



**Philip v Parkire (Environment and Land Appeal 1 of 2024)
[2025] KEELC 1036 (KLR) (Environment and Land) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1036 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL 1 OF 2024**

MC OUNDO, J

MARCH 6, 2025

BETWEEN

MARGARET KANINI PHILIP APPLICANT

AND

RIPO OLE PARKIRE RESPONDENT

RULING

1. Pursuant to a Judgment delivered on the 3rd October, 2024 in the instant matter, the Applicant has now filed the present Application by way of a Notice of Motion dated 4th October, 2024 brought under the provisions of Order 42 rule 6 of the Civil Procedure Rules, Section 3A of the *Civil Procedure Act* and all enabling provisions of the law, where she seeks that court orders stay of execution of the orders issued in its Judgment delivered on 3rd October, 2024 pending the filing and hearing of an intended Appeal in the Court of Appeal. She also sought that the costs of the Application be provided for.
2. The application is supported by the grounds therein as well as by the sworn affidavit of an equal date by the Applicant, wherein she deponed that pursuant to the order of the court directing the District Land Registrar, Naivasha to amend the register of Lands to reflect the removal of her name as the registered owner of the suit premises known as LR. No. Naivasha/Moi Ndabi/407, she was yet to receive certified copies of the judgement or proceedings despite having applied for the same as evidenced from the relevant letters for the requests, filed Notice of Appeal and the payment receipts marked as annexures “MKP 1(a) and (b)” and “MKP 2(a) and (b)”.
3. That unless stopped by the court’s order, the Respondent would, based on the impugned judgement, try to forcefully enter the premises to her detriment. That she had employees living on the suit land as well as crops on the farm which could not suddenly be removed.



4. That the Respondent stood to suffer no prejudice if the stay order was granted since he did not have anything on the premises. That indeed, the Respondent had a pending criminal case for having forcefully entered into the suit premises, hence the fear that he could re-enter therein. She thus sought for the stay of execution of the impugned decision in the interest of justice
5. A Replying Affidavit by the Respondent sworn on 16th October, 2024 opposed the Application for reason that the court had properly held that the Applicant had not demonstrated to the required standard, on how she had obtained her title hence the court had properly found that the same had been fraudulently obtained. That subsequently, the court having ordered that the said title be cancelled, it had become *functus officio*.
6. That in any event, the orders sought could not be granted as it would amount to the court perpetuating an illegality and aiding the applicant to continue benefitting from the fraudulently obtained title. That by the court staying the execution of its orders, it would be like it was sitting on appeal to stay the orders it had already issued. That he had already instructed his advocates to file a cross appeal against the Applicant's Appeal.
7. That further, the Applicant had been using the court to benefit from her fraudulent actions. That after the lower court had delivered its judgement, she had taken possession of the suit land where on the strength of the fraudulently obtained title, she had been tilling and using the suit land hence prejudicing him. That further, the Applicant used illegally obtained title to evict him from the suit land and thereafter to institute criminal proceedings against him to frustrate him.
8. That owing to the judgement of the court, the land registrar was to act on the same and rectify the records hence staying that justified act would amount to further propagating fraud.
9. That the Applicant had not met the threshold required for stay of execution of the judgement of the court since she was seeking for stay of orders which had not been granted and had been non-existence in the judgement. That in any case, the Applicant had only expressed fears of execution which did not meet the threshold of stay of execution and that the filing of an Appeal was not a ground for stay of execution. That the Applicant would not be prejudiced in any manner if the application was not allowed.
10. The application was disposed of by way of written submissions to which I shall herein summarize.

Applicant's written submissions.

11. In support of her application dated 4th October 2024, the Applicant submitted that her application had been borne of two grave issues. Firstly, the implementation of the order to rectify the land register with respect to the parcel number LR. Naivasha/Moi Ndabi/407 meant that the land would revert back to the Department of Settlement and immediately become available for re-allocation to the third parties hence the substratum of the appeal would be defeated. That further, innocent parties would have given value to get the land, fresh title issued and that substantial development could take place, changing the form and the value of the suit premises. That since the Land Registrar had not been a party to the suit, he may not have any background of the direction that the matter had taken. That further, since both parties were appealing, it would make sense that the status quo remains pending the hearing of the appeal.
12. That secondly, the Respondent had been extremely aggressive in his effort to access the suit premises and had only mellowed down due to the pending criminal case concerning his conduct in the suit premises. That immediately the judgement had been delivered, the Respondent made subtle threats to the Applicant's workers on the ground.



13. That she had been on the ground for a considerable period of time and had heavily invested on the suit premises thus relocation would take time, from harvesting the crops that were already on the land, to relocating the structures on the ground that were being used by the workers among other practical challenges. That indeed, the same could not be done in an orderly manner when the Respondent was interfering with the suit premises.
14. That in any case, the court did not give the Respondent the land but had only ordered that the same reverts to the state and there had been no evidence that there had been complaint by the state on any possible maintenance of stay pending appeal thus the Respondent had already been out of the equation. That the Applicant had an arguable appeal there having been a trail of documents availed in the trial court that conformed with the requirement for issuance of title for which the court had probably not seen.
15. She placed reliance in the decided case of *Maasai Mara University Council & another v Walingo & 3 others* (Civil Application E031 of 2024) [2024] KECA 336 (KLR) (2 April 2024) (Ruling), to urge the court to consider where the balance of convenience lied in arriving at a decision. That whereas the Respondent would suffer absolutely no prejudice, the Applicant would suffer monumental loss as herein above stated. That the balance of convenience tilted more in favour of preserving the status quo by ordering stay of execution than denying it.

Respondent's Submissions

16. The Respondent's submissions dated 18th November 2024 in opposition to the Application dated 4th October, 2024, were based on the framed issues for determination as follows:
 - i. Whether the orders sought should be granted.
 - ii. Who should bear the costs of the Application?
17. On the first issue for determination as to whether the orders sought should be granted, reliance was placed on the provisions of Order 42 Rule 6(2) (sic) as well as on the decided case of *Machira t/a Machira & Co. Advocates v East African Standard* [2002] eKLR to submit that the Applicant had not demonstrated any substantial loss that may result were the stay orders not granted as she had not placed any material before the court or shown any loss she was likely to suffer.
18. That granting the prayers sought in the instant Application would perpetuate an illegality by allowing the Applicant to benefit from a title already determined by the court to have been fraudulently obtained. That it would also contravene the principle of *functus officio*, as the court, having delivered its judgement, no longer retained authority to stay its orders since by doing so, it would be sitting on appeal of its own decision. He thus urged the court to dismiss the present application in the best interest of justice and to prevent misuse of judicial processes by the Applicant. That indeed, the Applicant had been using the said title that the court had found to have been obtained fraudulently to frustrate the Respondent in the instant application including instituting criminal proceedings.
19. That in any case, the Applicant's concern about potential entry by the Respondent onto the suit property had been speculative and could not justify stay orders since the only order that the court had made was for the title held by the Applicant to be cancelled. That the issue of entry into the suit land were new issues that had not been before the court thus could not be brought in the present stage. It was thus his submission that granting the prayers sought in the instant application would undermine the court's findings and reward the Applicant's fraudulent actions, delaying the rectification of the land register and further steps as to the proper documentation and registration hence the orders sought herein should not be granted.



20. On who should bear the costs of the Application, reliance was placed in the Supreme Court's decision in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR to submit that it was trite law that while the award of costs was in the discretion of the court, it generally followed the event. He thus submitted that the instant Application be dismissed with costs to the Respondent.

Determination.

21. I have considered, the Applicants' Application, the supporting affidavit, the Replying Affidavit as well as the written submissions by both parties. The judgment and decree sought to be stayed herein was delivered by this court on the 3rd October, 2024 wherein the court directed the Land Registrar to rectify the register to land parcel No. Naivasha/Moi Ndabi/407 by cancelling from therein the Appellant's name within 30 days of delivery of the judgment. The Applicant has now filed the present Application seeking stay of those orders.
22. The Applicant contends that unless stopped by the court's order, the Respondent would, based on the impugned judgement try to forcefully enter the premises to her detriment since she had employees living therein and there were crops on the farm. That the Respondent stood to suffer no prejudice were the order granted since he did not have anything on the premises.
23. The Respondent on the other hand has argued that the court properly held that the Applicant's title had been fraudulently obtained. That subsequently, the court having ordered that the said title be cancelled, it had become *functus officio*. That by granting the orders sought, the court would be sitting on an appeal of its own decision. That the Applicant had not met the threshold required for the stay of execution of the judgement of the court since she had only expressed fear of the execution of the said judgement but had not demonstrated the harm that would be occasioned upon her in the event that the orders herein were executed. He contended that the Applicant would not be prejudiced in any manner if the application was not allowed.
24. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:
- '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 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.'
25. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to wit:



- 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.
26. I find two issues for determination arising therein namely:
 - i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
 - ii. What orders should this Court make.
27. For the Applicant to succeed in the present application the onus was on her to satisfy the conditions as set down under Order 42 Rule 6 of the Civil Procedure Rules. Indeed, the purpose of stay of execution is to preserve the substratum of the case. In the case of *Consolidated Marine. vs. Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi), the Court held that: -

“The purpose of the application for stay of execution pending Appeal is to preserve the subject matter in dispute so that the right of the Appellant who is exercising his undoubted right of Appeal are safeguarded and the Appeal if successful is not rendered nugatory”.
28. The Courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to Section 1A (2) and 1B of the *Civil Procedure Act*.
29. It therefore follows that all the pre-overriding objective decisions must now be looked at in the light of the said provisions. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.
30. On the first condition of proving that substantial loss may result unless stay order is made, it was incumbent upon the Applicant to demonstrate the kind of substantial loss she would suffer were the stay order not made in her favor. The Applicant’s contention is that if the stay orders were not granted, she stood to suffer substantial loss in that she was on the ground, had crops and employees on the suit premises and was apprehensive that the Respondent would forcefully enter the suit premises unless stopped by the court.
31. Indeed, in the case of *Mukuma v Abuoga* (1988) KLR 645 the court had held as follows;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
32. Although it is trite that the Court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the Appeal so that her Appeal is not rendered nugatory, and the interest of the Respondent if any. In this case however, the impugned judgement was to the effect that neither the Applicant nor the Respondent were the beneficiary of the court’s order the court having found that none of the parties herein were the legally registered proprietors of the suit property herein. In other words, there was no successful litigant with regards to the ownership of the suit premises. Indeed, the Applicant conceded that pursuant to the impugned judgement, the suit premises



had remained government land pending re-allocation in the unlikely event that her appeal was to be unsuccessful. This being the case, and while keeping in mind that the Applicant is in possession of the suit premises, and further that in exercising the court's discretion, the court should always opt for the lower rather than the higher risk of injustice, I find that the Applicant has discharged the first condition of proving that substantial loss may result unless stay order is made.

33. On the second condition, there is no dispute that the impugned judgment was delivered on 3rd October, 2024 wherein and the Applicant filed the present Application on the following day, that is 4th October, 2024. The Application was therefore filed without undue delay and there is nothing to add on this limb.
34. On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. The Applicant has not pledged any security and the Respondent has also not insisted that the same be deposited. I also note that the impugned order of the court was not a monetary decree.
35. In the case of Arun C. Sharma vs. Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others [2014] eKLR the court had held that:

“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.”

36. On the last condition, I find that although the Applicant has not met the third condition or volunteered any security for the due performance of the decree and further in regard to the provisions of the law as stipulated under Section 3A of the *Civil Procedure Act*, this Court is not inclined to grant the Order of stay of execution so sought, however since I find that there would be no prejudice occasioned to the Respondent if the grant of stay of execution is granted, in the circumstance, I make the following orders:
 - i. The Application dated 4th October, 2024 is hereby allowed and there shall be stay of execution of the judgment delivered on the 3rd October, 2024 pending the hearing and determination of the Applicant's Appeal
 - ii. The Applicant shall within 30 days from the date of this ruling deposit Kshs.500,000/=(five Hundred Thousand) in Court. In default, the stay shall automatically lapse.
 - iii. If the Applicant has not been supplied with the proceedings required to prepare the record of Appeal, her Counsel shall liaise with the Deputy Registrar of this court and ensure that the same are supplied within fifteen (15) days of this order.
 - iv. The Applicant shall within forty-five (45) days from the date of this ruling compile, file and serve upon the Respondent a complete record of Appeal.
 - v. If the Applicant does not file the Appeal within the time stipulated in (iv) above, the window granted to file the Appeal shall automatically lapse.



There shall be no Costs.

DATED AND DELIVERED AT NAIVASHA VIA TEAMS MICROSOFT THIS 6TH DAY OF MARCH 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

