



Wanyoike v Embakasi Ranching Company Limited & 3 others (Environment and Land Appeal E200 of 2024) [2025] KEELC 4400 (KLR) (12 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4400 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E200 OF 2024**

**JG KEMEI, J
JUNE 12, 2025**

BETWEEN

JOHN WANYOIKE APPELLANT

AND

EMBAKASI RANCHING COMPANY LIMITED 1ST RESPONDENT

ANN MUCHIRU MURIUKI 2ND RESPONDENT

CHIEF LAND REGISTRAR NAIROBI 3RD RESPONDENT

THE HON ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. Vide this Notice of Motion Application dated 10/03/2025, which is premised on Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the Appellant / Applicant has sought the following substantive orders:
 - a. The Court be pleased to grant a stay of execution in MilimaniMCELC No. E219 OF 2022 pending hearing and determination of the appeal filed at the Environment and Land Court at Milimani against the Judgement made by the Hon. P.K. Rotich on 30/10/2024.
 - b. The costs of this application be provided for.
2. The application is premised on the grounds that the Honourable Magistrate delivered a Judgement awarding the 2nd Respondent the parcel of land namely LR Nairobi Block 105/1156 (suit land). That if the stay is not granted, substantial loss may result to the Appellant as once the suit property is executed in favour of the 2nd Respondent, it may not be recoverable. The Appellant argues that the appeal herein has high chances of success and if the execution is carried out the appeal will be rendered nugatory. That the Applicant is willing to abide by any conditions as to security that the court may deem fit.



3. The application is further supported by the Affidavit of John Wanyoike Mburu, the Applicant herein dated 10/3/2025. The Appellant restates the grounds in support of the application and further avers that the Respondent herein is likely to execute the decree at any time unless the orders of stay of execution are granted. That the Respondent herein embarked on claiming costs and has purportedly filed a Bill of Costs of Kshs. 76,000/= hence the appeal is likely to be rendered nugatory. That it is in the interest of justice that the orders sought be granted.

The 2nd Respondent's Replying Affidavit

4. The 2nd Respondent opposed the application vide the Replying Affidavit of Ann Muchiru Muriuki, the 2nd Respondent herein deponed on 28/3/2025. The 2nd Respondent avers that the application is defective as it is filed by an Advocate who has no audience in this Court as he never sought for or obtained orders to act for the Plaintiff in place of the previous Advocates, M/s Kabaka & Company Advocates. Further and on a without prejudice basis, that the Application is not deserving of the orders sought as was not timeously filed. That the Application was filed on 10/03/2025, over 120 days after the Judgment.
5. She argues that the Application was only filed after she instructed Auctioneers to recover the litigation costs of Kshs. 76,000/=; which amount cannot cause any alleged substantial loss, or cause the Appeal to be rendered nugatory as claimed. She avers that she is and has been in occupation of the suit property even before the Plaintiff filed the suit in the year 2022.
6. She contends that the appeal has no chances of success as it is frivolous and vexatious. That the Appellant has not even annexed the impugned judgment and proceedings subject of this Appeal. That the Appellant only applied for certified copies of proceedings and judgment on 28/02/2025 way after the Judgment was delivered. The 2nd Respondent further argues that the Appellant has not met the conditions for grant of stay as he shall not suffer any prejudice if the orders sought are not granted. She states that she can always refund costs to the Appellant should the appeal succeed. Further that the application has been filed with unreasonable delay and that the Appellant has not offered any security. Consequently, she prays that the application be dismissed with costs.

The Court's Directions

7. On 2/4/2025, When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. As a consequence, the parties were granted timelines within which to file and exchange their respective submissions. However, by the time of preparation of the ruling, none of the parties had filed submissions.

Analysis and Determination

8. The court has considered the Appellant's application on record, the replying affidavit in opposition thereto as well as the material on record. The court is of the view that the key issues for determination herein are as follows:
 - a. Whether the Appellant's application is incurably defective;
 - b. Whether the Applicant is entitled to an order of stay of execution of the Judgment delivered on 30/10/2024, in the Magistrate's Court.
 - c. Who shall bear costs of the application.



9. I note that the 2nd Respondents has raised issue on the competence of the application on the basis that it was filed by an Advocate who has no audience in this Court as he never sought for or obtained to act for the Plaintiff in place of the previous Advocates, M/s Kabaka & Company Advocates.
10. Order 9 Rule 9 of Civil Procedure Rules stipulates that;
- “When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—
- a. upon an application with notice to all the parties; or
 - b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
11. In my view and as has been held in various court decisions, the intent of Order 9 Rule 9 and 10 of the Civil Procedure Rules was to cure the mischief of litigants sacking their advocates at the execution stage or at the point of filing their bill of costs thus denying their advocates their hard-earned fees.
12. In the instant scenario, this court is sitting as an appellate court. Does one need to seek leave in such circumstances? It is my view that Order 9 Rule 9 and 10 of the Civil Procedure Rules does not apply in instances of an appeal because the advocate’s instructions in a lower court are exhausted at the conclusion of a matter and requiring such leave would be tantamount to denying such an Appellant a right to legal representation of his choice at an appellate stage thus negating the intent of just and expeditious disposal of a dispute. See the persuasive cases of *Magereza Savings & Credit Co-operative Society Limited v Samuel Gachini Wahu & 881 others* [2014] eKLR and *Martin Mutisya Kiio & Another v Benson Mwendu Kasyali Machakos High Court Misc. Application No. 107 of 2013*.
13. In view of the foregoing I am not persuaded to hold that the application is defective and I find that the firm of J & J Company Advocates are properly on record for the Appellant/Applicant.

A. Whether the Applicant is entitled to an order of stay of execution of the Judgment delivered on 30/10/2024, in the Magistrate’s Court

14. Section 79G of the *Civil Procedure Act* provides that:
- “Every appeal from a subordinate court to the High Court shall be filed within a period of thirty (30) days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
- Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
15. I note from the record that Judgement was entered in the Lower court on 30/10/2024. The Appellant duly filed his Memorandum of Appeal on 28/11/2024. That is within the stipulated period. There is therefore a valid appeal before this Court although the Appellant is yet to file his Record of Appeal.
16. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 rule 6 of the Civil Procedure Rules. An Applicant for an order of stay of execution of a decree or an order pending appeal is obligated under Order 42 rule 6(2), to satisfy the following conditions, namely:



- a. That substantial loss may result to the applicant unless the order is granted.
 - b. That the application has been made without unreasonable delay, and
 - c. That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
17. The applicant states that he stands to suffer substantial loss as the 2nd Respondent is likely to execute the decree at any time. That she has embarked on claiming costs by filing a Bill of Costs.
- It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show how execution shall irreparably affect him or will alter the status quo to his detriment therefore rendering the appeal nugatory, which the applicant in this case has failed to do.
18. Although the Appellant/Applicant has not annexed the Judgment of decree from the Lower Court, which he is appealing from, the court has considered the material on record. It is clear from the record that the suit before the trial suit was concluded and a judgment delivered on 30/10/2024 dismissing the Appellant's suit with costs. In essence this is a negative order and incapable of execution.
19. This principle was enunciated by the Court of Appeal in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR where the court held as follows: -
- “An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.”
20. Similarly, in *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others* [2016] eKLR the Court of Appeal expounded on stay of execution and cited its earlier decision in *Kanwal Sarjit Singh Dhiman v Keshavji Juvraj Shah* [2008] eKLR where a similar application for stay of a negative order, held as follows: -
- “The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.”
21. On Security of costs, the purpose of security was explained in the case of *Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated: -
- “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 the 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.”
22. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicant has not offered any security for the performance of the decree although he stated that he is



willing to comply with any terms and/or conditions issued by the court. The 2nd Respondent on the other hand argues that she is capable of refunding the costs awarded to her by the trial court should the appeal succeed.

23. It is trite law that the right of appeal must be balanced against an equally weighty right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. See the case of Samvir Trustee Limited v Guardian Bank Limited [2007] eKLR. The Appellant has not challenged the 2nd Respondents capabilities of refunding the said sum. I find no basis of issuing any order for security.
24. Final Orders for Disposal
 - a. All considered, I find that the applicant has not met the threshold of granting stay of execution pending appeal.
 - b. Accordingly, I find that the application dated 10/03/2025 lacks merit and is hereby dismissed with costs to the 2nd Respondent.
25. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF JUNE, 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE.

Delivered Online in the Presence of:

Mr. Wanganga for the Applicant

Mr. Isaac Aloo for the 1st Respondent

NA for 2nd, 3rd and 4th Respondents

CA – Ms. Yvette Njoroge

