. While the Appellant has sought for orders of stay of proceedings, there are no proceedings pending before the Tribunal for this court to issue orders of stay, seeing as the ruling appealed from was a negative order, which dismissed the Appellant’s suit and awarded costs to the Respondents.
18. The only issue pending before the Tribunal is payment of costs, and a certificate of costs has already been issued. There is therefore no basis for this court to grant the prayer for stay of proceedings.
19. The Appellant has sought that this court stay the execution of the certificate of costs for the sum of Kshs. 106,000 pending the determination of the appeal or in the alternative, that each party deposit the said sum to be held by the court, pending the determination of this appeal.
20. This court is guided by the finding of the court in *RWW vs EKW* [2019] eKLR that the purpose of an application of stay of execution is to preserve the subject matter of an appeal. The court held that: -

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgement. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”
21. Under Order 42 Rule 6(2)(b) of the *Civil Procedure Rules* as quoted above, no order for stay of execution can be made unless the Applicant or Appellant as in this case, issues such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
22. Such security would thereby not be legally required from the Respondents. The law requires the Appellant to provide security, and not the Respondents, before an order of stay can be granted.
23. This court thereby finds merit in the Appellants’ prayer of stay of execution of the execution of the certificate of costs, on the condition that the Appellant deposit the sum of Kshs. 106,000 being the sum necessary for the performance of the said certificate with the court, pending hearing the determination of this appeal.
24. Accordingly, this court finds the Appellant’s application partially merited and allows it on the following terms:
 - a. That an order of stay of execution against the certificate of costs dated 22nd January 2025 do hereby issue pending hearing and determination of this Appeal, on condition that the Appellant deposits the sum of Kshs. 106,000 with the court as security within 30 days of the delivery of this ruling.
 - b. Each party to bear his costs in respect of the application.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 6TH DAY OF MARCH, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for Appellant

No appearance for Respondents

Court Assistant: Tracy

