



**Kathuthu (Suing as the Legal representative of the Estate of Nkuni M'Turuchiu - Deceased) v Kiunga (Suing as the legal representative of the Estate of Stephen Michuki Kiunga - Deceased) (Environment and Land Appeal E084 of 2024) [2025] KEELC 1110 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1110 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E084 OF 2024**

**BM EBOSO, J**

**MARCH 6, 2025**

**BETWEEN**

**STEPHEN KATHUTHU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NKUNI M'TURUCHIU - DECEASED) ..... APPLICANT**

**AND**

**MICHUKI KIUNGA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF STEPHEN MICHUKI KIUNGA - DECEASED) ..... RESPONDENT**

**RULING**

1. Through a notice of motion dated 19/12/2024, the appellant seeks an order of stay of execution pending appeal in the following verbatim terms:
  1. Spent
  2. Spent
  3. There do issue an order of stay of execution of the judgment/decree in Tigania PM ELC Case No. 23 of 2024 (Theresa Michuki Kiunga v Stephen Kathuthu) delivered on 10th November, 2022, and orders of 10th November, 2023 pending the hearing and determination of the appeal against the order/ruling of this Honourable Court issued on 17th October, 2024 or until further orders of the Honourable Court.
2. The application was premised on the grounds outlined in the motion and in the appellant's two affidavits dated 19/12/2024 and 2/2/2025. It was canvassed through written submissions dated 3/2/2025



3. The case of the appellant is that, he filed an application dated 14/5/2024 in Tigania Principal Magistrate Court MCELC No. 23 of 2014 urging the said court to set aside its *ex parte* Judgment rendered on 10/11/2022. The lower court heard the application and disposed it through a ruling dated 17/10/2024. The lower court did not find merit in the application and dismissed it. Aggrieved by the ruling, he (the appellant) filed this appeal.
4. The appellant contends that unless the order of stay is granted, the family of the late Nkuni Kathuthu, which is currently occupying the suit land (Thau/Mumui/773], will be evicted and rendered homeless, adding that this will expose him to substantial loss. He adds that he brought the application timeously. Lastly, he states that because the impugned decree is non-liquidated, the court can allow the application without the requirement for security, adding that he is willing to offer security “to ensure the wheels of justice prevail”.
5. The respondent opposed the application through her two affidavits dated 20/1/2025 and 7/2/2025 and written submissions dated 7/2/2025. Her case is that the suit land has undergone the full dispute resolution mechanism set out under the *Land Adjudication Act*, culminating in a decision by the Minister which is final under Section 29 of the Act. She states that the appellant filed Meru ELC JR No 15 of 2019 challenging the Minister’s decision and lost. She adds that the appellant has to-date not paid the taxed costs of the said suit, to wit, Kshs 139,170. She terms the appellant’s application as a gross abuse of the process of the court.
6. It is the respondent’s case that the security of Kshs 47,385 which the appellant is offering is “a joke”, adding that the suit land measures 15.86 acres and the appellant has been in illegal occupation of the land since 2014 when the suit in the lower court was filed. The respondent proposes that commensurate security would be Kshs. 100,000 per acre per year reckoned from 2014 to 2024, making a total of Kshs 15,860,000 plus the taxed costs in Meru ELC JR No. 15 of 2019 [ Kshs 139,170] and assessed costs in Tigania PM E&L Case No 23 of 2014 [Kshs 157,845]
7. The court has considered the application, the response to the application, and the parties’ respective submissions on the application. The single issue to be determined in the application is whether the criteria for grant of an order of stay of execution pending an appeal has been satisfied.
8. The relevant criteria is spelt out in Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows-:
  - 42 (6)No order for stay of execution shall be made under subrule (1) unless;
  - (2)
    - (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 jurisprudential principle upon which the jurisdiction to grant an order of stay is exercised was articulated by the Court of Appeal in the case of *Absalom Dova v Tarbo Transporters (2013) eKLR* as follows:
 

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the Court, as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights, the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes



full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

10. Put differently, when exercising jurisdiction to grant an order of stay of execution pending appeal, the court is required to carefully balance the appellant’s right of appeal against the respondent’s right to enjoy the fruits of his judgment.
11. In the application under consideration, it is not contested that the family of the late Nkuni M’Turuchiu has been in occupation of the suit land during the period of litigation in the lower court. They are still in occupation. The estate contends that execution of the impugned decree would culminate in their eviction and would occasion substantial loss to the estate. This has not been controverted.
12. On filing the application timeously, the applicant contends that the impugned ruling was delivered on 17/10/2024 and the appeal was lodged on 15/11/2024. He adds that he subsequently filed the application on 19/12/2024. It is his view that this was reasonable time. Going by the applicant’s position on the correct date of the ruling, a period of 62 days lapsed from the date of delivery of the impugned ruling. Certainly, this cannot be said to be timeous. It is, however, excusable delay.
13. On security, our courts have umpteen times stated that the purpose of security under Order 42 rule 6(1) is to guarantee the due performance of such decree or order as may ultimately become binding, and have emphasized that it is not intended to punish the judgment debtor. This principle was emphasized by the court in *Arun C Sharma Vs Ashane Raikundalia t/a Raikundalia & Co advocates & 2 others* [2014] eKLR in the following words:

“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 act 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.”
14. In the application under consideration, the impugned ex-parte Judgment decreed the eviction of the late M’Turuchiu from the suit land. The appellant, through his further affidavit dated 2/2/2025, presented what was described as “Crop Valuation”, indicating that the annual yield from the suit land in a normal year of two rain seasons is approximately Kshs 94,770. The valuation also indicates that only 3 acres of the suit land are arable. On his part, the respondent gave proposals indicating that the assessed/taxed costs relating to the suit in the lower court and in the related Judicial Review Case total Kshs 297,015. He also made suggestions on annual income from the suit land. He did not however, back the annual income with evidence.
15. Taking into account all the above circumstances, and being cognizant of the fact that grant of an order of stay of execution is an exercise of discretion on the basis of well-settled principles, the court comes to the conclusion that this is a matter where stay should be granted on conditional terms. Put differently, a case for conditional stay has been made. Consequently, the application dated 19/12/2024 is disposed as follows:
  - a. The appellant shall deposit in Court, within 30 days, Kshs 350,000 as security for the due performance of the decree and orders in the Lower Court and in this Court.



- b. Subject to compliance by the Appellant, there shall be a stay of execution of the Judgment in Tigania Principal Magistrate Court MCELC No 23 of 2014 for a period of six (6) months.
- c. Unless expressly extended by the Court, the stay shall lapse upon expiry of six (6) months.
- d. Costs of the application shall be in the appeal.

**DATED, SIGNED AND DELIVERED AT MERU THIS 6<sup>TH</sup> DAY OF MARCH 2025.**

**B M EBOSO[MR]**

**JUDGE**

In the Presence of

Mr Otieno for the Respondent

Mr Ngeera for the Appellant

Mr Tupet – Court Assistant

