



Gitau & 6 others v Attorney General for Commissioner of Lands & another (Environment & Land Case 120 of 2008) [2025] KEELC 4301 (KLR) (9 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4301 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 120 OF 2008**

**OA ANGOTE, J
JUNE 9, 2025**

BETWEEN

**MARION GITAU 1ST PLAINTIFF
AGNES KAGIRA 2ND PLAINTIFF
BEATRICE KANYURU 3RD PLAINTIFF
ROLAND KIOGORA 4TH PLAINTIFF
WANJIRU KIONGO 5TH PLAINTIFF
SYLVIA MUTHONI 6TH PLAINTIFF
LIZA MWAKAZI 7TH PLAINTIFF**

AND

**THE ATTORNEY GENERAL FOR COMMISSIONER OF
LANDS 1ST DEFENDANT
KIPCHOGE KEINIO, TOM O MWOMBO, FRIDAH SHIROYA JOINTLY
SUED AS THE TRUSTEES OF THE NATIONAL OLYMPIC COMMITTEE
KENYA 2ND DEFENDANT**

RULING

1. Before this Court for determination are the Applicants'/Judgment Debtors' Notice of Motion Applications dated 28th February, 2025 and 4th April, 2025.
2. The Motion dated 28th February, 2025 has been brought pursuant to the provisions of Article 159 of *the Constitution*, Order 22 Rule 22 of the Civil Procedure Rules, and Sections 3A, 63E and 66 of the *Civil Procedure Act* seeking the following reliefs:



- i. That pending the hearing and determination of the Appeal against the ruling of the Deputy Registrar on 25th February, 2025, there be a stay of execution against the 2nd Defendants'/ Decree Holders' from executing the warrant of arrest granted herein.
 - ii. That there be a provision for cost.
3. The Motion is based on the grounds on the face thereof and supported by the joint Affidavit of Marion Gitau and Beatrice Kanyuru, the 1st and 3rd Applicants dated 27th February, 2025. They deponed that these proceedings arise from the ruling of the Deputy Registrar dated the 25th February, 2025 in which she allowed the Notice to Show Cause by the Decree Holder/Respondent and directed that execution against them issues by way of arrest and committal to civil jail.
4. According to the deponents, dissatisfied with the ruling of 25th February, 2025, they are in the process of filing an appeal to the Court of Appeal and filed a Notice of Appeal dated 26th February, 2025 and that the Respondents failed in not strictly observing the provisions of the Civil Procedure Rules in invoking the prayer for their arrest and detention to prison for settlement of the decretal amount.
5. The Applicants deponed that they have learned that the Respondent is keen on extracting warrants of arrest to have them committed to civil jail and unless the orders are granted, they will be committed to civil jail rendering their appeal an academic exercise.
6. The deponents urged that they are retired citizens of advanced age without formal income generating activities; that they have offered viable proposals on how to settle the decretal sum which has been rejected by the Respondent and that if given sufficient time, they will be able to have the same settled.
7. Further, they urge, they have college going students whose lives depend on their guidance and support and that that the court should accord them an opportunity to challenge the ruling of the Deputy Registrar by granting them an order of stay of execution.
8. In response to the application, the Respondent/ Decree Holder filed Grounds of Opposition dated 17th March, 2025 premised on the grounds that:
 - i. The Honourable Deputy Registrar has no jurisdiction to entertain the Plaintiff/Applicants' Application dated the 28th February, 2025 by dint of the provisions of Order 49 Rule 5 of the Civil Procedure Rules and consequently the Honourable Deputy Registrar is invited to down tools and strike out in limine the application dated the 28th February, 2025.
 - ii. The Application was clearly intended to enable the Plaintiffs/Judgment Debtors to delay the execution of costs through frivolous and vexatious filings. That it is crystal clear on record that the order for the payment of the costs and the taxation of costs leading to the Certificate of Taxation dated the 7th November, 2022 has not been set aside and/or upset. That the order exists on record and therefore the Plaintiff/Decree Holders herein are now trying to come back to the court for a second bite at the cherry on matters costs.
 - iii. The Plaintiffs/Judgment Debtors have not properly invoked the jurisdiction of the court under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules and therefore the orders sought are for denial.
 - iv. The Applicants have not demonstrated any substantial loss that they will suffer if they are arrested and committed to civil jail for failure to pay the taxed costs herein. That being retired citizens of advanced age is not sufficient ground enough to stop the execution of the court orders herein. What is good for the goose is good for the gander.



- v. In the case of *X-Press Systems and Services Limited vs Kifaru Enterprises Limited* [2024] KEELC 3276(KLR), the court stated:
- “First, the court must be satisfied that substantial loss will be occasioned to the applicant unless the order of stay is made. Secondly, the application for stay pending appeal must be made without unreasonable delay; and finally, there must be security for the due performance of the decree.”
- “I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulates 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. See *Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates*. Under the provisions of Order 42 rule 6 (1) (2) of the Civil Procedure Rules, a party seeking a stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. In the instant matter, the applicant was required to provide the actual security for consideration by the Court as to its sufficiency. See *Equity Bank Ltd –vs- Taiga Adams Company Ltd* [2006] eKLR.”
- vi. The Applicants have shown no willingness nor have they demonstrated their willingness to deposit the taxed costs of Kshs 10, 079, 905/= either in court or in a joint account as security and therefore their application is for dismissal with costs.
- vii. Hon Angote J in dismissing an application to stay an appeal of taxed bill of costs stated in the case of *Simekha & 3 Others*(Suing on their own Behalf and on Behalf of Members of the Local Congregation Mariakani Christian Centre Church of God in East Africa Kenya)vs *Makhoka & 9 Others*[2023]KEELC 20264(KLR):
- “As to the third condition of security for costs, the applicants have shown no willingness to deposit the taxed amount either in court or in a joint account as security. The rationale for security under order 42 of the Civil Procedure Rules is to guarantee the due performance of the decree which may ultimately be binding on the plaintiffs..”
- viii. The order for committal to civil jail of the Judgment Debtors issued on the 25th February, 2025 were made by the Deputy Registrar legitimately and in accordance with the law and therefore whoever was aggrieved will have their remedy in the higher court. As it is now, the Deputy Registrar is functus officio of the matter.
9. In respect to the Motion dated 4th March, 2025, the same was filed pursuant to the provisions of Order 40 Rule 1 and 2 of the Civil Procedure Rules and Sections 3A and 63E of the *Civil Procedure Act* seeking the following reliefs:
- i. That the 2nd Defendants whether by himself, through their servants, agents and/or one purporting to act under them be forthwith be restrained from executing the warrants of arrests germinating from the ruling of the Deputy Registrar of 25th February, 2025, or at all pending the hearing and determination of this intended Appeal.
- ii. That there be a provision for costs.
10. The Application is based on the grounds on the face of the Motion and supported by the joint Affidavit of Marion Gitau and Agnes Kagira, the 1st and 2nd Applicants of an even date.



11. They deponed that by a decision of the Deputy Registrar delivered on 25th February, 2025, warrants of arrest were directed to be issued in execution of the taxed decretal amount of Kshs 10,079,905; that dissatisfied with the decision aforesaid, they instructed their Advocate to appeal and that they caused to be filed a Notice of Appeal in preparation for intended Appeal.
12. Subsequently, they caused to be filed an Application dated the 28th February, 2025 seeking for a stay of execution of orders and the court granted a temporary reprieve on the 1st April, 2025 pending the hearing and determination of the Motion.
13. The Applicants urged that they do not have sufficient funds to settle the decretal amount but are working towards it and as a sign of good faith, they are willing to comply with the legal requirement for security for costs by depositing in court the equivalent of between Kshs 200,000/= to Kshs 300,000/= within a period of 45 days or as the court may guide.
14. It is the Applicants' case that they are elderly widows and are apprehensive that they will be committed to civil jail before being granted an opportunity to reach an amicable settlement in the way they previously proposed and that the orders sought will not be prejudicial but will ensure that the ends of justice are seen as done.
15. In response, the Respondent/ Decree Holder filed Grounds of Opposition dated the 28th April, 2025 based on the grounds that:
 - i. The Application dated the 4th April, 2025 ought to be dismissed in limine. That at all events, the said Application was frivolous, vexatious, and amounts to an abuse of the court process. The Application before this court is a palpable and outright abuse of court process. It simply duplicates the very prayers of the earlier Application of the 28th February, 2025 which application is still pending. The present Application merely rehashes prayers already before court in an application dated the 28th February, 2025 and were still live before the court.
 - ii. The Application is a clear attempt of engaging in a waste of judicial time and resources by duplicating matters already before this Honourable Court. Judicial time must be preserved for the fair and efficient administration of justice, not for repetition of claims. The Application before court achieves nothing new, it is an obvious dilatory tactic not a bona fide request. The Decree Holders will be prejudiced if more court time is squandered on what is essentially the same motion, that is the Notice of Motion dated the 28th February, 2025 and 4th April, 2025. The court's time must be used optimally and applications which merely postpone the inevitable or offer a new opportunity to argue multiplicity of applications must be resisted. To allow the instant re-run would violate the overriding objective of civil procedure and bring the administration of justice into disrepute.
 - iii. The Applicants/Judgment Debtors are engaging in a litigation of playing lottery by filing successive similar applications in the hope of obtaining a favorable order to prejudice of the Decree Holder. The instant Application filed after the refusal of interim orders is exactly such a second bite at the cherry a lucky draw at the expense of the Decree Holder. It is an affront to the principle that litigation must be conducted clearly, plainly and without tricks. The court in Ephrain Miano Thamaini vs Nancy Wanjiru Wangai & 2 Others[2022]eKLR stated that:

“Abuse of judicial process is a term generally applied to a proceeding which is wanting in bona fides and is frivolous vexatious and oppressive. It also means abuse of legal procedure or improper use of the legal process. It creates a factual scenario where a party is pursuing the same matter by two court process. In other words, a



party by the two-court process is involved in some gamble, a game of chance to get the best in the judicial process.”

- iv. The Application filed is a backdoor attempt to stay execution-rather than a genuine interlocutory remedy and must be rejected as an abuse of process. The bad faith of the Applicants infects the present Motion and demands its dismissal pronto.
 - v. Moreover, the Applicants scheme and finagling ground directly infringes the Decree Holder’s right to enjoy the fruits of judgment. It is a well-established principle that the successful party in litigation should be allowed to enforce and benefit from the judgment. It is trite that litigation ought to come to an end.
 - vi. The law provides clear remedies once this court refused to extend any interim orders. The aggrieved party’s remedy was either to appeal or to seek review or an extension of time under the proper channels. It was not to relitigate the same issues through a new application. Proper procedure demands finality in the interim order: once refused, the only way to challenge it is by appeal or review, not by a re-run in the trial court by having a second bite at the pie.
 - vii. The Court of Appeal in *Muchanga Investments Limited vs Safarisa Unlimited(Africa) Ltd & 2 Ors*[2009]eKLR 229 in dealing with the principle of abuse of court process stated as follows:

“.....The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive.”
 - viii. The sum total of all the above is that the Application dated the 4th April, 2025 is misconceived, incompetent and a gross abuse of the court process. It ought to be dismissed with costs.
16. No submissions were filed as at the 16th May, 2025.

Analysis and Determination.

17. Vide the Grounds of Opposition, the Respondent seeks to impugn the Motion of 4th April, 2025 on the basis that the same duplicates the Motion of 28th February, 2025 which Motion is live before the court. Consequently, it is asserted, it constitutes an abuse of process and should be dismissed.
18. The concept of abuse of the court process has been the subject of many decisions by the courts. The Court of Appeal in *Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No. 25 of 2002 (2009) eKLR defined it thus:

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious or oppressive.”



19. Speaking to the same, the Supreme Court in Kenya Section of the International Commission of Jurists vs Attorney-General & 2 Others [2012] eKLR stated as follows:

“The concept of “abuse of the process of the Court” bears no fixed meaning, but has to do with the motives behind the guilty party’s actions; and with a perceived attempt to manoeuvre the Court’s jurisdiction in a manner incompatible with the goals of justice.”

20. Setting out circumstances that constitute abuse of court, the court in Satya Bhama Gandhi vs Director of Public Prosecutions & 3 Others [2018] KEHC 6100 (KLR) persuasively expressed itself as follows:

“The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:

- a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- b. Instituting different actions between the same parties simultaneously in different court even though on different grounds.
- c. Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
- d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
- e. Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.
- f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
- g. Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
- h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.”

21. It is generally accepted that the court is entitled to protect itself from abuse, as persuasively stated in Stephen Somek Takweny & Anor vs David Mbuthia Githare & 2 Others Nairobi (Milimani HCC No. 363 of 2009) as follows:

“...The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilized legal process, it is the machinery



used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it."

22. The court has considered the record. Vide the Motion of 28th February, 2025, the Applicants/Judgment Debtors sought for a stay of execution of the ruling of the Deputy Registrar dated the 25th February, 2025 pending determination of an appeal against the same. On the 19th March, 2025, the Motion was placed before the Deputy Registrar for determination. An objection was however raised to the Deputy Registrar's jurisdiction to handle the matter.
23. On the 1st April, 2025, the Deputy Registrar acceded to this objection finding that she had no jurisdiction to determine the application. She directed the same be mentioned before this court for directions.
24. On the 4th April, 2025, the Applicants filed the impugned Motion. It seeks to have the Respondent restrained from executing warrants of arrest arising from the ruling of the Deputy Registrar of 25th February, 2025 pending their intended appeal against the aforesaid decision before the Court of Appeal. It is indeed apparent that this Motion seeks the same relief as the one of 28th February, 2025.
25. As aforesaid, whereas the Motion of 28th February, 2025 was initially placed before the Deputy Registrar, and she declined to assume jurisdiction over the matter, she did not dismiss the same. She issued a directive that the matter be mentioned before this court for further directions and appropriate orders.
26. Rather than await the directions of this court, the Applicants decided to file a fresh Motion. The court notes with concern that the Applicants have not provided any explanation or justification as to why they elected to file a new application instead of prosecuting the initial one. In the circumstances, the court agrees that the Motion of 4th April, 2025 amounts to an abuse of the process of the court. The same is dismissed with costs.
27. Vide the Motion of 28th February, 2025, the Applicants seek a stay of execution of the decision of the Deputy Registrar issued dated 25th February, 2025.
28. The same is opposed vide Grounds of Opposition by the Respondent. According to the Respondent, the jurisdiction of this court under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules has not been properly invoked and that the Applicants have not demonstrated any substantial loss nor indicated willingness to deposit the taxed costs either in court or in a joint account as security.
29. It is noted that the substantive provision upon which the present Motion is premised is Order 22 Rule 22 of the Civil Procedure Rules, it is apparent that this is not the proper provision. Order 22 Rule 22 of the Civil Procedure Rules specifically applies in situations where a decree has been transferred for execution to another court, distinct from the court that issued the decree.



30. That is not the scenario here. The execution is being undertaken by this court albeit by the Deputy Registrar pursuant to Order 49 Rule 5 of the Civil Procedure Rules. Nonetheless, the courts have stated time and again that reliance on a wrong provision of the law does not in itself render a Motion incompetent. [See Supreme Court decision in *Hermanus Phillipus Steyn vs Giovanni Gnechchi-Ruscione* [2013]eKLR].

31. The stay sought herein falls within the ambit of Order 42 Rule 6(1) and (2) of the *Civil Procedure Act*. It provides 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.”

32. In *Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990* [1990] KLR 365, the Court of Appeal, discussing the High Courts’ (read ELC’S) jurisdiction under this Order stated:

“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.”

33. 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 in *Butt vs Rent Restriction Tribunal* [1982] KLR 417 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.”
34. Further to the above, courts are now enjoined to give effect to the overriding objectives as expressed in Section 3 of the *Environment and Land Court Act* and Section 1A of the *Civil Procedure Act*. The court is so guided.
36. By way of brief background, on 13th May, 2021, the Applicants withdrew the present suit and costs thereof were awarded to the Respondents. Subsequently, the Respondents filed a Party-Party Bill of Costs dated 4th May, 2022 which bill was taxed at Kshs 10, 079, 905/=.
37. On 26th September, 2024, the Applicants filed a Motion for execution by way of a Notice to Show Cause as to why execution should not issue. This Motion was prosecuted and vide her ruling of 25th February, 2025, the Deputy Registrar found the Motion to be merited and allowed the plea for execution to issue by way of arrest and committal to civil jail.
38. Aggrieved by this decision, the Applicants intend to appeal to the Court of Appeal and have filed a Notice of Appeal. They have asked this court to stay the execution of the aforesaid ruling pending determination of the intended appeal.
39. As aforesaid, as expressed in *Vishram Ravji Halai* (supra) an Applicant seeking stay must first establish sufficient cause. What constitutes the same was explicitly discussed by the court in *Antoine Ndiaye vs. African Virtual University* [2015] eKLR, thus:
- “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.”
40. The court concurs. In determining whether the sufficient cause has been established, the court will examine whether the Applicants have satisfied the three mandatory prerequisites to the grant of stay pending appeal.
41. The question of what constitutes unreasonable delay was discussed in the case of Jaber Mohsen Ali & another vs Priscillah Boit & Another [2014] eKLR thus:
- “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.”
42. It is noted that the impugned ruling was issued on the 25th February, 2025. The present Motion was filed 3 days later on the 28th February, 2025. In the circumstances there has been no delay.
24. In Rhoda Mukuma vs John Abuoga [1988] eKLR, the court proffered the following definition of substantial loss:
- “substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory...”
43. Similarly, the court in Century Oil Trading Company Ltd vs Kenya Shell Limited as cited in Muri Mwaniki & Wamiti Advocates vs 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.”
44. The courts' have also held that substantive loss must be demonstrated. This position was articulated by the Court of Appeal in Kenya Shell Limited vs 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.”
45. The court in James Wangalwa & Another vs 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...”

46. The court is also alive to its duty to balance the interests of an Applicants who are seeking to preserve the status quo so that his appeal is not rendered nugatory, and the interests of the Respondent who is seeking to enjoy the fruits of his judgment. As cautioned by Kuloba, J in *Machira T/A Machira & Co Advocates vs 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.”

47. According to the Applicants, they are elderly citizens with college going children who depend on them. Further, that should the stay not be granted, they will be committed to civil jail rendering their appeal an academic exercise. This, they aver, constitutes irreparable loss. The Respondent asserts that this does not in itself constitute substantial loss.

48. Indeed, the impugned ruling directs for the issuance of warrants of arrest against the Applicants. As they seek to appeal the ruling on its merits, should the court decline to issue a stay, they will be committed to civil jail and this will ultimately render their appeal, should it succeed, nugatory. This is itself constitutes substantial loss.

49. Whereas the issue of determining the appropriate security is discretionary, and the court may well decide based on the circumstances of the case that the same is not necessary, it behooves Applicants to at the very least indicate their willingness to abide by the conditions of the court pertaining to security for the due performance of the Decree. No such demonstration has been made herein.

50. This court can however impose security for the due performance of the Decree. This being a money decree, the Applicants should deposit the assessed costs in an interest earning as a condition precedent for the issuance of an order of stay of execution.

51. For those reasons, the court makes the following final determination;

- a. The Motion dated 4th April, 2025 be and is hereby struck out.
- b. Pending the hearing and determination of the Appeal against the ruling of the Deputy Registrar of 25th February, 2025, there be a conditional stay of execution against the 2nd Defendants’/Decree Holders’ from executing the warrant of arrest granted herein.
- c. The order of stay of execution granted in (a) above is on condition that the Applicants deposit in a joint interest earning account of the Applicants’ and the Respondent’s advocates a sum of Kshs 10,079,905 within 60 days from the date of this Ruling.
- d. Parties to bear their own costs.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF JUNE, 2025.

O. A. ANGOTE

JUDGE

In the presence of

Mr. Kuria for Judgment debtors

No appearance for Decree holders

Court Assistant: Tracy

