



**Cheboiywo & 5 others v Chirchir & 2 others (Environment & Land  
Case 327 of 2014) [2025] KEELC 4963 (KLR) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 4963 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 327 OF 2014**

**A OMBWAYO, J  
JULY 3, 2025**

**BETWEEN**

**GEORGE KIGEN CHEBOIYWO ..... 1<sup>ST</sup> PLAINTIFF**

**KARON CHEPKAT KIMUGE & 4 OTHERS & 4 OTHERS & 4  
OTHERS ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KIPNGOK CHIRCHIR ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH CHELELGO & ANOTHER & ANOTHER &  
ANOTHER ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the Plaintiffs/Applicants Notice of Motion application dated 13th March, 2025 which sought the following orders;
  1. Spent.
  2. Spent.
  3. That pending the hearing and determination of the appeal there be stay of execution of the judgment delivered on 14th February, 2025 ordering the survey, subdivision and allocation of the suit parcels of land according to shares of contribution to be ascertained by the officials of the Kyomutich Self Help Group.
  4. That in the alternative, the court be pleased to review the judgment delivered on 14th February, 2025 and direct that upon survey of the suit parcels of land, the Applicant be given first priority to purchase any extra portion that they may be found to be in occupation and in default any such portion be sold to any other willing members.



5. That costs of the application be provided for.
2. The application was supported by the affidavit of Solomon Chirchir Tuwei sworn on 13th March, 2025. He stated that this court delivered its judgment on 14th February, 2025 and that the same was uploaded in the system on 21st February, 2025. He stated that they had no prior notice of the date of delivery of judgment and upon discovery they immediately loaded a Notice of Appeal. He added that they also requested for typed proceedings. He stated that despite the fact that no party sought survey of the suit land, the court nevertheless ordered that survey be carried out on the suit parcels and the same be shared out on the basis of shares held by each member as ascertained by the officials.
3. He stated that the current officials harbor grudges and hatred towards them and that they will use the said opportunity to oppress or deny them their rights over the suit parcel.
4. He further stated that the court already found that the Respondent's surveyor was incompetent for the previous survey done. He added that they stood to suffer substantial loss in the event the 1st and 3rd Respondents are allowed to carry out fresh survey on the suit land.
5. He stated that they were ready and willing to provide security for any extra land they were in occupation of as may be directed by the court. In the alternative, they sought for review of the judgment. He also stated that there was no prejudice to be occasioned upon the self-help group in receiving any other balance for extra land installments.
6. In conclusion, she stated that the application was filed without unreasonable delay. She urged the court to allow the application in the interest of justice.

### **Response**

7. The 4th and 7th Defendant/Respondent filed their Replying Affidavit sworn on 26th March, 2025. They averred that despite the fact that there was no remedy of survey prayed for, the court was proper in ordering the same so as to resolve the dispute. They averred that the issue of grudges was a mere apprehension which was not pleaded in the pleadings and that will not affect the Plaintiffs/Applicants.
8. They also averred that the Applicants stood to suffer no substantial loss since they will be entitled to what they purchased. They added that on the issue of costs, they urged the court to direct the Applicants to deposit Kshs. 2,000,000/= in joint interest earning account of the three advocates failure which survey proceeds.
9. They averred that on the issue of review, the Applicants cannot seek for the same yet they are appealing against the judgment. They urged the court to dismiss the application with costs.
10. The 3rd Respondent also filed his Replying Affidavit sworn on 2nd April, 2025. He averred that the Applicants did not have any arguable appeal on the basis of the shares held by each of them. He further averred that the Applicants want the court to order that any extra parcels that shall remain after allocation be sold to them which is a premature ground.
11. He averred that the Applicants allegation that they were likely to lose more land was unfounded as the court in its judgment did not award the suit property to the 1st and 3rd Respondents but to all members as per their shares. He averred that execution of the judgment shall be done as per the orders of the court and not as per the 1st Respondent or his wishes.
12. In conclusion, he urged the court to dismiss the application with costs or in the alternative with the Applicants be ordered to furnish security in the sum of Kshs. 4,000,000/= to be deposited in a joint account of the parties advocates.



## Submissions

13. Counsel for the Applicant filed his submissions dated 30th June, 2025. It was his submission that the Applicants are in possession of probably more than they might have contributed. He further submits that resurvey of the suit property would mean that part of the land that they occupy will be taken away.
14. He further submits that the Applicants have demonstrated sufficient reason to warrant the court to review its judgment to include that the Applicants herein be granted priority to purchase any extra portion that they may be found to be in occupation and in default, any such portion be sold to any other willing members. He relied on Order 45 Rule 1 of the Civil Procedure Rules.
15. He submits that in the event the court is not convinced to review its orders, the Applicants they seek stay of execution the judgment of the court and more precisely, the order for the survey, subdivision, and allocation of the suit parcels of land according to shares of contribution to be ascertained by the officials of the Kyomutich Self Help Group. He relied on the case of Butt V Rent Restriction Tribunal [1982] KLR 417 and Order 42 Rule 6 (1) of the Civil Procedure Rules. He further cited the case of Consolidated Marine V Nampijja & Another, Civil Appeal No. 93 of 1989 /Nairobi.
16. He urged the court to allow the application as prayed.
17. Counsel for the 4th to 13th Respondents filed his submissions dated 3rd March, 2024(sic) where he identified three issues for determination. The first issue was whether the Applicants have made a case for grant of order of survey, subdivision and allocation of the suit parcels according to shares of contribution to be ascertained by the officials of Kyomutich Self Help Group. It was his submissions that the said issue is moot as it was sought in prayer number two of the instant application. He submits that they want the suit parcel subdivided yet they have appealed against the judgment they intend to enforce.
18. The second issue was whether the Applicants have made a case for grant of stay of execution pending hearing and determination of the appeal. He relied on Order 42 Rule 6 of the Civil Procedure Rules and argues that on the aspect of substantial loss, the Applicants are challenging the decision touching on the extra acreage on the basis that they should be given the same since they are in occupation yet they have not purchased. He further argues that the Applicants have no basis for the extra acres and they cant use the same as basis for substantial loss. He relied on the case of RWW V EKW [2019] eKLR.
19. On security for costs, counsel submits that the Applicants should deposit Kshs. 2,000,000/= as security for cost in a joint interest earning account in the names of the three advocates. He relied on the case of Gianfranco Manenthi & Another V Africa Merchant Assurance Company Ltd [2019] eKLR The final issue was whether the Applicants have made a case for review of judgment. Counsel submits in the negative and submits that a party cannot maintain an appeal and at the same time seek review of the judgment.
20. In conclusion, he submits that the stay be granted on condition that the security for costs is paid.  
Analysis and determination
21. The Court has considered the application and the main issue for determination is whether orders of stay of execution pending appeal should issue.
22. Order 42 Rule 6 (1)(2) of the Civil Procedure Rules provides as follows;
  - (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.

23. In *RWW V EKW* [2019] eKLR the court held as follows:

...the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

24. For this court to grant an order of stay of execution, the Applicants must demonstrate that they filed the application under consideration without unreasonable delay, that they will suffer substantial loss if the orders sought are not granted and that they are willing to deposit security for costs. It is also noteworthy that the court should endeavor to balance the interests of both the successful party in litigation so as not to unnecessarily bar them from enjoying the fruits of judgment and that of the Applicants whose appeal may succeed and be rendered nugatory if stay of execution is not granted. On the issue of delay, a perusal of the court record shows that judgement in the matter was delivered on 14th February, 2025 and the Applicants filed a Notice of Appeal on 28th February, 2025. It is this court’s view that the same was filed within a month hence the time was reasonable and without delay. It is noteworthy that the present application was filed on 13th March, 2025 translating to a period of less than a month from the date of judgment. This court is of the view that that the period does not amount to inordinate delay.
25. The Applicants have to also demonstrate that unless the court grants stay of execution orders pending appeal, they stood to suffer substantial loss. The Applicants argue that they stood to suffer substantial loss in the event the 1st and 3rd Respondents are allowed to carry out fresh survey on the suit land. It was their contention that the 1st and 3rd Respondents harbored grudges against them which might prejudice the process.
26. The 1st, 3rd, 4th and 7th Respondents denied the claims by the Applicants and stated that the court did not award the suit property to the 1st and 3rd Respondents but to all members as per their shares. They also contend that the appeal lacked merit and added that the Applicants would be entitled to the parcel of land as per their paid up shares.
27. It is worthwhile to note that the Respondents were not opposed to the stay orders granted on condition that the Applicants deposit a sum in a joint account held by all advocates.
28. On the issue of security of costs, the Applicants have expressed their willingness to offer security of costs.
29. In the case of *Siegfried Busch vs MCSK* [2013] eKLR, the court held as follows:
30. A superior court to which an application has been made must recognize and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment...”



31. This court is of the view that grant of stay remains a discretionary order that must consider the fact that the court ought not to make a practice of denying a successful litigant the fruits of their judgment.
32. In the upshot, this court shall exercise its discretion and order of stay of execution of this court's judgement delivered on 14th February, 2025 on the following conditions;
  - a. The Applicants to deposit a sum of Kshs. 2,000,000/= as security for costs in a fixed joint interest earning account in the names of both counsel for the parties within 21 days from the date of this ruling.
  - b. The Applicants shall compile, file and serve a record of appeal within 60 days and move the Court appropriately towards the finalization of this Appeal within 180 days from the date of this ruling.
33. In the event the Applicants fail to abide by any of the above stated two conditions within the fixed time lines there will be an automatic lapse of the stay of execution herein irrespective of whether or not one condition shall have been met earlier than the failure of the latter.
34. Each party shall bear its own costs to the application. It is so ordered.

**HON. JUSTICE ANTONY O. OMBWAYO**

**NAKURU ENVIRONMENT AND LAND COURT**

**2025-07-03**

