



Osaga & 4 others v Marwanga (Environment and Land Appeal 8 of 2023) [2025] KEELC 5605 (KLR) (15 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5605 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 8 OF 2023
FO NYAGAKA, J
JULY 15, 2025**

BETWEEN

**HELLEN MAGASI OSAGA 1ST APPLICANT
OSAGA MAGASI 2ND APPLICANT
MACHERA MAGASI 3RD APPLICANT
PETER MAGASI 4TH APPLICANT
MAGASI MAGASI 5TH APPLICANT**

AND

FRED ONYANCHA MARWANGA RESPONDENT

RULING

1. By way of Notice of Motion dated 26th February 2025 the Applicants seek the following orders;
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased to grant a stay of execution of the judgment delivered on 19/2/2025 pending the hearing and determination of the intended appeal.
 4. That this Honourable Court be pleased to make such further or other orders as it may deem fit in the interest of justice.
2. The Application is premised on the grounds on the face of it and the averments of the 1st Applicant in the affidavit sworn in support of the application.
3. In her affidavit, the 1st Applicant deponed that the Respondent filed a suit against the Applicants which they successfully defended and the Respondent appealed against the judgment of the lower court and



- succeeded. The judgment of the superior court substituted the holding of the Magistrate's Court in SPM ELC No. 1 of 2020 and dismissed the Applicants' counterclaim while awarding costs against them. She urged that the Applicants were intent on filing an Appeal against the said judgment and attached a copy of the Notice of Appeal annexed and marked as HMO-3.
4. The deponent averred that they have been in occupation of LR No. Bugumbe/ Masaba/ 3xx (the suit land) the subject matter of the appeal, for over 4 decades. Additionally, that the Respondent is unlikely to be in a financial position to refund the costs paid and all expenses incurred since the development of the suit land in 1974 if the appeal succeeds. She urged that the Respondent shall not suffer any prejudice should the application be allowed and prayed that the orders sought issue to preserve the subject matter of the appeal and prevent irreparable harm to the applicants.
 5. The Respondents opposed the Appeal vide a Replying Affidavit sworn by the Respondent, Fred Onyancha. He deponed that the court became functus officio upon delivery of the said judgment and therefore the applicants ought to have moved to the court of appeal for any remedy against the competency of the High Court.
 6. Further, that the applicants' counter claim before the trial court 'was overturned by the High court on appeal, and that the said judgment on appeal is a negative order to the counter claim and no stay of execution can be granted on a negative order like in the instant case. He urged that the applicants did not extract a decree the subject of an appeal to the court of appeal while filing the present application and therefore, the current application is premature on the limb for failure to attach the decree to be appealed against.
 7. The deponent averred that an order of stay of execution pending appeal must be founded on an arguable appeal and which can only be brought to this court by way of a draft memorandum or grounds of appeal. That in the absence of the draft memorandum or grounds of appeal the court will not issue orders in vacuum since the applicants have failed to demonstrate this limb. Additionally, that the Applicants have failed to attach any letter requesting for proceedings to demonstrate that there is an intended appeal to the court of appeal.
 8. The deponent stated that the buildings over the suit property belong to him and were never constructed by the applicants for this court to grant an order of status quo which is intended to deny him the fruits of my Judgment and the mesne profit which the applicants have enjoyed during the course of the proceedings. He stated that he stands to be prejudiced and suffer loss and damage if the orders sought are not granted.
 9. The parties filed submissions on the application.

Applicants' submissions

10. Counsel for the applicant submitted that the application is premised on Order 42 Rule 6(2) of the [Civil Procedure Rules](#) and reproduced the provisions therein.
11. On substantial loss, counsel submitted that the lower court decreed vide a decree dated 19th February 2025, that the Respondent/Appellant appeal succeeded and a permanent injunction was issued against the Applicants' from occupying/claiming the suit land and an eviction was decreed against the Applicants' in favour of the Appellant herein the same was to be effected with the assistance of police officers. He stated that the Applicant resides on the suit land LR No. Bugumbe/Masaba/3xx and is apprehensive that the Respondent will proceed and is in the process to evict the Applicants' herein to satisfy the decree herein. Further, that the Applicant will suffer substantial loss in any event the Respondent proceeds with execution by evicting the Applicant and the appeal will be rendered



- nugatory. He placed reliance on the case of *Machira T/A Machira & Co Advocates v East African Standard* (No.2) (2002) eKLR 63 and the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR in this regard.
12. Counsel urged that the present application was filed on the 27th February 2025 and the judgment which the Applicants' have appealed against was delivered on the 19th February 2025. The court on delivering the said judgment directed that the application for stay be filed and therefore, there is no unreasonable delay on the part of the Applicants.
 13. On the issue on security, counsel submitted that the Applicants are ready and willing to offer such security as the court may deem fit, proper and just in the circumstances, including depositing the sum in a joint interest earning account by the corresponding firm of advocates pending the outcome of the present appeal.
 14. Counsel urged that the application is merited, citing the case of *Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 Others* eKLR and prayed the court allow the same.

Respondents' Submissions

15. Learned counsel for the respondents laid down the background of the case and urged that where a party is dissatisfied with the decision of a superior court, then the party ought to move to the court of appeal to demonstrate the key components of stay pending appeal. That this court whose judgment has been impugned has no such capacity to determine the requirements for stay pending appeal before the court of appeal. Further, that it is now settled law that where a party seeks such a stay he or she must demonstrate by filing a draft memorandum of appeal or grounds of appeal to justify that there is an intended appeal and bring out issues for determination which must have an arguable case. He pointed out that from the application placed before this court the applicant has not attached any memorandum of appeal or grounds of appeal' and the letter requesting for proceedings to confirm that the intended appeal is not an academic exercise and unless stay is granted it will not be rendered nugatory. Where the applicant has not demonstrated such crucial components the application for stay pending appeal is incompetent and amounts to an abuse of due process. He placed reliance on the case of *Counterfeit Authority v John Kariuki T/A Khifram Ltd & 2 others* Nyeri Court of Appeal Misc. Appl. No. 118 of 2020 in this regard.
16. Counsel submitted that the superior court while analysing the evidence and submissions determined that the applicants had not acquired a prescriptive right of adverse possession and that the trial court had no jurisdiction to determine a claim for adverse possession. That this is a clear demonstration that the intended appeal is frivolous and is not arguable
17. Counsel submitted that for the applicant to be granted an order of stay of execution pending appeal she must meet two conditions:-
 - a) Whether the appeal is arguable
 - b) Unless the order for stay of execution is granted the appeal will be rendered nugatory
18. Counsel cited the decisions in *JK industries Ltd v Kenya Commercial Bank Ltd* (1932-8S(KAR 1088)), *Republic v Kenya Anticorruption Commission & 2 others* (2009) KLR 21 and *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 others* (2013) eKLR in support of his submissions and urged that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible or if it is not reversible, whether damages will reasonably compensate the party aggrieved.



19. Counsel urged that the property that is the subject of stay of execution pending the intended appeal is land which is immovable property but with mesne profits which have been enjoyed by the applicants for over 8 years. The court ordered for eviction of the applicants from the suit property which the applicants have contested based on a claim for adverse possession. If eviction were issued pending the hearing and determination of the intended appeal, the applicants will not be prejudiced or suffer loss and damage and hence the appeal cannot be rendered nugatory.
20. It is the Respondents' case that the continued use of the suit property without payment of mesne profits prejudices the interest and rights of the respondent over lack of use of the property. Further, that if the court is inclined to grant stay, the applicants ought to deposit a sum of Kshs. 1,000,000/- as security for costs and mesne profits. Counsel urged that the applicant has not demonstrated that the respondent is incapable of compensating her if the appeal is successful, meaning that the appeal will not be rendered nugatory if stay was not granted.
21. On security, counsel submitted that the Applicant has not given any undertaking as to security if stay is granted. Counsel proposed that the applicant deposit a sum of Ksh. 1,000,000/- as security for costs and mesne profits. He prayed the application be dismissed with costs.

Analysis & Determination

22. The issue that arises for determination is; Whether the Applicants should be granted stay of execution pending appeal.
23. The legal provisions governing stay of execution pending Appeal are contained in Order 42 Rule 6(2) of the *Civil Procedure Rules* which provides that:-

“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. Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. The Court of Appeal in the case of *Butt v Rent Restrictions Tribunal* [1982] KLR 417 gave guidance on how a court should exercise the said discretion and held that: -
 1. The power of the court to grant or refuse an application for a stay of execution is 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 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 of stay of execution to lapse.”

Substantial loss

25. Substantial loss was explained in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

26. It is evident that the applicant still resides on the suit land as per the orders issued by the court on 19th February 2025, there is a pending eviction of the Applicants. Consequently, the applicants will suffer substantial loss if the eviction is allowed and the appeal shall also be rendered nugatory. I have taken into consideration the period they have occupied the suit land and it is my considered view that the applicant stands to suffer substantial loss if the prayers sought are not granted.

Security

27. The applicants have proposed to abide by any terms of security the court may direct. In *Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another* (2018) eKLR the court stated that:

“Where the applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The applicant has offered to provide security and has therefore satisfied this ground.”

28. Guided by the decision above, I find that the applicant has satisfied this ground by making an offer to pay security, and the same is to be made as directed below.

Delay

29. The impugned judgement was delivered on 19th February 2025 whereas the present application was filed on 27th February 2025. It follows that the same was timeously filed.
30. Upon considering the pleadings and the submissions, I find that the application is merited and hereby grant stay of execution of the judgment delivered on 19/2/2025 pending the hearing and determination of the intended appeal. The stay is granted on condition that the Applicant deposits



a sum of Kenya Shillings four hundred thousand (Kshs 400,000/=) only in Court within the next twenty one (21) days and files and serves the Record of Appeal within the next thirty (60) days since proceedings are already typed, in default of any one of the two conditions or both, the stay of execution granted herein shall lapse automatically.

31. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 15TH DAY OF JULY 2025

HON. DR. IUR FRED NYAGAKA

JUDGE

