



Waithaka (Suing as the Personal Representative of the Estate of Martin Francis Thuku Waithaka - Deceased) v Ouko & 3 others (Environment and Land Case Civil Suit E148 of 2021) [2025] KEELC 6060 (KLR) (17 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6060 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E148 OF 2021
CA OCHIENG, J
SEPTEMBER 17, 2025**

BETWEEN

MARGARET NYAMBURA WAITHAKA (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF MARTIN FRANCIS THUKU WAITHAKA - DECEASED) PLAINTIFF

AND

**ROSELYN DOLA OUKO 1ST DEFENDANT
AARON TAFAKARI OUKO 2ND DEFENDANT
ANDREW ATINDA OUKO 3RD DEFENDANT
NASHON KEBWARO OMWENGA 4TH DEFENDANT**

RULING

1. Judgment was entered for the Plaintiff herein on 12th February 2025 wherein this Court issued a permanent injunction restraining the Defendants from interfering with the Plaintiff's occupation of LR No. 3589/6. Further, the 1st to 3rd Defendants were directed to issue the Plaintiff with her title upon payment of Kshs.400,000/ in fourteen (45) days.
2. Subsequently, the 4th Defendant filed the Notice of Motion application dated 10th March 2025, which is for determination. He seeks the following orders:
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. Spent.



- e. After the said inter-partes hearing of this application, this Court be pleased to grant a stay of execution of the judgment and decree of the Honourable Court rendered on 12th day of February 2025 pending the hearing and determination of the Applicant's intended appeal.
 - f. In the alternative, after the said inter-partes hearing of this application, the Court be pleased to grant an order maintaining status quo stopping the Plaintiff, and the First to Third Defendants ("the Respondents"), or any other person, whether by themselves and/or their servants, agents, assignees or other persons under them or otherwise howsoever from entering, subdividing, selling, transferring, assigning, leasing, selling, subletting, charging or otherwise trespassing upon and/or alienating and/or evicting and/or interfering with the Applicants' ownership, use and quiet enjoyment of the parcel of land known as L.R. No. 3589/53 pending hearing and determination of the Applicant's intended appeal.
 - g. This Honourable Court do grant such further orders as it deems necessary and expedient in the circumstances; and
 - h. An appropriate order be made for costs of this Application.
3. The application is premised on grounds on its face and on the 4th Defendant's supporting affidavit. He avers that he intends to contest the whole of the judgment in this matter in the Court of Appeal and has filed a Notice of Appeal to that effect. He insists that his intended Appeal raises manifestly arguable grounds and he is apprehensive that if the application is not allowed, the 1st to 3rd Defendants will transfer the suit land to the Plaintiff and render the Appeal nugatory.
 4. He asserts that execution of the judgement would irreparably prejudice his legal rights in that he would lose title to a property, which he has utilized with his family for more than three decades and where his matrimonial home is partially developed. Further, he risks losing an investment of rental houses, which he had commenced, to sustain him in his sunset years as he is over 77 years old.
 5. He undertakes not to dispose of or waste the suit property by maintaining status quo during the pendency of the intended Appeal and asserts that the Plaintiff will not be prejudiced as any delay occasioned to her could be compensated by an award of damages. He also undertakes to abide by any conditions that the Court may find just and equitable as a condition for grant of stay.
 6. The application is opposed by the Plaintiff who filed a replying affidavit. She avers that the application is an attempt to prevent her from enjoying the fruits of her judgment as the 4th Defendant has not met the threshold for grant of the orders sought. She points out that the 4th Defendant's matrimonial home is not on the suit property as claimed as per the Site Visit Report and asserts that she is capable of satisfying a decree against her should the intended Appeal be successful.
 7. The instant application was canvassed by way of written submissions.

Submissions

8. The Plaintiff submits that the 4th Defendant did not meet the principles for grant of stay of execution under Order 42 of the Civil Procedure Rules and as emphasized in the case of *Omar Mwakweli & 3 Others v Vipingo Development Limited & 2 Others* (Civil Application E060 of 2021) [20221 KECA 1378 (KLR) (16 December 2022) (Ruling). Further, that the intended Appeal is not arguable as the 4th Defendant is claiming ownership of the suit property both by way of purchase in this suit and by adverse possession in Case No. 416 of 2018 thus he cannot be allowed to approbate and reprobate. Further, that in its judgment herein, the Court found that there was no evidence to prove sale and ownership.



9. The Plaintiff further submits that the 4th Defendant has not shown the loss he is likely to suffer in the event the orders of stay of execution are not granted. Further, that execution is a lawful process and the 4th Defendant has not met the threshold for grant of an order of status quo as he has not established a prima facie right. To this end, the case of Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR was relied upon.
10. The 4th Defendant submits that it has met the principles for grant of stay of execution pending Appeal. He points out that the application is brought timeously and that he has established that ownership and possession will be at the core of the intended Appeal hence the substratum of the intended Appeal ought to be sustained. Further, that he has security for performance of the decree. He urges the Court to take a much broader view of justice and take the overriding objectives under the Civil Procedure Act into consideration. He also urges the Court to issue an order of status quo as an alternative to stay pending appeal considering the irreparable loss that would be visited upon him.
11. To buttress his averments, the 4th Defendant relied on the following decisions: Antoine Ndiaye v African Virtual University [2015] eKLR, Focin Motorcycle Company Limited v Ann Wambui Wangui & Another [2018] eKLR, Kenya Commercial Bank Limited Sun City Properties Limited & 5 others [2012] eKLR, RWW v EKW [2019] eKLR, National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another [2006] eKLR, Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227, African Safari Club Limited v Safe Rentals Limited [2010] eKLR, Republic v National Environment Tribunal, Ex-parte Palm Homes Limited & Another [2013] eKLR, Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & Another [2020] eKLR, Mugah v Kunga [1988] eKLR and Thugi River Estate Limited & Another v National Bank of Kenya Limited & 3 Others [2015] eKLR.

Analysis and Determination

12. Upon consideration of the instant Notice of Motion application including the respective affidavits and rivalling submissions, the only issue for determination is whether the Court should grant a stay of execution pending lodging and determination of the intended Appeal by the 4th Defendant or in the alternative make an order of status quo.
13. The 4th Defendant seeks stay of execution pending appeal or in the alternative, an order of status quo pending appeal. The legal provisions governing stay pending Appeal are contained in Order 42 Rule 6(2) of the Civil Procedure Rules which provides inter alia:
 - “No order for stay of execution shall be made under subrule (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.”
14. While dealing with an application for stay of execution pending Appeal, the Court of Appeal in RRR v EKW [2019] eKLR, stated 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. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent...”

15. The criteria for grant of stay pending appeal was also restated in the case of *Elena Doudoladova Korir v Kenyatta University* [2014] eKLR where it was held as follows:

“The application must meet a criteria set out in precedent and the criteria is best captured in the case of *Halal & another v Thornton & Turpin Ltd* where the Court of Appeal (Gicheru J. A. Chesoni & Cockar Ag JA) held that; “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely: - sufficient cause, Substantial loss would ensue from a refusal to grant stay. The Applicant must furnish security; the application must be made without unreasonable delay.”

16. In this instance, Judgement was delivered in favour of the Plaintiff on 12th February 2025 wherein, the Court issued a permanent injunction restraining the Defendants from interfering with her occupation of LR No. 3589/6 and directed the 1st to 3rd Defendants to issue her with title upon her paying Kshs.400,000/ in fourteen (45) days. The 4th Defendant being dissatisfied with the whole of the said judgement seeks to lodge an Appeal and filed a Notice of Appeal. The 4th Defendant claims he has developed the suit property and has part of his matrimonial property thereon. He avers that he is ready to grant security for costs. I note except for the Notice of Appeal, the 4th Defendant has not demonstrated if he has filed a substantive Appeal nor the cause number in the Court of Appeal. The Plaintiff has vehemently opposed the instant application and claims the 4th Defendant has not fulfilled the criteria for grant of stay of execution pending Appeal.
17. From the averments in the respective affidavits, I note the 4th Defendant has not denied that his matrimonial home is not on the suit property as claimed. I further note that he has not even lodged a substantive Appeal against the impugned judgment. Insofar as the 4th Defendant filed the instant application after delay, I opine that the stay of execution pending an intended Appeal is sought in futility.
18. Based on the facts as presented while relying on the legal provisions quoted and associating myself with the decisions cited, I find that since the 4th Defendant is yet to lodge an Appeal in the Court of Appeal, the instant application for stay of execution pending Appeal is premature. In the circumstances, I find that the 4th Defendant has failed to meet the threshold set for granting stay of execution pending Appeal and will decline to grant the said orders.
19. On injunctions or grant of status quo order pending Appeal, Order 42 of the Civil Procedure Rules envisages it can be issued in instances where an Appeal has been lodged. In *Patricia Njeri & 3 Others -Vs- National Museum of Kenya* [2004] eKLR, the learned Judge while dealing with injunction pending Appeal observed that: “The Appellants did, however, pray (in the alternative) for an order of injunction pending appeal. There was no dispute that the court can, in a proper case grant an injunction pending appeal. What are the principles that guide the court in dealing with such an application” In the *Venture Capital case (Venture Capital and Credit Ltd –Vs- Consolidated Bank of Kenya Ltd Civil Application No. Nairobi 349 of 2003 (UR))* the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in a whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows:



(a) The discretion will be exercised against an Applicant whose appeal is frivolous (See Madhupaper International Limited –Vs- Kerr [1985] KLR 840 which cited Venture Capital). The Applicant must state that a reasonable argument can be put forward in support of his appeal (J. K. Industries –Vs-KCB 1982 – 88) KLR 1088 (also cited in Venture Capital. (b) The discretion should be refused where it would inflict greater hardship that it would avoid (See Madhupaper supra). (c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See Butt –Vs- Rent Restriction Tribunal [1982] KLR 417 (cited also in Venture Capital). (d) The Court should also be guided by the principles in Giella –Vs- Cassman Brown & Company Ltd [1973] EA 358 as set out in the case of Shitukha Mwamodo & Others (1986) KLR 445 (also cited in Venture Capital).” See also Mukoma – Vs Abuoga [1988] KLR 645.”

20. In the foregoing, while associating myself with the decision cited, since there is no Appeal, I find that the 4th Defendant has not met the threshold set for granting an injunction or status quo order pending an Appeal.
21. It is against the foregoing that I find the 4th Defendant’s Notice of Motion application dated the 10th March, 2025 unmerited and will dismiss it with costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF SEPTEMBER 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Kahura for Plaintiff/Respondent

Marube for 1st – 3rd Defendants

Kinuthia for 4th Defendant

Court Assistant: Joan

