



**Ogutu v Opere (Environment and Land Appeal E029 of 2023)  
[2025] KEELC 5235 (KLR) (14 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5235 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E029 OF 2023**

**SO OKONG'O, J  
JULY 14, 2025**

**BETWEEN**

**SILVANUS OKOTH OGUTU ..... APPELLANT**

**AND**

**PIA OGONY OPERE ..... RESPONDENT**

**RULING**

1. The Respondent is the owner of all that parcel of land known as Kisumu/Kasule/3XX7 (hereinafter referred to as “the suit property”). The Respondent filed a suit against the Appellant at the Senior Principal Magistrate’s Court at Winam, being SPMC ELC No. E021 of 2022 (hereinafter referred to as “the lower court”) seeking, among others, an order for the eviction of the Appellant from the suit property. The suit was defended. The lower court heard the parties and delivered a judgment in favour of the Respondent on 23<sup>rd</sup> October 2023. The lower court ordered the Appellant to vacate and hand over possession of the suit property to the Respondent within 90 days from the date of the judgment.
2. The Appellant was aggrieved by the said judgment and filed the present appeal on 1<sup>st</sup> November 2023. The Appellant challenged the decision of the lower court on several grounds. The Appellant thereafter applied for a stay of execution pending appeal in the lower court. The lower court allowed the application conditionally on 26<sup>th</sup> August 2024. The lower court granted the Appellant a stay of execution of the lower court judgment pending the hearing and determination of this appeal on condition that the Appellant deposits in court a sum of Kshs. 100,000/- as security within 45 days from the date of the order.
3. The Appellant neither complied with the conditions for stay nor vacated the suit property in accordance with the terms of the lower court judgment. Since the order of stay lapsed, the Respondent moved the lower court for an order that the Appellant be evicted from the suit property with the assistance of the police. The application was opposed by the Appellant. The application was allowed by the lower court in a ruling delivered on 12<sup>th</sup> May 2025. The lower court ordered that the Appellant



be evicted from the suit property with the assistance of the police. The lower court found that the Appellant had not provided a reasonable excuse for not complying with the conditions for the stay imposed by the court.

4. What is now before me is the Appellant's Notice of Motion application dated 11<sup>th</sup> April 2025, seeking an order for a stay of execution of the judgment of the lower court delivered on 23<sup>rd</sup> October 2023 pending the hearing and determination of the appeal herein.
5. The application was brought on the grounds that the Respondent was in the process of evicting the Appellant from the suit property while the appeal is pending an action that would render the appeal nugatory. The Appellant averred that he would suffer substantial loss if evicted from the suit property and that the application was brought timeously. The Respondent was served with the application but did not respond to the same. The application came up for hearing on 10<sup>th</sup> July 2025, when the Appellant's advocate relied entirely on the affidavits filed in support of the application and urged the court to allow the same.
6. I have considered the Appellant's application together with the affidavits filed in support thereof. The application was brought under Order 42 Rule 6 of the [Civil Procedure Rules](#). Order 42 Rule 6(2) of the [Civil Procedure Rules](#) provides that:

“(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 ultimately be binding on him has been given by the applicant.”

7. In [Kenya Shell Limited v Karuga](#) (1982 – 1988) I KAR 1018 the court stated that:

“It is usually a good rule to see if order XLI rule 4 of the [Civil Procedure Rules](#) can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”

8. I am not persuaded that the Appellant's application has met the threshold for granting an order for a stay of execution. The judgment of the lower court sought to be stayed was delivered on 23<sup>rd</sup> October 2023. The Appellant applied for and was granted a conditional stay of execution by the lower court on 26<sup>th</sup> August 2024. The Appellant's application before this court for a stay of execution was not brought until 11<sup>th</sup> April 2025, one and a half years after the date of the judgment sought to be stayed, and seven months after the lower court granted the Appellant a conditional stay. I am of the view that after obtaining an order of stay of execution from the lower court, the Appellant went to sleep and was only awakened by the Respondent's application to the lower court for an order for his eviction from the suit property with the help of the police. I am of the view that the application for stay was brought after an unreasonable delay, which has not been explained. I am also not persuaded that the Appellant is likely to suffer substantial loss if the stay is not granted. From the proceedings of the lower court, the Appellant has an alternative land to move to if evicted from the suit property. The Appellant's only



problem with that alternative land was that it was insecure. I am of the view that a case has not been made for the grant of the discretionary order sought by the Appellant. It would be inequitable and against the rules for granting an order of stay of execution to grant the order.

9. The upshot of the foregoing is that the Appellant's application dated 11<sup>th</sup> April 2025 has no merit. The application is dismissed with no order as to costs.

**DELIVERED AND SIGNED AT KISUMU ON THIS 14<sup>TH</sup> DAY OF JULY 2025**

**S. OKONG'O**

**JUDGE**

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO  
CONFERENCING PLATFORM IN THE PRESENCE OF:**

Mr. Ombwayo for the Appellant

N/A for the Respondent

Ms. J.Omondi-Court Assistant

