



**Gichuhi as Chairman & 2 others (Suing for and on Behalf of Marurui Estate Residents Welfare Association) v Kariuki & another (Environment and Land Case Civil Suit 473 of 2008) [2025] KEELC 5174 (KLR) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5174 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 473 OF 2008  
OA ANGOTE, J  
JULY 10, 2025**

**BETWEEN**

**PETER GICHUHI AS CHAIRMAN ..... 1<sup>ST</sup> PLAINTIFF  
SIMON KIMUNGE MWIHOTE AS SECRETARY ..... 2<sup>ND</sup> PLAINTIFF  
STEPHEN KAMAU MUCHIRI AS TREASURER ..... 3<sup>RD</sup> PLAINTIFF  
SUING FOR AND ON BEHALF OF MARURUI ESTATE RESIDENTS WELFARE  
ASSOCIATION**

**AND**

**JANET WAIRIMU KARIUKI ..... 1<sup>ST</sup> DEFENDANT  
THE CITY COUNCIL OF NAIROBI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before this Court for determination is the Plaintiff/Applicant's Notice of Motion Application dated the 13<sup>th</sup> November, 2024 brought pursuant to the provisions of Sections 1A, B & 3A of the [Civil Procedure Act](#), Order 22, Rule 22 and Order 42, rule 6 of the [Civil Procedure Rules](#) seeking the following reliefs:
  - i. Spent
  - ii. That this Honourable Court be pleased to order a stay of the execution of the decree herein and all the consequential orders thereon pending the hearing and determination of this application and the intended appeal application pending before the Court of Appeal being *Appeal Civil Application No. E001 of 2022*.
  - iii. That costs of this application be in the cause.



2. The Motion is based on the grounds on the face thereof and supported by the Affidavit of Peter Gichuchi, the Plaintiff/Applicant's chairman of an even date. He deponed that judgment in the matter was delivered on 16<sup>th</sup> September 2021. Upon reviewing the same, he found it unsatisfactory and issued instructions for the filing of an appeal. However, he explained, the judgment was delivered in Eldoret and without any prior notice to them.
3. Consequently, he stated, they only became aware of the judgment 14 days after the deadline for lodging an appeal had lapsed. As such, their Notice of Appeal dated the 12<sup>th</sup> October 2021, was not admitted on account of being out of time. He stated that they thereafter instructed their Counsel to file a Motion before the Court of Appeal seeking admission of the appeal out of time. The Motion, dated the 10<sup>th</sup> May, 2022 is still pending before the Court of Appeal.
4. According to Mr Gichuhi, as advised by Counsel, it is necessary that stay of execution is granted since the intended appeal is meritorious and unless execution herein is put on hold, the said appeal, if successful, will be rendered nugatory. If the stay is not granted, he urged, they would suffer substantial loss as the decree involves a significant amount of money.
5. Mr Gichuhi urged that the Motion has been filed timeously. He moved the court as soon as he became aware of execution proceedings initiated by the 1<sup>st</sup> Defendant/Respondent and is willing to provide security for the due performance of the decree as may ultimately be binding. He proposed to deposit such amount as the court may order into an interest earning account held jointly by both parties' Advocates as security and stated that no prejudice will be suffered by the Respondents as they will be heard on this application and the intended appeal.
6. In response to the Motion, the 1<sup>st</sup> Defendant/Respondent swore a Replying Affidavit on the 13<sup>th</sup> December, 2024. She deponed that judgment in this matter was delivered on the 16<sup>th</sup> September, 2021 after which she filed a bill of costs whose ruling was delivered on the 18<sup>th</sup> August, 2023.
7. She stated that prior to the delivery of the judgment, they had attended court virtually on the 30<sup>th</sup> June, 2021, wherein they were informed that the judgement would be delivered on the 16<sup>th</sup> September, 2021. Judgement was duly delivered on the aforesaid date in the absence of the Plaintiff's Counsel.
8. It is her position that the Plaintiff has not demonstrated any tangible steps taken to follow up on the matter save for the letter to the registry on the 12<sup>th</sup> October, 2021 seeking copies of the typed proceedings. Further, not only did the Plaintiff file the Notice of Appeal out of time, it took a period of about 8 months from the 12<sup>th</sup> October, 2021 to the 10<sup>th</sup> May, 2022 to file a Motion before the Court of Appeal seeking to have their appeal admitted out of time.
9. Worse still, she stated, this Motion has been made 2 years and 5 months after the Motion for leave to file the appeal out of time before the Court of Appeal and there is manifest undue delay. As advised by Counsel, she averred, the filing of a Notice of Appeal before the Court of Appeal does not operate to stay the judgment of this court.
10. According to Ms Kariuki, the status of the Motion for leave to file out of time is unknown and there is no evidence that tangible steps have been taken to follow up on the same. She stated that it is not enough to merely state that the appeal is meritorious and if execution is allowed it will render the same nugatory.
11. She urged that she would suffer irreparable loss if the stay were granted as the judgment in this matter was delivered in 2021. It is her position that the interests of justice and equity dictate that she be granted



an opportunity to enjoy the fruits of her judgment which the Plaintiff seeks, through this Motion to delay.

12. The 2<sup>nd</sup> Defendant/ Respondent filed Grounds of Opposition dated the 5<sup>th</sup> February, 2025 premised on the grounds that:
  - i. The application is bad in law and an abuse of the court process.
  - ii. The application is a non-starter and misconceived.
  - iii. The application is frivolous, vexatious, lacks merit and should be dismissed with costs to the 2<sup>nd</sup> Respondent.

### Submissions

13. The Plaintiff filed submissions on the 20<sup>th</sup> June, 2024. Counsel submitted that the rules upon which this court may grant orders for stay of execution are well outlined under Order 42 Rule 6 of the [Civil Procedure Rules](#) to wit demonstration that the Applicant will suffer substantial loss/irreparable harm unless the order is made, the application for stay was made without unreasonable delay and the Applicant is willing to provide security for the due performance of the decree.
14. According to Counsel, Ogolla, J in *Tropical Commodities Suppliers Ltd & Others v International Credit Bank Ltd [in liquidation]* [2004] 2 EA 331 cited in [Nesco Services Limited v CM Construction \[Ea\] Limited](#) [2019] eKLR expressed that 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 or a loss that is merely nominal. The case of *Butali Sugar Mills Ltd v East African Portland Cement Co. Ltd* [2016] eKLR, was also cited in this respect.
15. In the circumstances, Counsel submitted, allowing execution for costs of the substantial sum of over Kshs. 524,564/=, pending the hearing and determination of the appeal would amount to punishing the officials of the Residents' Association, and by extension, the residents themselves for pursuing a legitimate public interest cause. It was emphasized that the Association had acted within its mandate in advocating for environmental protection and the enforcement of planning and city land use regulations.
16. It was submitted that, on a balance of probabilities, the Plaintiff's interest in the pending appeal outweighs the Defendants interests especially considering the public interest nature of their litigation. The case of [Century Oil Trading Company Ltd v Kenya Shell Limited Nairobi \[Milimani\]](#) HCMCA No. 1561 of 2007 Kimaru J also cited in [Nesco Services Limited v CM Construction \[Ea\] Limited](#) [2019] eKLR was referenced in support.
17. Counsel submitted that the Motion was not filed out of time, rather, it was filed in response to a Notice to Show Cause issued by the 1<sup>st</sup> Defendant dated 17<sup>th</sup> September 2024, requiring the Plaintiff to appear and show cause on 8<sup>th</sup> October 2024. It was explained that upon becoming aware of the judgment, the Plaintiff promptly lodged an appeal before the Court of Appeal. However, the matter before the appellate court has since experienced delays beyond the Plaintiff's control.
18. Counsel stated that the 1<sup>st</sup> Defendant proceeded to tax their bill of costs and, rather than await the appeal process, took steps to initiate execution through a Notice to Show Cause. Counsel argued that it was this turn of events that necessitated the filing of the present Motion to prevent prejudice to the Plaintiff while the appeal remains pending.



19. It was urged that the Respondent will not suffer any prejudice if the stay of execution is granted. The Respondent will have an opportunity to be heard on the application for leave to appeal, as well as on the appeal itself. Costs is not a positive monetary award or judgment for which non-payment may create loss or prejudice.
20. The 1<sup>st</sup> Defendant filed submissions on the 24<sup>th</sup> April, 2025. Counsel submitted that pursuant to Order 42 Rule 6 of the *Civil Procedure Rules*, a party seeking the grant of stay of execution pending appeal needs to establish substantial loss which was as explained in *James Wangalwa & Another v Agnes Naliaka Cheseto*[2012]eKLR what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. Reliance was also placed on the case of *New Wide Garments v Ruth Kanini Kioko*[2019]eKLR and *Absolom Obuchina v Joseph Wanghuku*[2016]eKLR.
21. Counsel submitted that the Plaintiff has failed to demonstrate how substantial loss will be occasioned as a result of the decretal amount being a substantial amount having not established that the 1<sup>st</sup> Defendant will not be in a position to repay the same should the appeal succeed. Reliance in this regard was placed on the case of *Equity Bank Limited v Taiga Adams Company Limited*[2006] KEHC 860 KLR.
22. According to Counsel, the Motion has been filed after unreasonable delay which delay has not been explained and the court should, guided by *Duba & Another v Wairimu*[2022]KEHC 15103 KLR dismiss the same. As regards provision of security, it was noted that whereas Peter Gichuhi has indicated his willingness to furnish the same as guided by the court, it is unclear whether his two co-Plaintiffs also intend to abide by the same as he has not indicated that he deponed the Affidavit in support of the Motion on their behalf. As such the same must fail.
23. It was submitted that in any event, the requirements under Order 42 Rule 6 of the Civil Procedure Rules are conjunctive and having failed to meet the first two tests, the entire Motion must fail. Also, it was asserted, there is currently no appeal before the Court of Appeal.
24. The 2<sup>nd</sup> Defendant did not file submissions. [2<sup>nd</sup> July, 2025]

### **Analysis & Determination**

25. Having carefully considered the Motion, and responses, the sole issue that arises for determination is:
  - i. Whether the Plaintiff/Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution pending appeal?
26. The law with respect to stay of execution pending appeal is found in Order 42 Rule 6[1] and [2] of the *Civil Procedure Rules*, 2010. It provides as follows:
 

“6[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.”
27. Courts have substantially discussed this issue resulting in a plethora of decisions that guide this court. One such guiding decision is the case of *Vishram Ravji Halai v Thornton & Turpin* Civil Application



No. Nai. 15 of 1990 [1990] KLR 365, where the Court of Appeal, discussing the High Court's [read ELC's] jurisdiction under this provision stated:

“The Superior Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

28. As is clear from the foregoing, the court's power to stay execution pending appeal is a discretionary power which must of course be exercised judiciously, within the bounds of the law and not arbitrarily.

29. Moreover, this discretion is guided by the framework set out under Order 42 Rule 6[1] of the *Civil Procedure Rules*. Speaking to this, the Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 stated thus:

“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 the 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.”

30. It has also been held that sufficient cause must be demonstrated. As to what constitutes sufficient cause in this regard, the decision by the court in *Antoine Ndiaye v African Virtual University* [2015] eKLR, is instructive. Gikonyo J persuasively opined as follows:

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the *Civil Procedure Rules*. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the *Civil Procedure Rules*, that:

a. The application is brought without undue delay;



- b. The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and
- c. 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.”
31. Further to the above, this court is now enjoined to give effect to the overriding objectives in the exercise of its powers as expressed in Section 3 of the *Environment and Land Court Act* and Section 1A of the *Civil Procedure Act* to wit the just, expeditious, proportionate and affordable resolution of disputes.
32. The court is so guided.
33. By way of brief background, the Plaintiff/Applicant, a resident association established to champion the interests of its members and in particular to ensure that its members construct one single dwelling units covering not more than 50% of the space in the plots measuring 40 x 80 feet instituted the present suit as against the Defendants.
34. It sought among other reliefs, an order compelling the 2<sup>nd</sup> Defendant to demolish a structure erected by the 1<sup>st</sup> Defendant on plot number Nairobi Block 139/84, permanent injunctive orders restraining the 1<sup>st</sup> Defendant from constructing any high-rise or multi-storey buildings on the said property or any other plot within Marurui Estate.
35. The Plaintiff also prayed that the Defendants be held jointly and severally liable for the costs of the suit. The Plaintiff's case was premised on the claim that the 1<sup>st</sup> Defendant was erecting a multi-storey structure in violation of the lease terms and the Association's building guidelines.
36. The court, upon analyzing the Plaintiff's case, dismissed the same vide the judgment 16<sup>th</sup> September, 2021. The court found the claim premature, as the Plaintiff had failed to exhaust the applicable dispute resolution mechanisms for building approvals then in place. Further, it was found, the 1<sup>st</sup> Defendant, not being a member of the association was not bound by its regulations. Costs were awarded to the Defendants.
37. Aggrieved by the decision, the Plaintiff filed a Notice of Appeal on the 12<sup>th</sup> October, 2021. It now seeks to have this court stay the judgment of 16<sup>th</sup> September, 2021 pending appeal.
38. It is conceded by the Plaintiff that the Notice of Appeal of 12<sup>th</sup> October, 2021 was never admitted having been filed outside the timelines stipulated in Rule 77 of the *Court of Appeal Rules* thus:
- “ [1] A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.
- [2] Each notice under sub-rule [1] shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against which the appeal is intended.”
39. The Plaintiff however stated that it filed a Motion for leave to appeal out of time which it states is pending before the Court of Appeal. This raises a fundamental legal question, is there an appeal upon which the relief sought can be predicated.



40. It cannot be gainsaid that in seeking a stay of execution pending appeal, there must be an appeal. What signifies an appeal from the High Court to the Court of Appeal is a Notice of Appeal. This was aptly explained in *Yani Haryanto v E.D. & F. Man [Sugar] Limited*, Civil Appeal No. 122 of 1992 thus:
- “A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed.”
41. Where a Notice of Appeal is filed outside the prescribed statutory timelines without leave of the court, it is incurably defective. This position was affirmed by the Court of Appeal in *Gituro v Maki & 3 others* [Civil Appeal [Application] E050 of 2023] [2024] KECA 1204 [KLR] which stated:
- “A notice of appeal filed out of time bereaves this Court of jurisdiction to entertain the appeal and must suffer only one fate: striking out.”
42. Further still, in *Nguruman Limited v Shompole Group Ranch & Another* [2014]eKLR [2014] KECA 358 [KLR] the Court of Appeal affirmed that a stay of execution cannot issue in the absence of a valid notice of appeal on record.
43. From the foregoing, it is evident that no valid appeal is currently before the Court of Appeal. The mere existence of a pending Motion for leave to appeal out of time is not sufficient to trigger this court’s discretion to grant a stay. This is especially so where, as here, the status of that Motion remains unclear. Jurisdiction must be established. It cannot be assumed, and discretionary relief must rest on a concrete legal foundation.
44. In the circumstances, the Motion dated 31<sup>st</sup> November, 2024 is found to be unmerited. The same is dismissed with costs to the Defendants.

**Dated, signed and delivered virtually in Nairobi this 10<sup>th</sup> day of July, 2025.**

**O. A. Angote**

**Judge**

In the presence of;

Mr. Omari for Wamade for Plaintiff

Mr. Wangari for Anzale for 1<sup>st</sup> Defendant

Court Assistant: Tracy

