



Rotich v Kiplagat (Suing as the Legal Representative of the Estate of Hosea Kiplagat Mundui (Deceased)) (Environment and Land Appeal E068 of 2024) [2025] KEELC 4289 (KLR) (9 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4289 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E068 OF 2024**

**MAO ODENY, J
JUNE 9, 2025**

BETWEEN

PHILIP ROTICH APPELLANT

AND

HELLEN KIMOOI KIPLAGAT RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF HOSEA
KIPLAGAT MUNDUI (DECEASED)**

RULING

1. This ruling is in respect of a Notice of Motion dated 23rd December, 2024 by the Appellant seeking the following orders:
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to stay execution of the judgment and decree issued on 18th November, 2024 in Molo MCELC NO E043 of 2022: Hellen Kimooi Kiplagat v Philip Rotich pending the hearing and determination of this Appeal.
 - d. That costs of this application be provided for.
2. The application was supported by the annexed affidavit of Philip Rotich, sworn on 23rd December, 2024 where he deponed that by a judgment delivered on 18th November 2024, the subordinate court upheld the Respondent’s deceased husband’s title over that parcel of land known as Molo South/ Langwenda Block 11/651 (Kewamoi). He further deponed that he purchased the land in 1990 and he is apprehensive that the Respondent may forcibly evict him or dispose of the suit property to third parties if an order of stay of execution is not issued.



3. The Appellant also deponed that he filed the application without undue delay, will suffer substantial loss if the orders are not granted and is ready and willing to comply with any conditions the court may impose for the grant of the prayers sought.
4. Hellen Kimooi Kiplagat filed Grounds of Opposition dated 21st February, 2025 and a Replying Affidavit and deponed that her deceased husband was a bona-fide owner of land reference No. Molo South/Langwenda Block 11/651 (Kewamoi) measuring 0.72 Ha where the Appellant has been a trespasser since 2014 and urged the court to dismiss the application with costs.
5. The Appellant filed a Further Affidavit sworn on 11th February, 2025 and deponed that he is likely to be evicted as the Respondent's counsel has requested for eviction orders in the lower court and urged the court to allow the application as prayed.

Appellant's Submissions

6. Counsel for the Appellant filed submissions dated 11th February, 2025 and identified the issue for determination as: whether the court should stay execution of the judgment and decree issued on 18th November, 2024 in Molo MCELC NO E043 of 2022: Hellen Kimooi Kiplagat vs Philip Rotich pending the hearing and determination of this Appeal.
7. Counsel relied on provisions of Order 42 Rule 6 of the Civil Procedure Rules and the cases of Jamii Bora Bank Limited & Another vs Samuel Wambugu Ndirangu, Butt vs Rent Restriction Tribunal [1979], Shell Ltd vs Kibiru and Another [1986] KLR 410 and Jessikay Enterprises Ltd vs George Kahoto Muiruri [2022] eKLR.
8. On whether the appellant will suffer substantial loss, counsel submitted that the appellant has been in occupation of the suit land since he purchased it in 1990 where he has invested heavily by farming, erecting a barbed wire fence and planting trees, which have matured. Counsel submitted that if the application is not allowed, he may be evicted and the appeal will be rendered nugatory.
9. On whether the application has been made without inordinate delay, counsel submitted that the judgment of the subordinate court was delivered on 18th November, 2024 and the Memorandum of Appeal was filed on 17th December, 2024 while this application was filed on 17th January, 2025 hence brought without delay. On furnishing security, counsel submitted that the appellant is willing to furnish security that the court may order.
10. Counsel prayed for the costs and relied on the case of Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others [2014] eKLR.

Respondent's Submissions

11. Counsel for the Respondent filed submissions dated 21st February, 2025 and submitted that an appeal can only be heard on merits as stipulated by Order 51 Rule 12 of the Civil Procedure Rules and also relied on the case of Mohammed Abdi Mohammad vs Ahmed Abdulahi & 3 others (2018). Counsel submitted that the court would require a formal application to grant leave to introduce new facts.
12. It was counsel's submission that the Appellant is attempting to introduce new evidence by alleging the defense of adverse possession as the issues raised have been overtaken by events as they are time barred. Counsel urged the court to dismiss the application dated 23rd December, 2024.



Analysis And Determination

13. The issue for determination is whether the Applicant has met the threshold for grant of stay of execution of the judgment and decree issued on 18th November, 2024 in Molo MCELC NO E043 of 2022 pending the hearing and determination of this Appeal.
14. The law governing the grant of stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules which guides the court on whether to grant stay of execution or not. A party must file the application without undue delay, must prove that he/she will suffer substantial loss if stay orders are not granted, and offer such security as the court orders for the due performance of such decree or order as may ultimately be binding on him/her.
15. The grant of stay of execution is discretionary and such discretion must be exercised judiciously as was held in the Court of Appeal case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 which provides guidance on how a court should exercise discretion and held that:
 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 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. On the first issue whether the application has been made without unreasonable delay, the judgment was delivered on 18th November, 2024 and the application under consideration was filed on 20th January, 2025 which shows that the same was filed timeously in the circumstances.
17. On whether the Appellant shall suffer substantial loss if the stay orders are not granted, the Appellant submitted that he has been in occupation of the suit land for a period of 34 years. He submitted that if he is evicted, his development destroyed or the suit property is disposed of to third parties then his appeal will be rendered nugatory and he will suffer substantial loss.



18. In the case of Samvir Trustees Ltd. –vs- Guardian Bank Ltd. (Nairobi (Milimani) HCCC No. 795 of 1997, the court held that:

“... For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss ...”

19. The Applicant submitted that he will suffer substantial loss if he is evicted from the suit land. In the case of Tropical Commodities Suppliers Limited 7 others v International Credit Bank Ltd (in liquidation) (2004) 2 EA 331 the Court persuasively defined the aspect of substantial loss thus:

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value is a loss that is merely nominal.”

20. The Appellant’s argument that his eviction is imminent should not be automatically treated as proof of substantial loss as was held in the case of Karungu v Masira & another (Environment & Land Case 540 of 2016) [2024] KEELC 5683 (KLR) (25 July 2024) (Ruling) where this court held that:

“It should also be noted that where there is an order of eviction, it is not enough to say that a party shall be evicted, as that is a decree that was issued after the parties have been heard and a case is determined. A mere mention of imminent eviction is not proof of substantial loss”

21. Similarly, in the case of Charles Wahome Gethi vs. Angela Wairimu Gethi [2008] eKLR, the Court of Appeal held that:

“... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”

22. The imminent eviction of the Appellant does not qualify as substantial loss as he did not provide sufficient evidence to show that he will suffer such loss if stay of execution is not issued.

23. The Appellant also stated he has an arguable Appeal and if stay orders are not granted, his appeal will be rendered nugatory. As to what constitutes an arguable appeal, the Court of Appeal in Nairobi Women’s Hospital vs. Purity Kemunto [2018] eKLR held that:

“To say that an appeal is arguable is another way of saying that it is not frivolous and that it raises a bona fide issue deserving full consideration by the Court. Even one bona fide issue will satisfy the requirement, for the law does not look for a multiplicity of arguable issues.”

24. Where substantial loss has not been shown, then there would be no need to grant stay of execution orders like in this case. If the Appeal succeeds then the court has the power to undo what has been done.

25. On the issue of security for the due performance of the decree, the Appellant submitted that he is willing to furnish security that the court may order. It is the Appellant’s contention that the decree



appealed from being a non-monetary decree, the security to be furnished is that which the court may order.

26. I have considered the application and submissions by counsel and find that the Applicant has not satisfied the conditions set out in Order 42 rule 6 of the Civil Procedure Rules and hence the application is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 9TH DAY OF JUNE 2025.

M. A. ODENY

JUDGE

