



REPUBLIC OF KENYA



KENYA LAW
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**Teleposta Pension Scheme v Liyai & 2 others (Environment & Land
Case 239 of 2017) [2025] KEELC 3586 (KLR) (6 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3586 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 239 OF 2017**

JA MOGENI, J

MAY 6, 2025

BETWEEN

TELEPOSTA PENSION SCHEME PLAINTIFF

AND

VICKY KHADAKA LIYAI 1ST DEFENDANT

COMMISSIONER OF LANDS 2ND DEFENDANT

LAND REGISTRAR, THIKA 3RD DEFENDANT

RULING

1. I have before me an Application dated 28/11/2023 filed by the 1st Defendant where the Court is asked by the 1st Defendant/Applicant to stay the execution of the Judgment/Decree issued on 25/09/2023 pending the hearing and determination of the intended appeal before the Court of Appeal. The Application is supported by an Affidavit sworn on 28/11/2023 by Vicky Khadaka Liyai, the Applicant. The grounds are that;
 - a. Spent
 - b. Spent.
 - c. That the Honorable Court do grant the 1st Defendant/Applicant an order of stay of the Stay of the Execution of the Judgment/Decree delivered against the Applicant on the 25th September 2023, pending the hearing and determination of the intended appeal.
 - d. That the Respondents bear costs of this Application,
2. Further, the Applicant stated that she intends to appeal against the Judgment issued on 25/09/2023 and that she had filed the Notice of Appeal and applied for typed proceedings. Further that the Respondent is likely to move to execute the Judgment thus rendering the appeal nugatory.



3. She states that as the Applicant she will suffer loss if a stay of execution is not granted and is ready and willing to provide reasonable security for the Judgment.
4. The Application is strongly opposed through filing of its Replying Affidavit sworn by PETER K. ROTICH on 11/12/2023 and on behalf of the Plaintiff/Respondent.
5. It is the Plaintiff/Respondent's averment that the 1st Defendant/Applicant is attempting to wrongly re-litigate issues that were already adjudicated upon and determined by the trial Court. Further that having perused the Judgment of the Court delivered on 25/09/2023 he believes that the Court carefully evaluated the evidence presented by each of the parties to the proceedings in reaching its decision.
6. Vide annexure PKR, the draft Memorandum of Appeal, he averred that the 1st Defendant/Applicant only filed a Notice of Appeal on 6/10/2023 but failed to file an appeal before the appellate Court.
7. Further that the Applicant has failed to demonstrate substantial loss to be suffered, and that the Application herein has been brought with undue delay and that the Applicant has equally failed to demonstrate that it is ready and willing deposit such security as the Court orders for the due performance of such order, and in this case an amount equivalent to the value of the suit property.
8. Thus that the Applicant has therefore not met the threshold necessary to allow the Court exercise its discretion in granting the orders of stay as sought in the Application.
9. That the Applicant has failed to demonstrate substantial loss to be suffered, further that the Application herein has been brought with undue delay and the Applicant has equally failed to demonstrate that it is ready and willing deposit such security as the Court orders for the due performance of such order, and in this case an amount equivalent to the value of the suit property.
10. The Respondent contends that the grant of the orders sought herein will greatly prejudice the Plaintiff/Respondent as it is a Pension Scheme with obligations to remit Pension to its members and it has been unable to utilize the suit property for nearly twenty-three (23) years since filing of the suit herein.
11. That it is in the interest of justice that the Application herein be denied as the Plaintiff/Respondent has not been in possession of the suit premises neither has it been able to utilize the same due to the illegal title of the 1st Defendant/Applicant.
12. The Plaintiff/Respondent avers that the Applicant has not met the threshold necessary to allow the Court exercise its discretion in granting the orders of stay as sought in the present Application.
13. The 2nd and 3rd Defendants did not participate in the Application by not filing any response.
14. With leave of Court parties agreed to canvass the Applications by way of written submissions. The 1st Defendant/Applicant filed written submissions dated 11/12/2023. She submitted and identified one issue for determination being; whether the Application has merit
15. It was the submissions of the 1st Defendant/Applicant that the power to grant an order for stay of execution is discretionary in nature and that the Honourable Court has power to grant the same. She maintains that she is a bonafide purchaser for value which transaction has gone through the requisite stages of approval from the allotment stage upto the transfer of the same to the name of the Applicant and hence the value of the suit property.
16. It was further submitted that the 1st Defendant/Applicant stands to suffer irreparable loss if the stay of execution Orders are not granted since the suit property is currently in his names and if execution of the Judgment/Decree proceeds, the suit property would transfer to the Plaintiff/Respondent which



will render the intended Appeal nugatory if the 1st Defendant/Applicant succeeds as the suit property is the subject of the intended Appeal. Thus rendering the intended appeal since the 1st Defendant/Applicant is the current owner of the suit property since the title is in his names and one of the prayers indicated in the draft Memorandum of Appeal is that the Appellate Court does dismiss the Plaintiff/Respondent's suit and allows his prayers in his defense and if the Plaintiff/Applicant is allowed to execute the Judgment/Decree of this Honourable Court, the substratum of the intended Appeal will be lost and hence the prayer for stay of execution.

17. From the view of the Applicant, it is their submission that the Orders of stay of execution would preserve the subject matter of the intended Appeal since should the Plaintiff/Respondent alienate the suit property, the 1st Defendant/Applicant will not be able to recover the land should he succeed on appeal.
18. In their submissions the 1st Defendant/Applicant stated that he had established before the Honourable Court that he has an arguable appeal by attaching a draft Memorandum of Appeal to the Application indicating the grounds he wishes to rely on in the intended Appeal. Further that the instant Application was made without unreasonable delay since the Judgment of the Honourable Court was delivered on the 25/09/2023 and the Application was made on the 28/11/2023. Thus the 1st Defendant/Applicant has submitted that the Court should grant the prayer for stay of execution since there will be no prejudice to be suffered if the Orders are granted.
19. The 1st Defendant/Applicant relied on two cases *Evalyne Chepkirui v Geoffrey Turere Kusero & Another Environment and Land Appeal E038 of 2023* and *Naftali Irungu Ndiritu v Paul Njoroge Gichiri & 8 Others Environment and Land Appeal E003 of 2024*.
20. On the other hand the Plaintiff/Respondent filed its submissions dated 16/07/2024 and identified two issues for determination being; whether the Applicant has satisfied the principles for grant of stay of execution pending appeal and whether the Application is merited.
21. It is the Respondent's submission that the Applicant has not met the threshold of grant of orders for stay since he did not show what substantial loss he will suffer if stay is not granted.
22. It is the Respondent's contention that that as the Plaintiff it has been kept out of the suit premises which was legally vested in it by its predecessors and for public purpose to enable it meet its pension obligations to its pensioners who were former employees of Kenya Posts & Telecommunication Corporation (KPTC), Postal Corporation of Kenya (PCK) and Telkom Kenya Limited, which has led to the Respondent suffering loss of use of the scheme's property.
23. Further that the Applicant has not provided security for due performance of the Judgment and Decree issued by Court as required by law. Further that the Applicant does not even have an arguable appeal. The Respondent has relied on the cases of *Congress Rental South Mrica v Kenyatta Internationak Convention Centre, Cooperative Bank Kenya Ltd & Another (Garnishee) [2019]eKLR*, *Silverstein v Chesoni [2002] eKLR*, *Machira T/A Machira & Co. Advocates v East African Standard [2002]eKLR*, *Kenya Shell Limited v Benjamin Karuga Igbiru [1986]eKLR*, *Equity Bank Ltd v Taiga Adams Company Ltd [2006]eKLR*, *Antaine Ndaiye v African Virtual University [2015]eKLR* and the case of *Mohammed Salim T/a Choice Butchery Nasserpuria Memon Jamal [2013]eKLR*.
24. For failing to meet the four provisions of Order 42 Rule 6(1) and (2) for grant of stay the Plaintiff/Respondent submitted that the Application should be dismissed with costs.
25. That the Plaintiff/Respondent is entitled to enjoy the fruits of the Judgment having been kept out its land for over 20 years. It is the Respondent's contention that the Applicant's Application has fallen



short of satisfying the requirements of Order 42 rule 6 of the Civil Procedure. Further that there being no appeal filed except for a draft Notice of Appeal which has not been filed in Court, that there was nothing pending to warrant a stay; that there is no guarantee that if stay is granted, that the Applicant will take any steps to pursue the intended appeal; that the Applicant has not demonstrated any substantial loss likely to be suffered if the Application is disallowed.

26. In brief the facts of the case are that the effect of the Judgment rendered on 25/09/2023, declared the purported allocation and issuance of the title in favour of the 1st Defendant as fraudulent illegal wrongful and null and void, cancellation of title issued in favour of the 1st Defendant and issuance of new title in favour of the Plaintiff. At the same time the Court ordered for vacant possession of the suit property and a permanent injunction against the 1st Defendant and her servants or agents from interfering with rights of possession of the suit property of the Plaintiff.
27. Following this, the 1st Defendant on 6/10/2023 filed a Notice of Appeal. She also wrote through her counsel to the Registrar a letter dated 28/09/2023 seeking typed proceedings.
28. In a rejoinder, and through submissions the Decree holders are of the contrary view that there is no pending appeal, and that the threshold of stay has not been attained.
29. Order 42 rule 6 of the Civil Procedure Rules is the entry point for anybody seeking to stay execution. The hurdles to be met are; demonstration of substantial loss and damage if the stay orders are not granted; timeous filing of the Application for stay, offer of security for the due realization of the Decree should the appeal not succeed and lastly, a demonstration that it was in the interest of justice that the stay be granted.
30. To stay or not stay an execution is under the discretion of Court through which has to be exercised judiciously and not capriciously bearing in mind the ends of justice to both parties where one has a right to enjoy the fruits of the litigation whereas the other has an unfettered right to an appeal.
31. While discussing the aforesaid principles, the Court of Appeal in Halai & Another V Thorton & Turpin [1963] Ltd [1990] KLR 365 held that while the discretion was unfettered, an Applicant must meet the conditions set by the law and in addition demonstrate that the appeal will be rendered nugatory if stay was not granted were the appeal to succeed. The Court cited with approval Hassan Guyo Wakao v Straman E A Ltd [2013] eKLR where it was held that the triple principles go hand in hand and failure to prove one dislodges the other.
32. The Decree holders herein have taken the view that no appeal was pending and therefore, there was nothing to warrant for a stay. As indicated above a Notice of Appeal was issued by the 1st Defendant/ Applicant but there is no appeal filed as yet.
33. In Otieno Ragot and Co Advocates v NBK Ltd [2021] eKLR the Court held that an appeal is deemed to have been filed once a notice thereof has been lodged in the appropriate registry. Therefore I find this ground of objection unmeritorious.
34. Coming to substantial loss the Court of Appeal in James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR held that an Applicant must establish other factors which show that the execution will create a state of affairs that would irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. It is not enough for a party to allege substantial loss by saying that they fear that the Decree holder will file execution or that execution is underway. Execution by itself is a lawful process. Therefore, a party must over and above alleged substantial loss demonstrate how he was likely to suffer or be affected should the substratum of the appeal materially change.



35. In *Jeniffer Akinyi Osodo v Boniface Okumu Osodo & 3 Others* [2021] eKLR, the Court of Appeal cited with approval the case of *Stanley Kangethe Kinyanjui v Tony Ketter & Others* [2013] eKLR where the Court held that an arguable appeal was not one that must necessarily succeed but one which merits consideration by the Court.
36. Substantial loss is what has to be prevented by preserving the substratum of the suit however, the Applicant has never lived on the suit property and only became a registered owner through questionable processes.
37. In *WW v EKW* [2019] eKLR, the Court held that the purpose of stay of execution pending appeal was to preserve the subject matter in dispute, so that the two rights of the parties can be safeguarded and the Court must weigh the two rights to ensure no one suffers prejudice that cannot be compensated by way of costs.
38. In this Application the Applicant has not laid out a clear case why its rights of appeal should pend the rights of the Decree holders to realize the fruits of the Judgment.
39. In *Butt v Rent Restrictions Tribunal* [1982] KLR 417 the Court held that a party seeking stay must also demonstrate special circumstances of the case and unique requirements.
40. Further and in the case of *Thugi River Estates Ltd & Another v NBK and 2 Others* [2008] eKLR the Court based on material before it, especially the undertakings and commitments made on security granted stay or injunctions on terms so that the Applicant did not just keep the land and also enjoy the benefits as a balancing act.
41. The Applicant has also not addressed the Court on the issue of security and or offered the same in the supporting affidavit. It is not for the Court to suggest to a party but for the party to offer the security as was discussed by Justice Makau in the case of *Congress Rental South Africa* (supra) where he quoted the case of *Equity Bank Ltd v Taiga Adams Company Ltd* (Supra). Justice Makau emphasized that relying on the Court to provide the security is tantamount to having the Court stepping into the arena of dispute.
42. The Court must also consider if it is in the interest of justice to grant stay as per the overriding objectives under Sections 1A, 1B & 3A of the *Civil Procedure Act*.
43. Looking at the totality of circumstances in this matter the Applicant has not offered any security, by way of a surrender of the original title deeds to the property before Court or any related commitment or assurances to safeguard the interests of the rights of the Decree holders.
44. The upshot is that I find the Application lacking merit and is dismissed with costs awarded to the Plaintiff/Respondent.
45. Orders accordingly.

DATED SIGNED AND DELIVERED VIRTUALLY AT THIKA VIA VIDEOLINK THIS 6TH DAY OF MAY, 2025.

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MOGENI J

JUDGE

In the presence of: -

Ms. Ocholla holding brief for Mr. Bundotich for the Plaintiff



Ms. Okongo holding brief for Ms. Guserwa for the 1st Defendant
2nd and 3rd Defendants – Absent
Court Assistant - Melita

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MOGENI J
JUDGE

