



**Wekesa & 2 others v Simiyu & 2 others (Environment & Land Case  
42 of 2019) [2025] KEELC 4386 (KLR) (10 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4386 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 42 OF 2019**

**CK NZILI, J  
JUNE 10, 2025**

**BETWEEN**

**EVERLYNE WEKESA ..... 1<sup>ST</sup> PLAINTIFF  
WHITNEY FARIDA WAFULA ..... 2<sup>ND</sup> PLAINTIFF  
PETER PRESTON WAFULA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**TIMOTHY WAFULA SIMIYU ..... 1<sup>ST</sup> DEFENDANT  
THE LAND REGISTRAR TRANS-NZOIA COUNTY ..... 2<sup>ND</sup> DEFENDANT  
RITA NALIAKA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The court, by an application dated 11/2/2025, is asked to:
  - (1) Stay the ruling of 5/2/2025 and the proceedings hereto pending determination of the intended appeal.
  - (2) Issue an order conserving and preserving the subject matter pending hearing and determination of the intended appeal.
2. The reasons are contained on the face of the application and a supporting affidavit of Everlyne Wekesa, sworn on 11/2/2025. The applicant deposes that she has filed an appeal against the ruling dated 5/2/2025, dismissing her application for injunction dated 20/12/2024 as per a copy of the notice of appeal attached as EW-2. The applicant deposes that the orders of the court were prejudicial to the plaintiffs who have a beneficial interest in the suit property as per annexures marked EW-3(a) - (d), being the title deed, caution, mutation form, land control board consent form, and an assistant chief's letter.



3. The applicant deposes that his advocates on record have sought the typed proceedings and ruling to compile the record of appeal as per the annexed letter marked EW-4. The applicant deposes that the 1<sup>st</sup> respondent has commenced the execution process and scheduled the burial while the deceased remains a stranger and the issue of ownership is core to the trial. The deponent deposes that allowing a stranger to her land will cause them great financial loss, injustice, and embarrassment since they have the right to peaceful, quiet, and uninterrupted possession now threatened by the actions of the 1<sup>st</sup> respondent.
4. Again, the applicant deposes that the intended appeal has a high chance of success; otherwise, unless a stay is granted, the intended appeal will be rendered nugatory and there will be no prejudice to the respondents, unlike them who will be vexed, scandalized, and embarrassed if execution occurs.
5. The application is opposed by the 1<sup>st</sup> respondent through a replying affidavit sworn on 14/2/2025. It is deposed that the body of his late wife was removed from Kiminini Hospital Mortuary on 13/2/2025 and interred the same day after a short funeral service as per annexed copies of photographs marked TWS(a) and (b). The 1<sup>st</sup> respondent deposes that since the body has already been buried, the application is overtaken by events, rendering the orders sought incapable of being granted or enforced. The 1<sup>st</sup> respondent deposes that the substratum of the application no longer exists, the orders sought are academic and unenforceable.
6. The applicants rely on written submissions dated 14/2/2025. They submit that the principles under Order 42 Rule 6(2) of the Civil Procedure Rules have been met. Reliance was placed on *Butt v Rent Restriction Tribunal* [1979] eKLR, *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, *Nicholas Stephen Okaka & Another v Alfred Waga Wesonga* [2022] eKLR, *Kitho Civil & Engineering Co. Ltd v NBK & Another* [2023] KECA 387 [KLR] 31<sup>st</sup> March 2023 and *Josephine Koki Raymond v Philomena Kanini Maingi (Personal Representative of Maingi Musila Mutava (Deceased) & Another* [2018] eKLR.
7. The 1<sup>st</sup> respondent relies on written submissions dated 14/2/2025, stating that the application does not comply with the threshold for grant of stay under Order 42 Rule 6 of the Civil Procedure Rules, more so since there is nothing to stay.
8. The issues calling for my determination are:
  - (1) If the applicants are entitled to stay of execution.
  - (2) If the court should stay the proceedings of this suit pending hearing and determination of the intended appeal.
9. A party seeking a stay of execution must surmount three hurdles, namely; demonstrate substantial loss, file the application without unreasonable delay, and offer security for the due realization of the decree should the appeal not succeed. What the applicants are seeking to stay execution of is the ruling dated 5/2/2025, where the court declined to stop the 1<sup>st</sup> respondent from burying the remains of the 3<sup>rd</sup> defendant (then), at L.R No. Kiminini/Matunda Block 4/Cheptarit/246 pending hearing and determination of the applicants' suit.
10. The 1<sup>st</sup> respondent has in the affidavit in reply confirmed that the burial took place on 13/2/2025. So the applicants aver and submit that if the burial was to take place, their suit would be compromised and condemned unheard before full trial. The applicants submit that it would be difficult to prosecute the matter since ownership of the subject matter is at the core of the suit and the eventual appeal will be rendered nugatory.



11. In James Wangalwa (supra), the court observed that execution is a lawful process, and an applicant for stay of execution has to establish other factors showing 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 and that substantial loss is what is to be prevented from happening by preserving the status quo, because such loss would render the appeal nugatory.
12. The ruling sought to be stayed was delivered on 5/2/2025. The notice of appeal was lodged on 11/2/2025. This application was filed on 13/2/2025 at 13.07 hours. Whereas the law does not define maximum or minimum delay, it all depends on the circumstances of each case for even a one-day delay could be unreasonable. The delay of close to eight days in applying has not been explained at all. By the time this application was filed, the 1<sup>st</sup> respondent avers that the burial ceremony or process was underway.
13. In Dominic Nzyoka Mutua & Another v Sammy Mutua & Others [2018] eKLR, the court had been called upon to stop the burial to enable a DNA sample to be taken to prove the relationship with the deceased to avoid disinheritance. The court in answering what substantial loss was likely to be suffered on the apprehension by the applicant said that the issue of administration and distribution of the deceased estate is governed by the Law of Succession Act, and since the applicant had all the time to establish paternity during the lifetime of the deceased, and not just surfaced after his burial, they had proved no substantial loss, unlike the suffering psychologically and financially of the people who had lived with the deceased all his life.
14. In Reuben Mbaisi & 2 others v ELCA Adisa Onzele [2021] KEHC 2353 (KLR), the court cited KCB v Benjamin Amalgamated Ltd & Another Nairobi Appl. No. 50 of 2001, that the onus of satisfaction the of the nugatory aspect in the absence of a stay is upon the applicant and it all depends on the facts of each case. In Norah Adongo Onyango & Another v Jane Awino Onyango [2018] eKLR, the High Court had directed the deceased to be buried at his homestead in Kisumu/Nyalunya/1638. A stay had been refused by the High Court. In an application at the Court of Appeal, the applicant argued that the orders of the High Court were prejudicial to him. The deceased had been at the morgue for 1 year and 2 months, incurring a huge bill.
15. The court observed that the interment of the body was not going to prevent the applicants from proceeding with the appeal and if they succeeded, an order of exhumation and removal of the body from the place interred to another suitable place was an option.
16. In Caroline Mmbaya Imbayi v Grace Khatunyi Imbayi [2021] KEHC 7205 (KLR) the court allowed the application to stay the burial, which matter turned on the burial rights of the parties, which the applicant was disputing and was seeking to get a second opinion at the High Court. The court preserved the status quo on condition that the applicant who was willing to bear mortuary charges, deposit Kshs. 80,000/= to secure the charges. In Malula Mavuti & Others v Paul Musango Mavuti & Others [2016] eKLR, the court observed that under Order 42 Rule 6(2) of the Civil Procedure Rules, the prospects or otherwise of an appeal is secondary to the requirements of substantial loss and the provision of security.
17. Coming to the aspect of stay of proceedings, the principles were discussed in KWS v James Mutembei [2019] eKLR. The court said that stay of execution and stay of proceedings should not be confused for the latter as a grave judicial action which seriously impedes on the right of a litigant to conduct his litigation, the right to access justice, to be heard expeditiously and hence the test is high and stringent. In Global Tours & Travels Ltd, Nairobi Winding Up Cause No. 43 of 2000, the court set out the considerations of stay of proceedings to include:



- (a) The need for expeditious disposal of cases.
  - (b) Prima facie merits of the intended appeal.
  - (c) Sense of whether or not will probably succeed.
  - (d) If it is an arguable one.
  - (e) Scarcity and option utilization of judicial time.
  - (f) If the application has been brought in time.
18. In *David Morton Silverstein v Atsango Chesoni* [2002] eKLR. As the court said each case must depend on its own facts to determine if the appeal will be rendered nugatory. On an arguable appeal, in *UON v Ricatti Business of East Africa* [2020] eKLR, the court observed that an arguable appeal need not succeed but has a bona fide arguable point that is not frivolous and needs to be argued fully on appeal. On lack of anything to stay in *Charles Mwangi v Henry Mukora Mwangi* [2000] eKLR, the Court of Appeal observed that where there was evidence that the order sought to be stayed had been implemented, or complied with, it would be superfluous to stay execution pending appeal.
  19. Applying the foregoing case law to the instant application, it is not in dispute that this suit is parheard, and was at the defense stage when DW1, the 1<sup>st</sup> respondent, was stood down for the late Rita Naliaka was joined as the 3<sup>rd</sup> defendant on 12/6/2023. Following amendments of pleading by consent of parties dated 15/7/2024, the plaintiff's case was re-opened only for the plaintiffs to introduce a further witness statement touching on the 3<sup>rd</sup> defendant's case, be cross-examined and close the case, for the matter to proceed with DW1, who had been stood down.
  20. After this court took over the file on 23/1/2025, directions under Order 18 Rule 8 of the Civil Procedure Rules were taken. With this background in mind, there is no dispute that the burial sought to be stayed took place on 13/2/2025. The intended appeal against the ruling declining to stop the burial was filed on 11/2/2025, just two days before the burial took place, and which was six days after the ruling dated 5/2/2025. See *Utalii Transport Co. Ltd v NIC Bank Ltd* [2014] eKLR.
  21. The 1<sup>st</sup> respondent deposes in his affidavit and also submits that there is nothing to stay as the burial has taken place. The applicants urge the court to find that there will be great prejudice to their cause of action if the burial took place before the ownership of the suit land is determined at the trial. Further, the applicants aver that a stranger is to be buried on their land, which will embarrass and or gravely affect them.
  22. Substantial loss is the cornerstone of stay. The substantial loss is what is to be prevented from happening. Where burial has taken place, there is nothing to stay or stop. Tangible or pecuniary loss has to be shown to the satisfaction of the court. See *Peter Ndungu Ngae & Others v Mungaro Karomo* [2015] eKLR. In *Rosemary Nyambura Mburu v Lilian Waithera Mburu & Another* [2016] eKLR, the court cited *Kenya Shell Ltd v Karuga Kibiru* [1986] eKLR, that evidence of substantial loss must be availed. The court observed that nothing could change the fact of the burial without the participation desired by the applicant, even at the appeal.
  23. The applicants have not attached a draft memorandum of appeal. How the appeal would be rendered nugatory given the confirmed burial of the deceased which unfortunately took place on the day this application was filed, is not clear or demonstrated by the applicants. Equally, the court's determination of the pending suit will not solely be based on who was buried where but on the admitted holding of the land by both the 1<sup>st</sup> applicant and the 2<sup>nd</sup> respondent as trust property and on what percentages.



24. The court therefore finds no substantial loss demonstrated that would render the intended appeal nugatory. Regarding inordinate delay and security, it is not disputed that the delay of 6 days was inordinate and unexplained in the circumstances. The applicants knew that there was an impending burial, mortuary, and burial charges accruing. There was no offer for security as a condition precedent for applying for a stay of execution. It is upon the applicants to offer and mention security commensurate to the issue at hand.
25. In *Machira T/A Machira & Co. Advocates v East Africa Standard No. 2* [2002] KLR 63, the court observed that even where execution has been reviewed or completed, the applicant must establish other factors which show that 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. In *Arun C. Sharma v Ashana Raikundalia T/A Raikundalia & Co. Advocates & Others* [2014] eKLR, the court said that the purpose of security is to guarantee the due performance of such decree or order as may ultimately be binding on the application and that security offered must serve that purpose.
26. Other than mere assertions of substantial loss, the applicants have brought no empirical or documentary evidence in support of such contention that the burial of the 3<sup>rd</sup> defendant (deceased) on the land will render nugatory the intended appeal. Adequate and proper evidence of substantial loss as held in *Samvir Trustee Ltd v Guardian Bank Ltd* [2007] eKLR, is what the applicants should have availed before the court.
27. As to delay, as held in *Utalii Transport Co. Ltd v NIC Bank Ltd & Another* [2014], it all depends on the circumstances of each case, the subject matter of the case, the nature of the case, and the explanation for the delay. In this application, I think the applicants took too long to seek for stay, especially given that they knew that the 1<sup>st</sup> respondent had delayed the burial after they applied for an injunction and the funeral and mortuary expenses had been incurred between the time the interim orders of injunction were granted and the ruling date.
28. Concerning security, the purpose is not to punish the applicants as held in *Arun C. Sharma* (supra). None has been offered at all. Lastly, on the arguable appeal with high chances of success. Again, as held in *Judson Oriema Okoth & Another T/A Okoth & Kiplagat Advocates v N.H.C.* [2006] eKLR, such a consideration does not fall under this court. I refrain from usurping such powers, particularly when there is no draft memorandum of appeal attached.
29. As to whether there should be a stay of proceedings, the affidavit in support of the application is silent on the basis and the justification of staying the proceedings especially given that the burial has taken place, the suit is at an advanced stage, the prejudice likely to be faced by the applicants, who are the plaintiffs in the matter, and how the reversal of the dismissal of the application for injunction will impact on the pending hearing of their suit. *The Constitution* mandates that courts expedite hearings and the disposal of matters.
30. The stay of proceedings ordinarily is an exception rather than as a matter of right to a party. There must be exceptional reasons to order proceedings to be stopped. The applicants have not told the court that the appeal may have serious effects on the entire case so that if the stay of proceedings is not granted, the result of the appeal may well be rendered an exercise in futility as held in *Niazson (K) Ltd v China Road & Bridge Corporation (K) Ltd* [2001] eKLR. Judicial time is the only resource the court has at its disposal. How the same is managed impedes positively or negatively on the system of administration of justice as held in *Muchanga Investment Ltd v Safaris Unlimited (Africa) Ltd & Others* [2009] eKLR.
31. Guided by the foregoing case law, I find no basis to stay the hearing of the case. The application dated 11/2/2025 stands dismissed with costs.



**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT  
KITALE ON THIS 10<sup>TH</sup> DAY OF JUNE 2025.**

In the presence of:

Court Assistant – Dennis

Nafula for Samba for 1<sup>st</sup> defendant present

Songole for the plaintiffs present

Kwame for Odeyo for 2<sup>nd</sup> defendant present

3<sup>rd</sup> defendant absent

**HON. C.K. NZILI**

**JUDGE, ELC KITALE.**

