



REPUBLIC OF KENYA



KENYA LAW
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**Waweru v Njuguna & 4 others (Environment & Land Case
394 of 2017) [2025] KEELC 1215 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1215 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 394 OF 2017
OA ANGOTE, J
MARCH 13, 2025**

BETWEEN

GEOFFREY THIONG'O WAWERU PLAINTIFF

AND

KEZIAH WAHU NJUGUNA 1ST DEFENDANT

**ROSEMARY WAMBUI GICHURU (SUED AND SUING AS THE
REPRESENTATIVES OF THE ESTATE OF GEORGE GIKONYO KAMAU -
DECEASED) 2ND DEFENDANT**

JOSEPH GIKONYO KAGWI 3RD DEFENDANT

LAND REGISTRAR 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. Before this Court for determination is the 1st and 2nd Defendants'/Applicants' Motion dated 27th August, 2024 brought pursuant to the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act* and Orders 42 Rule 6 and 51 Rule 1 of the *Civil Procedure Rules* seeking the following reliefs:
 - a. That there be a stay of execution of the Judgment delivered by the Honourable Court on the 31st July, 2024 pending the hearing and determination of the Appeal.
 - b. That the costs of this Application be provided for.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Keziah Wahu Njuguna, the 1st Defendant, with the authority of the 2nd Defendant of an even date. The 1st Defendant deponed that vide its Judgment on 31st July, 2024, this court, *inter-alia*, allowed the



- Plaintiff's suit and that being dissatisfied with the Judgment, they have filed an appeal to the Court of Appeal and have duly served the Plaintiff/Respondent with the Notice and Memorandum of Appeal.
3. According to Ms Njuguna, on 31st July, 2024, the court granted a 30 day stay of execution of its orders and that the aforesaid order has since lapsed and they are apprehensive that if the stay sought herein is not granted, the Plaintiff will cause the Registrar of Lands to cancel the title in respect of the parcel of land known as LR No Dagoretti/Riruta/6629 and Dagoretti/Riruta/6630(suit properties).
 4. She urged that they have an arguable appeal with high chances of success and the same will be rendered nugatory unless stay of execution is granted and that they have approached the court timeously and are willing to offer reasonable security for costs as and when the court directs.
 5. In response to the Motion, the Plaintiff/Respondent filed a Replying Affidavit on 26th September, 2024. He deponed that he instituted the suit after the 1st and 2nd Defendants and their family members, being beneficiaries of the Estate of the Late Kamau Waweru, violently invaded his plot to evict his son and tenants from the suit property despite having earlier acknowledged that he had lawfully purchased the suit property.
 6. He contends that in view of the Defendant's conduct aforesaid, should the stay of execution be granted, he is apprehensive that they will continue in their dealings in a manner prejudicial to his legal and beneficial ownership of the suit property and that as advised by counsel, what is required from the 1st and 2nd Defendants is not reasonable security for costs, rather, security for due performance of his decree or orders that may ultimately be binding on them in the event their appeal is unsuccessful.
 7. The 1st Defendant urged that in considering what is reasonable, the court, noting that his plot which constitutes approximately 74% of the total combined acreage of the suit plots is currently valued at approximately Kshs 29,600,000 should direct that the Defendants deposit the sum of Kshs 14,800,000 being 50% of the current value of the suit property in a joint interest earning account.
 8. Further, it was deponed, the court should direct the 1st and 2nd Defendants to within 7 days, deposit the original title deed to the suit parcels into the court for safe custody and jointly execute an irrevocable undertaking binding themselves and their personal representatives and beneficiaries not to undertake any developments on the suit property pending determination of the appeal.
 9. The 1st and 2nd Defendants, through Ms Njuguna, filed a Supplementary Affidavit on 14th November, 2024. She deponed that the Plaintiff has vide his Replying Affidavit alluded to issues heard, considered and determined by the court and that in any event, they have not engaged in any secret activities aimed at depriving the Plaintiff of the suit property, the sub-divisions alluded to having been undertaken openly and pursuant to the orders of the Succession Court.
 10. It is her averment that if stay pending appeal is granted, the status quo in regards to the titles and the land shall be maintained; that the Plaintiff has been in occupation of Dagoretti/Riruta/6629 since 2017; that they have at all times been in possession of the title deeds but have not interfered with the same and have no intention to do so and that they cannot afford to deposit Kshs 14,800,000 as sought by the Plaintiff.
 11. She urged that the court has the discretion to order terms and conditions that are not punitive in nature and which might impede access to justice and that they are willing to offer reasonable security as the court may direct. Both parties filed submissions and authorities which I have considered.



Analysis and Determination

12. Having keenly considered the Motion, Affidavits and submissions, the sole issue that arises for determination is whether the 1st and 2nd Defendants/Applicants have satisfactorily discharged the conditions warranting the grant of stay of execution pending Appeal?
13. The law with respect to stay of execution pending appeal is found in Order 42 Rule 6(1) and (2) of the [Civil Procedure Rules](#), 2010 which provide 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 appeal case of 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.
14. In [Visbram Ravji Halai v. Thornton & Turpin](#) Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal, discussing the High Court’s [read ELC’s] jurisdiction under this Order stated as follows:

“The Superior Court’s discretion to order a stay of execution of its order or decree 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.”
15. What arises from the foregoing is that the grant of orders of stay of execution is subject to the court’s discretion, the court in this respect being guided by the provisions of Order 42 rule 6 of the [Civil Procedure Rules](#). The question of how the court should exercise this discretion was extensively discussed by the Court of Appeal in [Butt v Rent Restriction Tribunal](#) [1982] KLR 417 who stated thus:
 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.



4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2)(b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
16. Further to the above, this court is now enjoined to give effect to the overriding objectives in the exercise of its powers as expressed in Section 3 of the *Environment and Land Court Act* and Section 1A of the *Civil Procedure Act*, to wit, the just, expeditious, proportionate and affordable resolution of disputes.
17. By way of a brief background, the Plaintiff instituted this suit seeking, inter-alia, a declaration that he is the legitimate proprietor of approximately 0.25 acres that ought to have been excised from the suit properties; cancellation of the Title Deed issued in respect to the suit properties to the 1st and 2nd Defendants and mandatory orders compelling the Land Registrar to cancel the registration of the suit property in the 1st and 2nd Defendants’ name and carry out an amalgamation and sub-division to create a portion of land measuring 0.25 acres out of the two suit properties and cause a transfer over the property so created in his favour.
18. On their part, the 1st and 2nd Defendants maintained that the Plaintiff was not entitled to the portion he claimed, but rather, parcel Dagoretti/Riruta/4474. They sought vide the counterclaim to have the Plaintiff restrained from interfering with the suit parcels and evicted from parcel number 6629.
19. The matter proceeded for hearing and vide the Judgment entered on the 31st July, 2024, the court found that the Plaintiff had established his case on a balance of probabilities and was the legal and beneficial owner of the suit property.
20. The court ordered the Land Registrar to cancel the registrations of title numbers LR Dagoretti/Riruta/6629 and 6630 and carry out an amalgamation and subdivision to create a portion of land measuring 0.25 Ha, to be transferred and registered in the name of the Plaintiff.
21. Aggrieved by this decision, the 1st and 2nd Defendants intend to appeal to the Court of Appeal. In the meantime, they have asked this court to stay the execution of its Judgment of 31st July, 2024 and the Decree arising therefrom pending determination of the pending appeal.
22. At the onset, the court notes that the 1st and 2nd Defendants have submitted on the arguability of their Appeal. The court wishes to reiterate that its jurisdiction to grant an order of stay of execution pending appeal is derived from Order 42 Rule 6 of the *Civil Procedure Rules*. As correctly stated by the Plaintiffs, this provision does not contemplate or require the court to assess the arguability of the pending appeal as a condition for granting a stay.
23. This position is well-founded. It would be both procedurally improper and logically untenable for this court to assess the arguability of an appeal arising from its own decision. The court will disregard any arguments under this head.



24. Moving to the pre-requisites under Order 42 Rule 6(2), the court will begin with the aspect of sufficient cause. What constitutes the same was explicitly discussed by the court in *Antoine Ndiaye v. African Virtual University* [2015] eKLR, which persuasively stated:

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the *Civil Procedure Rules*. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the *Civil Procedure Rules*, that:

- a) The application is brought without undue delay;
- b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and
- c) 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. The question of what constitutes unreasonable delay was discussed in the case of *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR where Munyao J stated as follows:

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of *Christopher Kendagor v Christopher Kipkorir*, Eldoret E&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.”

26. The court in *Utalii Transport Company Limited & 3 Others v. NIC Bank Limited & Anor* [2014] eKLR further stated:

“Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court’s mind on the delay, caution is advised for courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality.”

27. The Judgment sought to be appealed against herein was delivered on the 31st July, 2024 whereas the present Motion was filed on 27th August, 2024. It is noted that upon delivery of the Ruling, the court granted the 1st and 2nd Defendants a 30 -day temporary stay of execution. This Motion was filed two days before the lapse of the temporary stay aforesaid. There has been no allegation of unreasonable delay by the Respondent. The court finds that there was no unreasonable delay in filing the application.



28. In *Rhoda Mukuma v John Abuoga* [1988] eKLR, the Court proffered the following definition of substantial loss:

“Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory...”

29. Similarly, the court in *Century Oil Trading Company Ltd v Kenya Shell Limited* as cited in *Muri Mwaniki & Wamiti Advocates v Wings Engineering Services Limited* [2020] eKLR, held as follows:

“The word 'substantial' cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words 'substantial loss' must mean something in addition to all different from that.”

30. Courts have also held that substantive loss must be demonstrated. This position was articulated by the Court of Appeal in *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR thus:

“It is usually a good rule to see if Order 41 Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an Appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

31. The Court in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR similarly opined that the process of execution alone does not amount to substantial loss. It stated as follows:

“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 *CPR*. 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. This is what substantial loss would entail...”

32. The court is also alive to its duty to balance the interests of an Applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory, and the interests of a Respondent who is seeking to enjoy the fruits of his judgment. As expressed by Kuloba, J in *Machira T/A Machira & Co Advocates v East African Standard* [2002] eKLR:

“To be obsessed with the protection of an Appellant or intending Appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and



normally must be put into effect by the way Applications for stay of further proceedings or execution, pending Appeal are handled. In the Application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court.”

33. The 1st and 2nd Defendants opines that should the stay not be granted, the Land Registrar will cause the creation of a portion of land from the suit property and have it registered in the Plaintiff’s names and that as the registered owner, the Plaintiff may dispose of the same ultimately rendering the appeal nugatory. This, they state, will constitute substantial loss.
34. On his part, the Plaintiff asserts that the Defendants have not demonstrated what, if any, loss they will suffer if the stay orders are not granted and that execution does not in itself constitute substantial loss.
35. The Judgment of this Court mandates the cancellation of the titles to the suit properties and an amalgamation and sub-division of the same, to create a new parcel of land by the Land Registrar measuring 0.25 acres whose title is to be transferred to the Plaintiff.
36. It is trite that upon the amalgamation and sub-division aforesaid, the suit properties as were will cease to exist. Similarly, upon the registration and transfer of the new parcel to the Plaintiff, he will, as the proprietor, be vested with the statutory privileges underpinned by the provisions of Section 24 and 25 of the *Land Registration Act*.
37. One of the statutory rights and privileges that attach to ownership of a property is the right to sell, alienate, dispose of and/or charge same. Should the Plaintiff exercise his rights in this regard, it will negate and/or otherwise put the title of the suit property outside the purview of the appeal. This, the Court opines constitutes substantial loss.
38. Moving to the last issue regarding provision of security, its purpose was discussed by the Court in *Arun C Sharma v. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, thus:

“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.”
39. While in *Focin Motorcycle C. Ltd v Ann Wambui Wangui* [2018] eKLR, it was stated that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground of stay.”
40. From the above persuasive decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same.



41. The 1st and 2nd Defendants state that they are willing to abide by any reasonable conditions in this regard as the court may order. The Plaintiff asserts that this does not constitute an unequivocal undertaking and that in stating that they are willing to offer reasonable security, the Defendants have offered no security at all.
42. On the issue of provision of security for the due performance of the decree, the law does not mandate that such an undertaking be framed in rigid or absolute terms. There must however be a bona fide intention to comply with requirement by the court, and an unequivocal undertaking in that respect.
43. In my view, and considering that the Plaintiff is in occupation of the suit property, the deposit of the title document in court by the Defendants, and registration of an inhibition against the title will suffice as adequate security for the due performance of the decree.
44. Having carefully considered the specific circumstances of this case, and the need to balance the rights and interests of both parties, the court finds the Motion to be merited and proceeds to grant a conditional stay in the following terms:
 - a. A stay of execution of the Judgment and Orders of 31st July, 2024 be and is hereby granted pending the hearing and determination of the intended appeal to the Court of Appeal.
 - b. An order does hereby issue that an inhibition be registered against the title to the suit property- Dagoretti/Riruta/6629 and Dagoretti/Riruta/6630 prohibiting any dealings with the title pending the hearing and determination of the intended appeal.
 - c. The Defendants shall deposit in court as a condition precedent for the grant of stay of execution of the Judgment pending appeal the title deeds for parcel numbers Dagoretti/Riruta/6629 and Dagoretti/Riruta/6630 within 15 days from the date of this Ruling.
 - d. Each party to bear his own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13TH DAY OF MARCH, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Chumba for 1st and 2nd Defendants

Mr. Rugo for Plaintiff

Court assistant - Tracy

