



Maxitize Kenya Limited v Elegant Gems Ltd & 3 others (Environment and Land Appeal E194 of 2024) [2025] KEELC 3906 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3906 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E194 OF 2024**

**CG MBOGO, J
MAY 22, 2025**

BETWEEN

MAXITIZE KENYA LIMITED APPLICANT

AND

ELEGANT GEMS LTD 1ST RESPONDENT

**LUCY RAHAB WANJIRU & VERONICAH KAVITHE GITAU (SUING
AS PERSONAL REPRESENTATIVES OF THE ESTATE OF RUTH
WAITHIRA) 2ND RESPONDENT**

KARAGITA E.A. LTD 3RD RESPONDENT

CHIEF LAND REGISTRAR 4TH RESPONDENT

RULING

1. Before me is the notice of motion dated 26th November, 2024 filed by the appellant/ applicant, and it is expressed to be brought under Sections 1A and 3A of the Civil Procedure Act, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and Articles 50, 165 3 (a) and 169 of the Constitution seeking the following orders: -
 1. Spent.
 2. Spent.
 3. The honourable court be pleased to grant stay of execution of the ruling delivered on 21st November 2024 pending the hearing and determination of the applicant's appeal.
 4. Spent.



5. The honourable court be pleased to grant stay of further proceedings in MCELC No. E376 of 2024 Elegant Gems Ltd v Maximise Kenya Ltd & 3 others as consolidated with MCELC No. E296 of 2024 pending the hearing and determination of the applicant's appeal.
6. The costs of this application be provided for.
2. The application is premised on the grounds on its face. The application is further supported by the affidavit of Michael Mutembei Kibutha sworn on even date. The appellant/ applicant deposed that being dissatisfied with the ruling delivered on 21st November, 2024, they have preferred a ruling against the said decision. Further, that no special circumstances existed for the trial court to grant orders of mandatory injunction.
3. The appellant/applicant deposed that the special circumstances alleged by the court to exist as per the ruling are not known in law and as such, they stand to suffer prejudice if the ruling is upheld. Further, that while they were instructed to file an application for stay of execution, they sought to file the same before this court, and it would be in the interest of justice that the proceedings before the trial court be stayed pending the appeal.
4. The appellant/applicant deposed that unless the court grants the orders sought, the appeal will be rendered nugatory and they will be cited for contempt. Further, that no prejudice will be suffered by the respondents if the application is allowed.
5. The 1st respondent filed grounds of opposition dated 6th December, 2024 challenging the application on the following grounds: -
 1. The trial court exercised its judicial discretion in allowing the 1st respondent's interlocutory application requiring the appellant to deposit in court the Kshs. 12,500,000 it obtained from the 1st respondent herein pending the hearing and determination of the suit.
 2. It is settled in law that an appellate court can only vary such discretionary orders when and where it is satisfied that the court issuing such orders acted whimsically, under wrong principles or acted illegally.
 3. In the instant case, the appellant/applicant herein has neither demonstrated how and where the trial court acted whimsically, on the wrong principles or illegally.
 4. That it is also settled in law that at the interlocutory stage the trial court has a solemn duty to put the contending parties on an equal pedestal before embarking on the full trial of the dispute. This is meant to ensure that neither party gains or maintains the undue advantage it obtained over the other prior to the hearing of the dispute.
 5. In the instant case it is obvious that the appellant/applicant obtained Kshs. 12,500,000 purchase price from the 1st respondent herein. It is obvious that the appellant is keen to maintain and utilize the said monies to mount its defence against the 1st respondents suit filed before the trial court for the recovery of the same purchase price. This position is unfair and prejudicial to the 1st respondent case before this court and also before the trial court.
 6. That it is important to appreciate that the title the appellant is holding over the suit property is under serious attack from both the undisputed original owners of the said suit land i.e. the 3rd respondent herein, and from 2nd respondents who are the people who were allotted the said portion of the land by the 3rd respondent.



7. That other than the title, the applicant has not been able to with precision trace the root of the title it is currently holding.
 8. In any event, the appellant/applicant does not have an arguable appeal as the orders of the trial court only required that he deposits the Kshs. 12,500,000 it received from the 1st respondent in court. These monies would then be released back to it, if it successfully demonstrates during the trial that the root of the title it holds over the suit property is succinct. At any rate, these interlocutory orders are not in any manner or way final orders as the appellant would want this appellate court to believe.
 9. The appellant applicant has not demonstrated that it would suffer any substantial loss if it deposited the said amounts in court. Suffice to note from all indication the person who stands to suffer the most is the 1st respondent who is on the verge of losing both the suit land and the Kshs. 12,500,000 that was obtained from it by the appellant herein.
 10. That the primary duty of any trial court at the interlocutory stage is to ensure that the contending parties are placed on an equal pedestal before the full hearing of the substantive suit. The orders issued by the trial court perfectly ensure that both the appellant and the 1st respondent are on an equal footing before the trial court hears the substantive case.
6. The application was also opposed by the affidavit of Amos Gitau for and on behalf of the 1st respondent sworn on 10th December, 2024. The 1st respondent deposed that the orders in the application are not final, and that the appellants/applicants did not demonstrate any hardship that it was unable to make the said deposits. Further, that the minors' needs who attend school created exceptional circumstances that required the trial court to issue the orders sought.
 7. The 1st respondent deposed that the appellants/applicants stand to lose nothing if the orders are not granted for the reasons that the case is yet to be heard and determined. He deposed that the appellants/applicants have not expressed any willingness to deposit any security for costs nor it is willing to comply with the trial court orders. Further, that it would be unfair for the appellants/applicants to continue to utilize the money to prosecute the instant appeal. It was deposed that the appellant/applicant has not demonstrated why the proceedings should be stayed noting that no prejudice will be suffered by either party if the lower court proceedings were allowed to proceed unabated.
 8. The 2nd respondent filed a replying affidavit sworn on 19th December, 2024. In response thereto, the 2nd respondent opposed the grant of orders 4 and 5 of the application, and deposed that it seeks to delay the hearing of the substantive dispute frustrating the expeditious resolution of the matter. Further, that the instant application is meant to forestall the determination of the substantive issues in controversy and constitutes a blatant abuse of the court process.
 9. The appellant/applicant filed a further affidavit sworn on 20th January, 2025 in response thereto. The appellant/applicant reiterated the averments in his supporting affidavit and maintained that no special circumstances have been demonstrated to justify the orders issued by the trial court.
 10. The 1st respondent filed a replying affidavit (sic) in response thereto sworn on 23rd January, 2025. The 1st respondent reiterated the contents of his replying affidavit, and I need not repeat the same save to note its contents.
 11. The application was canvassed by way of written submissions. The appellant/applicant filed its written submissions dated 17th February, 2025 where it raised two issues for determination as listed below: -
 - i. Whether the applicant has met the threshold for the grant of orders of stay.



- ii. Who should bear the costs of the application.
12. On the first issue, the appellant/applicant submitted that the appeal raises arguable issues with high chances of success. To buttress on this submission, the appellant/applicant relied on the cases of *Butt v Rent Restriction Tribunal* [1979] eKLR, *Kenya Commercial Bank v Hon Nicholas Ombija* Civil Appeal No. 153 of 2009, *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR, and *Total Kenya Limited v Kenya Revenue Authority* [2013] eKLR.
 13. On the second issue, the appellant/applicant submitted that the order to deposit Kshs. 12,500,000 is unjust and oppressive as it disregards that the purchase price was lawfully received. Further, that the compelled deposit imposes a severe financial burden on it which cannot be reversed should the appeal succeed. Reliance was placed in the cases of *Antoine Ndiaye v African Virtual University* [2015] eKLR, *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, *Mugo & another v Mwaura* [2022] KEHC 14244 (KLR), and *Jason Ngumba Kagu & 2 Others v Intra Africa Assurance Co. Limited* [2014] eKLR.
 14. The appellant/applicant submitted that a balancing act of the competing rights of the parties is necessary when assessing the substantial loss, and relied on the case of *Tabro Transporters Ltd v Absalom Dova Lumbasi* [2012] eKLR. Further, it was submitted that the application has been made without unreasonable delay, and that it has demonstrated willingness to comply with any conditions from this court. Further reliance was placed in the case of *Total Kenya Limited v Kenya Revenue Authority* [2013] eKLR.
 15. The 1st respondent filed its written submissions dated 18th February, 2025 where it raised three issues for determination as follows: -
 - i. Whether the appellant/applicant has made out a case for the staying of the trial court proceedings.
 - ii. Whether the appellant/applicant has made out a case for the stay of execution of the orders of the trial court that required to deposit the Kshs. 12,500,000 purchase price it received from the 1st respondent in court pending the hearing and determination of the suit (sic).
 - iii. Who should bear the costs of the said applications.
 16. On the first issue, and while relying on the cases of *Kenya Wildlife Service v James Mutembei* [2019] eKLR, and *Mocha Hotel Ltd v Kwanza Estates Ltd* [2023] KEELC 21729 (KLR), the 1st respondent submitted that the appellant/applicant has not demonstrated what it stands to suffer if the proceedings in the lower court are not stayed.
 17. On the second issue, it was submitted that the appellant/applicant has not placed any material to show anticipated loss, and neither has it given any terms of security to warrant the application for stay. Reliance was placed in the cases of *Machira T/A Machira & Co. Advocates v East African Standard* [2002] KLR 63, *Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others* [2014] eKLR, and *James Wangalwa & Another v Anges Naliaka Cheseto* [2012] eKLR. In conclusion, the 1st respondent submitted that the application ought to be dismissed with costs.
 18. The appellant/applicant filed its supplementary written submissions dated 26th February, 2025. The appellant/applicant buttressed the issues contained in the initial submissions filed. Further, they submitted that they stand to suffer the most substantial harm, and that the court must always favour the lower rather than the higher risk of injustice. It was submitted that if the orders are allowed, it



would create an unfair standard where it is subjected to an irreversible financial burden in compliance with an order that is later found to be unjust.

19. On security for costs, the appellant/applicant submitted that the amount sought is excessive with the current economic challenges, and imposing such a significant burden would be unduly oppressive. On stay of proceedings, the appellant/applicant submitted that the 1st respondent successfully obtained a mandatory injunction which was improperly granted, and that if the trial proceeds before the appeal is determined, it risks rendering the appeal nugatory. Reliance was placed in the case of Francis Njakwe Githiari & another v Daniel Toroitich Arap Moi t/a Moi Educational Centre [2006] eKLR.
20. I have considered the application, the responses, and the written submissions filed as well as the authorities cited. In my view, the issue for determination is whether the appellant/applicant is entitled to the order of stay of execution and further proceedings pending the hearing and determination of the appeal.
21. Order 42, Rule 6 (1) and (2) of the Civil Procedure Rules 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 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.”
22. There are three conditions for grant of stay order pending appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which:-
 - 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
 - iv. 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.
23. Also, from the above cited provision of the law, it will be observed that a court may issue a stay of proceedings after an appeal has been filed though the mere filing of an appeal does not mean that the proceedings must be stayed. The same provision provides that the court must be persuaded that there is sufficient cause to do so.



24. 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”.

25. Being dissatisfied with the ruling of the trial court delivered on 21st November, 2024, the appellant/ applicant has preferred an appeal before this court. In considering the application, the appellant/ applicant ought to demonstrate substantial loss that it would incur if stay is not granted. Secondly, the application ought to be made without unreasonable delay and finally, there must be security for costs. However, in this case, the appellant/ applicant and the 1st and 2nd respondents strongly based their arguments on issues that are alive before the trial court. The appellant did not demonstrate any substantial loss to be suffered if stay is not granted.

26. Upon careful analysis, the arguments canvassed in this application are fit to be discussed in the appeal as they touch on the discretion of the trial court to grant the said orders. In other words, the appellant/applicant has failed to substantiate the loss to be suffered. Equally the appellant/ applicant was completely moot on the subject of security for costs and it is presumed that it was not intent on proposing the said security.

27. From the above, the application falls short of the conditions required under Order 42 Rule 6 of the Civil Procedure Rules. Having said that, there would be no need to stay proceedings in the trial court, save to urge the parties to expedite the hearing of the appeal. The notice of motion dated 26th November, 2024 is thus dismissed. Costs in the cause. Further mention on 19th June, 2025 for further directions.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 22ND DAY OF MAY, 2025.

HON. MBOGO C.G.

JUDGE

22/05/2025.

In the presence of:

Ms. Betty Cherono - Court assistant

Ms. Nyanchera holding brief for Mr. Onyango for the Applicant – present

Mr. Nakhone holding brief for the 1st Respondent – present

