



Nguli v Inspector General of Police & another (Environment and Land Appeal E006 of 2025) [2025] KEELC 1176 (KLR) (6 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1176 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E006 OF 2025**

**JG KEMEI, J
MARCH 6, 2025**

BETWEEN

TITUS MUTHUI NGULI APPELLANT

AND

THE INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

*(In respect of the Appellant's Notice of Motion dated 14/1/25
and the Respondent's Preliminary Objection dated 14/2/25)*

RULING

The Notice of Motion dated 14/1/25

1. The Appellant instituted the suit in the Chief Magistrates Court in MCELC E148 of 2022, Milimani. The trial Court rendered its Judgment on 20/12/24 dismissing the suit with costs and further directed that the Appellant vacates the suit premises within a period of 30 days. Aggrieved by the said Judgment, the Appellant preferred this appeal vide a memorandum of appeal dated 14/1/25.
2. Alongside the appeal, the Appellant filed an application of even date anchored on the provisions of Section 1A,2A,3, 3A & 3B and Order 42 Rule 6 of the Civil Procedure Rules as well as Article 159 of the Constitution seeking the following orders that;
 - a. Stay of execution of the Judgment dated 20/12/25 pending the hearing and determination of the intended Appeal.
 - b. The Draft Memorandum of Appeal be deemed as duly filed upon payment of the requisite fee.
 - c. Orders maintaining status quo of the suit property pending the hearing and determination of the proposed appeal.



- d. An order restraining the 1st Respondent, his agents, servants and/or employees from forcefully evicting, closing down, harassing, demolishing and/or in any way interfering with the Appellant's business in police canteen situated at Capitol Hill Police Station pending the hearing and determination of the proposed appeal.
 - e. The cost of the application be provided for.
3. The application is premised on the grounds annexed thereto and the supporting of Titus Muthuli Nguli, sworn on 14/1/25. The Appellant avers that; the Judgment was delivered on 20/12/24 dismissing the suit with costs in favour of the Respondents; the 1st Respondent is on the verge of executing the said Judgment; being aggrieved with the said decision, he has proffered an appeal against the whole Judgment rendered by the trial Court as per the Draft Memorandum of Appeal annexed thereto; the appeal is arguable with overwhelming high chances of success; the 30 days' period decreed in the Judgment is about to lapse and therefore, should the Court not grant the orders sought, he stands to suffer irreparable loss and the appeal will be rendered nugatory; the Respondents will not suffer any prejudice if the present application is granted and finally that it is in the interest of justice that the application be allowed as prayed.

The Preliminary Objection dated 14/2/25

4. The application is opposed by the Respondents vide the Preliminary Objection dated 14/2/25 on the grounds that:
- a. The application offends the mandatory provisions of Order 42 Rule 6 (1) of the *Civil Procedure Rules* which requires that an application for stay of execution be filed before the Court from which the judgment and/or decree was delivered and issued respectively.
 - b. The application is bad in law as no application for stay had been made before the Court of first instance for its determination.
 - c. Subsequent thereto, this Honourable Court lacks jurisdiction to hear and determine this the Applicant's application.
5. The Court, by consent of the parties, directed that the application and the preliminary objection be heard together and be canvassed by way of written submissions, the deadline for such filing being 28/2/25. The Applicant complied and filed his submissions dated 28/2/25 while the Respondents on the other hand did not file any submissions despite the lapse of the period granted for compliance.
6. The Applicant submits that the issues for determination are; Whether the Respondents Preliminary Objection and Whether the Applicant's instant application are merited. On the first issue, the Applicant submits that the Objection is premised under the provisions of Order 42 Rule 6(1) of the *Civil Procedure Rules* which are not mandatory provisions. That the Applicant has an option of either making the application for stay of execution pending appeal at the trial Court or the appellate Court. That the rationale is for parties not to treat an appeal as a Court order.
7. Further, that issuance of stay of execution orders under Order 42 Rule 6 (1) is a matter of Court's discretion and as such a preliminary objection cannot be raised. Therefore, the Preliminary Objection is not purely based on points of law as it requires the Court to exercise its judicial discretion. He submits that the preliminary objection is therefore not merited and ought to be dismissed with costs.
8. On whether the application is merited, the Applicant submits that substantial loss may result to the applicant unless the order is made, the Applicant submits that he is likely to suffer irreparable loss should the Respondents proceed to execute the orders issued by the trial Court. He avers that he is



a business person at the Respondent's premises and should the Court not issue stay of execution, he risks being evicted from the said premises which is his sole source of income. He therefore seeks the Court's intervention to cushion him from the loss he is likely to suffer.

9. As to whether the application has been filed without unreasonable delay, the Applicant avers that Judgment was delivered on 20/12/24 and the instant application and the Memorandum of Appeal filed on 14/1/25 therefore timeously
10. Finally, on security for costs, the Applicant submits that the Court has discretion to set security terms as it considers reasonable and just in the circumstances. He states that he is willing to abide by any orders as to the payment of security as the Court may direct. He prays that the orders sought be granted as the appeal shall be rendered nugatory if the orders sought are not granted.

Analysis and determination

11. I have considered the application, the preliminary objection and the Applicant's submissions and authorities cited. In my considered view, the issues for determination are;
 - a. Whether the Respondents' Preliminary Objection is merited.
 - b. Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the [Civil Procedure Rules](#) for stay of execution pending appeal.
 - c. Which orders should the Court grant?

a. Whether the Respondents' Preliminary Objection is merited

12. What constitutes a Preliminary Objection has been the subject of several Court decisions. In the case of [Hassan Ali Jobo & Another -Vs- Suleiman Said Shabal & 2 Others](#) SCK Petition No. 12013[2014] eKLR, the Supreme Court restated the definition in the case *Mukisa Biscuit Manufacturers Ltd vs West End Distributors Ltd* (1969) E.A where the Court of Appeal said that:

“...a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact need to be ascertained or if what is sought is the exercise of judicial discretion.”

13. It is clear that a preliminary objection can only be raised on pure points of Law which has been pleaded and which does not seek the Court to exercise its discretion.
14. The Preliminary Objection herein is premised on the ground that the Applicant did not seek a stay of execution under Order 42 Rule 6 (1) of the [Civil Procedure Rules](#) in the trial Court. It is settled law that stay of execution pending appeal is issued on the Court's discretion. The same cannot therefore be a basis of a preliminary objection. It follows that the objection fails as the application seeks this Court to exercise its discretion.
15. Further, Order 42 Rule 6 of the [Civil Procedure](#) allows an aggrieved party to seek stay of execution in either the Court being appealed from or the Court being appealed to. This rule affords the applicant the option to elect to either file the application in the trial Court or the Court to which he has appealed to. In either election, the application is not fatal. Therefore, the Court sees no fault in the applicant's choice in seeking a stay of execution before this Court.



b. Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

16. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the Court to order stay of execution are provided for under Order 42 Rule 6(2) *Civil Procedure Rules*. Under the said Rules, an applicant should satisfy the Court that:

- a. Substantial loss may result to him/her unless the order is made;
- b. That the application has been made without unreasonable delay; and
- c. The applicant has given such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.

17. Before delving further into the merits of the application, I note that one of the prayers sought by the Applicant is that the Draft Memorandum of Appeal be deemed as duly filed upon payment of the requisite fee. Section 79 G reads as follows; -

“Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.”

18. Judgment in the Magistrate’s Court was delivered on 20/12/24 .The Memorandum of Appeal was filed on 14/1/25. Evidently, the same was filed before the lapse of 30 days. The Applicant therefore does not need leave of Court to file the Memorandum as sought. The appeal is therefore rightly filed before the Court.

19. Turning back to the application for stay, the burden of proving that substantial loss would occur unless stay is granted rests upon and must be discharged accordingly by the Applicant. It is not enough to merely state that loss will be suffered, the Applicant ought to show the substantial loss that it will suffer in the event the orders sought are not given.

20. Substantial loss was clearly explained in the case of *James Wangalwa & Another -vs- Agnes Naliaka Cheseto* [2012] eKLR: -

“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 Civil Procedure Rules. 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.”

21. The Applicant contends that he stands to suffer irreparably if the Respondents levy execution against him. He submitted that he is a business person at the 1st Respondent’s premises and should the Court



not issue stay of execution, he risks being evicted from the said premises which is his sole source of income. He therefore seeks the Court's intervention to cushion him from the loss he is likely to suffer. In my view, since the Applicant is in occupation of the suit premises and can be removed if eviction proceeds, he has demonstrated the substantial loss he stands to suffer if stay orders are not granted.

22. The purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case. The Court of Appeal in RWW vs. EKW (2019) eKLR addressed itself on this as hereunder: -

“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 judgment. 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.”

23. I am of the view that it is in the interests of justice that the property subject matter of the appeal be preserved pending the hearing and final determination of the appeal herein.
24. In view of the Courts finding in para 23 I find no necessity to determine the orders of prayers sought in para 5 and 6 as they serve the same purpose.
25. Final orders for disposal
- a. The Preliminary Objection dated 14/2/25 is unmerited and it is hereby dismissed
 - b. An order of stay of execution of the Judgment dated 20/12/25 in Milimani MCELC E148 of 2022 is hereby issued limited to a period of One Hundred and Eighty days (180) days within which the applicant ought to have filed his Record of Appeal and prosecute his appeal to finality.
 - c. In default the orders herein granted shall lapse automatically
 - d. Costs of the application shall bide the determination of the appeal.
26. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF MARCH 2025 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered Online in the presence of:

1. Ms. Mutuku for Applicant
2. Ms. Ayuma for the 1st and 2nd Respondents
3. CA – Ms Yvette

