



**Kimani v Kimani (Environment and Land Case 85 of 2018)  
[2025] KEELC 5169 (KLR) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5169 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND CASE 85 OF 2018**

**A OMBWAYO, J  
JULY 10, 2025**

**BETWEEN**

**ANDREW KIMANI ..... PLAINTIFF**

**AND**

**WANJIKU ERIKANA KIMANI ..... DEFENDANT**

**RULING**

1. This ruling is in respect of the Plaintiff/Applicant's Notice of Motion application dated 28th April, 2025 which sought the following orders;
  - a. Spent.
  - b. Spent.
  - c. The court be pleased to grant a stay of execution of the Decree/Judgement delivered by Lady Justice L.A Omollo on 11th April, 2024 in Nakuru *ELC Case No. 85 of 2018* pending hearing and determination of the appeal against the said judgment.
  - d. That the costs of this application be provided for.
  - e. Any other orders that meet the ends of justice.
2. The grounds on the face of the application are that judgement was delivered on 11th April, 2024 and the Applicant being aggrieved by the said judgement, filed an appeal.
3. The application was supported by the affidavit of Andrew Kimani sworn on 28th April, 2025. He stated that on 11th April, 2024 the court delivered judgment in favour of the Respondent as the rightful owner of the suit property. He further stated that aggrieved by the said judgment, he obtained leave to appeal out of a time and by virtue of the order made on 9th April, 2025, he filed a Notice



of Appeal dated 10th April, 2025. He stated that the appeal raised substantial triable issues with a reasonable chance of success.

4. He also stated that the Respondent has already commenced execution of the decree to have the suit property transferred to her. He added that should his appeal succeed, re-transferring the suit property to his name would be costly. He stated that there was also a danger since the Respondent was likely to sell the suit property to third parties rendering the appeal nugatory.
5. He stated that the Respondent shall not be prejudiced by grant of the orders sought since she was in possession of the suit property.
6. In conclusion, he stated that there was no delay in filing the instant application. He urged the court to allow the application as prayed.

### **Response**

7. Respondent filed her Replying Affidavit sworn on 26th May, 2025. She averred that the judgment was conclusive and self-executing since it directed that in the event the Applicant failed to execute the necessary transfer documents, the Deputy Registrar shall execute on his behalf.
8. She further averred that the present application sought to undermine a lawful directive by this court and that it should be seen as an attempt to delay justice. She added that the same denies her the fruits of a valid and lawful judgment.
9. She averred that the Applicant's claim of substantial loss was speculative and lacked evidentiary basis. She averred that the fact that the suit property was registered in the Applicant's name does not override her right to the property affirmed through the judgment. She also averred that the process of re-transfer in the unlikely event the appeal succeeded remains a procedural matter and not a ground to frustrate the execution of a lawful order. She averred that the Respondent has failed to demonstrate any irreparable harm beyond the ordinary inconvenience of compliance with a lawful judgment. She added that by allowing the stay on speculative and unsupported ground of re-transfer would frustrate execution indefinitely and defeat the very purposes of obtaining judgment.
10. She averred that the Applicant has not offered any form of security for the due performance of the decree as required rendering the application unmerited. She further averred that in the absence of security, the application may be intended to delay execution and frustrate the Respondent's enjoyment of the fruit of a valid judgment. She averred that being granted leave to appeal out of time does not entitle a party to stay execution as a matter of course.

### **Submissions**

11. Counsel for the Applicant filed his submissions dated 2nd July, 2025 where he relied on Order 42 Rule 6(2) of the *Civil Procedure Rules* on what the court needs to consider in granting an order for stay of execution. On the first condition of substantial loss, he submits that that substantial loss may result to the Applicant if the suit property is transferred and registered in the name the Respondent should the Applicant succeed in his Appeal, he submits that re-transferring the suit property to his name would be costly.
12. On the second condition, he relied on the case of *Muthamia v State Law Office & Another; Kangai & 5 Others (Interested Parties) (Environment & Land Case E005 of 2023)* [2025] KEELC 4716 (KLR). He submits that there was no unreasonable delay on the part of the Applicant in filing the current Application.



13. The third issue on security, he submits that this being a land matter and not a liquidated claim but the Applicant is willing to abide by any order the court may give as relates to such security as the court.
14. It was his submission that Applicant's intended appeal is arguable and there is need to preserve the suit property pending the hearing and determination of the appeal. He relied on the case of *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd. & 5 others*. Civil Application No. 124 of 2008. He further submits that should the suit property be transferred to the Defendant there is a danger she may sell the same to third parties hence defeat the Appeal thus rendering the Appeal nugatory. In conclusion, he submits that the Applicant has satisfied the conditions for grant of a stay of execution pending hearing and determination of the intended appeal. He urged the court to allow the application as prayed.
15. Counsel for the Respondent on the other hand filed her submissions dated 28th May, 2025 where she identified one issue for determination. Whether the application is merited. She relied on Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules* and submits that an application for stay ought to satisfy 3 conditions. She relied on the case of *RWW v EKW* [2019] eKLR.
16. On the first condition of substantial loss, she relied on the case of *Charles Wabome Gethi v Angela Wairimu Gethi* [2008] eKLR. She submits that the Applicant has made a general claim that he stood
17. to suffer substantial loss but failed to specify, quantify and support the same with evidence. She further submits that the Applicant has not shown how the transfer of a title would occasion loss or how it would be irreversible if the appeal succeeds.
18. She submits that the Respondent has already prolonged delay with the judgment remaining unexecuted nearly a year later despite the court orders. She added that the process of re-transfer if it arose would not be irreversible and that any inconvenience or could be adequately compensated by costs or legal redress in the appeal.
19. On the second condition of delay, she submits that the Applicant failed to comply with the terms of the judgment within the 30-day period directed by court. She further submits that the Applicant attempts to justify delay in seeking stay which explanation shows lack of diligence. She relied on the case of *Rajesh Rughani v Fifty Investments Ltd & Another* [2005] eKLR. It was her submission that the Applicant is attempting to shift blame to the judiciary which delay would have been avoided through due diligence and consistent follow ups.
20. On the final condition of security for costs, she submits that the Applicant must furnish security for the performance of the order or decree. She relied on the case of *Arun C. Sharma Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR. She further submits that the Applicant has not proposed or deposited any security to guarantee the due performance of the decree in the event the appeal fails.
21. In conclusion, counsel urged the court to dismiss the application for failure to meet the said conditions.

### **Analysis and Determination**

22. The Court has considered the application and the main issue for determination is whether orders of stay of execution pending appeal should issue.
23. 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.

24. 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.”

25. For this court to grant an order of stay of execution, the Applicant must demonstrate that he 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 Appellant whose appeal may succeed and be rendered nugatory if stay of execution is not granted.
26. On the issue of delay, a perusal of the court record shows that judgement in the matter was delivered on 11th April, 2024 and the Applicant after seeking leave to file appeal out of time, the same was allowed on 9th April, 2025 prompting the Applicant to file his Notice of Appeal filed on 10th April, 2025. It is this court’s view that in as much as the Applicant initially delayed in filing his appeal, he sought leave which was granted and from the time the same was allowed, he immediately filed his Notice of Appeal.
27. The Applicant has to also demonstrate that unless the court grants stay of execution orders pending appeal, he stood to suffer substantial loss. The Applicant argues that Respondent was keen to execute the terms of the judgment by ensuring that the title for the suit property is transferred to her as ordered by the court.
28. Notably, the Respondent vide her replying affidavit emphasizes the need to have the same transferred to her name and the delay has made her not enjoy the fruits of her judgment. She added that any re-transfer in the event the appeal succeeds does not amount to substantial loss as the same could be compensated by costs. It is this court’s view that the Respondent has already intimated the need to have the Deputy Registrar execute the transfer documents in the event the Applicant fails to do so as affirmed by the judgment. The substratum of the suit is land which must be sustained. It is this court’s view that ownership and possession will be at the core of the appeal and thus, the register must be preserved pending determination of the appeal. It is therefore this court’s view that the same would be sufficient ground to demonstrate the substantial loss the Applicant may suffer if stay is not granted.
29. In the case of *Absalom Dora v Turbo Transporters* (2013) (eKLR) the court held that:

“The discretionary relief of stay of execution pending Appeal is designed on the basis that no one would be worse off by virtue of an order of the Court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his Appeal which includes the prospects that



the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”

30. On the issue of security of costs, the Applicant has expressed his willingness to offer security of costs and this court shall exercise its discretion regarding the security of costs to be offered by them.
31. In the case of *Siegfried Busch v MCSK* [2013] eKLR, the court held as follows:

“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...”
32. 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.
33. In the upshot, this court shall exercise its discretion and order of stay of execution of this court’s judgement delivered on 11th April, 2024 on the following conditions;
  - a. The Applicant to deposit a sum of Kshs. 300,000/= 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 Applicant 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.
34. In the event the Applicant 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.

Orders accordingly.

**SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO**

**THE JUDICIARY OF KENYA.**

NAKURU ENVIRONMENT AND LAND COURT

DATE: 2025-07-10 11:28:29

