Yator v Kiptoo & another (Environment and Land Case 98 of 2018)
[2025] KEELC 6089 (KLR) (18 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6089 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND CASE 98 OF 2018

CK YANO, J

SEPTEMBER 18, 2025

(FORMERLY HCCC NO. 138 OF 1996)

BETWEEN

CHEBET YATOR ..... PLAINTIFF

AND

DESPER JOSEPH KIPTOO ..... 1ST DEFENDANT

KIBIWOT KURIASES ..... 2ND DEFENDANT

RULING

1. The application before this court is the Plaintiff's Notice of Motion dated 27th January, 2025 brought pursuant to Sections 1, 1A, 3, 3A and 63(e) of the *Civil Procedure Act*, Order 22 Rule 22(1) Order 42 Rule 6(1)(2)(4) and Order 51 Rule 1 of the Civil Procedure Rules, seeking for orders that:-
    1. Spent
    2. Spent
    3. An order stay of execution of the judgment, order, decree or decision given on 16-12-2024 by this honorable court pending the hearing and determination of the plaintiff's/applicant's intended appeal to the Court of Appeal be and is hereby granted forthwith.
    4. Costs of this application be provided for.
2. The Application is premised on the grounds on the face of the Motion and supported by the Plaintiff's Affidavit dated 27th January, 2025. He deponed that judgment was delivered on 16th December, 2024 in the absence of the parties thus he was not aware of it, and that he was informed on 14th January, 2025. That as a result, he was unable to file and serve the notice of appeal or apply for certified copies of proceedings and judgment for purposes of preparing the record of appeal. He averred that he was

challenging the judgment and has an arguable appeal, and sought the stay so as to allow him an opportunity to be heard. He added that he is the registered owner of the suit land which is under threat from the intended execution of the judgment and decree that was made against him. He also added that he was not to blame for the delay as he was not notified of the judgment in good time.

3. A Replying Affidavit dated 12th February, 2025 sworn by the 1st Defendant was filed in response to the Application. In it, he deponed that the land sought to be preserved, L.R. No. Lelan/Kabiego/57, is ancestral land held by the Plaintiff in trust for himself and his 3 brothers. That the Plaintiff seeks to shut the Defendants out from their shares of the suit land, as he forcefully threw them out during the subsistence of the case. Further, that the Plaintiff had not demonstrated that he had applied for certified copies of the proceedings, filed a notice of appeal within the prescribed time or offered security for the due performance of the decree.

4. The 1st Defendant accused the Plaintiff of failing to keep tabs on his case even though the E-filing portal issued notice twice. He also faulted the Plaintiff for not stating the argument he intends to present to the Court of Appeal that would lead to the likelihood of success. He deponed that the ownership of the suit land had been determined, and that the order sought by the Plaintiff is absurd as he seeks to stay a negative order dismissing his suit. He averred that the Plaintiff and his counsel are guilty of unexplained delay thus the application should be denied. Further, that the Plaintiff had not demonstrated what prejudice he would suffer if stay is denied.

5. With leave of court, the Plaintiff filed a Supplementary Affidavit dated 20th February, 2025 where he denied the depositions contained in the Defendants' Replying Affidavit. The Plaintiff averred that he was not served with the notices as alleged. He reiterated that the suit land was not ancestral land, and neither did he hold it in trust, and he is thus challenging the judgment vide Civil Application No. E008 of 2025, which has since been served upon the Defendants.

Submissions:

6. The application was canvassed by way of written submissions.

Plaintiff/Applicant's Submissions;

7. In the Submissions dated 25th March 2025, Counsel for the Plaintiff submitted that stay of execution is provided under Order 42 Rule 6 of the Civil Procedure Rules. Further, that the Plaintiff had fulfilled the conditions set out therein. He relied on Butt vs Rent restrictions Tribunal (1982) eKLR. Counsel submitted that the Plaintiff found out about the judgement on 14th January, 2025 and filed this Application on 25th January, 2025 thus it was made without undue delay.

8. Counsel cited Tropical Commodities Suppliers Ltd & Others vs International Credit Bank Limited (in liquidation) (2004)2 EA 331, and submitted that the Plaintiff shall suffer substantial loss unless stay is ordered. Counsel explained that the property is under threat of execution arising out of the Judgment and decree of 16th December, 2024 in respect of the suit land, which is his only resource. He urged that the Plaintiff will therefore suffer loss and the intended appeal rendered nugatory if execution proceeds before the intended appeal is heard and determined. He also relied on James Wangalwa & another vs Agnes Naliaka Cheseto (2012) eKLR Century Oil Trading Company Limited vs Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007 and National Industrial Credit bank Ltd vs Aquinas Francis Wasike & Another (2006) eKLR.

9. On security, Counsel urged that it is to be determined by the Court, but ought not fetter the right to appeal. Counsel urged the court to consider the overriding objective and balance the interests of the

parties to the suit in determining the issue of security. He cited the case of Gianfranco Manenthi & Another vs Africa Merchant Assurance Co. Ltd (2019).

Defendants/Respondents' Submissions;

10. On the part of the Defendants, the submissions filed are dated 24th April, 2025. Counsel for the Defendants argued that substantial loss is the cornerstone for grant of an order of stay. He submitted that the Plaintiff has not sufficiently demonstrated substantial loss. He relied on Kenya Shell Ltd vs B. Karuga Kibiru C.A. No. 197 of 1986, where a similar application failed because the condition of substantial loss was not met.

11. Counsel reiterated that the Plaintiff had neither filed a Notice of Appeal, nor applied for certified copies of the proceedings and judgment. Further, that he had not offered any security for the due performance of the decree, which are all conditions contemplated under Order 42 Rule 6(2)(b). Counsel cited the case of Richard Muthusi vs Patrick Gituma Ngomo, where the court held that failure to prove loss is reason enough to warrant dismissal of the application. Counsel concluded that the circumstances of this case do not warrant the exercise of the court's discretion to stay its own negative orders. He asked that the application be dismissed with costs.

Analysis and Determination:

12. I have carefully considered the Application alongside the Affidavits filed in support thereof. I have also considered the Respondent's Replying Affidavit and the Submissions by the parties respective Advocates. The only issue which arises for determination is whether this court should stay the execution of its Judgment/Decree dated 16th December, 2024.

13. Stay of Execution is provided under Order 42 Rule 6 of the Civil Procedure Rules 2010 as follows:-

> 6. Stay in case of appeal [Order 42, rule 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.
>
> (2) 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. The three conditions to be fulfilled can therefore be summarized as follows;

    a. that substantial loss may result to the applicant unless the order is made

    b. application has been made without unreasonable delay

    c. security as the court orders for the due performance of the decree

15. Madan JA enunciated these principles in Butt vs Rent Restriction Tribunal (1982) eKLR, holding that:-

> " ... If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.
>
> It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:
>
> > " I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory."
>
> Megarry J, as he then was, followed Wilson (supra) in Erinford Properties Limited v Cheshire County Council [1974] 2 All ER 448 at p 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal's decision being rendered nugatory should that court reverse the judge's decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the Attorney General vs Emerson and Others 24 QBD (1889) 56 at p 59. The special circumstances in this case are that there is a large amount of rent in dispute between the parties and the appellant has an undoubted right of appeal.
>
> Proceeding on this narrow basis, that is to prevent the appeal, if successful, from being nugatory, I would grant the stay asked for pending determination of the appeal by this court against the decision dated January 9, 1979 but upon terms, as authorised by the provisions of Order XLI rule 4(2)(b), that the applicant will deposit in court within thirty days the sum of Kshs. 60,000 as security for the due performance of such decree or order as may ultimately be binding upon him, failing which the stay shall lapse without a further order of this court being necessary..."

16. The Court of Appeal in the above case also held that the power of the court to grant or refuse an application for a stay of execution is discretionary, which discretion should be exercised in such a way as not to prevent an appeal. Thus, aside from the three requirements set out at Order 42 Rule 6, courts must also consider whether or not the appeal will be rendered nugatory should the applicant succeed in their appeal.

17. Turning to the merits of the Motion, the first requirement is that the application for stay must be made without undue delay. I note that Judgement in this suit was delivered on 16th December, 2024 and the instant Motion was filed on 29th January, 2025. There is a delay of about 15 days between those two dates, considering that time does not run between 21st December and 13th January. The plaintiff claims that the delay was due to the fact that judgment was delivered in the absence of the parties, and so he was unaware of its entry until 14th January, 2025 when his advocate informed him.

18. I have confirmed from the record that the matter was first slated for judgment on the 26th day of October, 2024. It would appear that the same was not delivered on that day, and judgment was eventually delivered on 16th December, 2024. However, the record also shows that the parties had been notified of the judgment date. The Notice dated 5th December, 2024 also indicates that both advocates for the Plaintiff and the Defendants were served with the Judgment Notice but failed to appear on the material day and judgment was indeed delivered in their absence.

19. In any event, there is no explanation as to why, even knowing that the matter was pending judgment, the Plaintiff and his advocate failed to keep tabs up on the case to the extent that judgement was delivered in their absence. Moreover, it is trite that a case belongs to a litigant and not his advocate. A litigant therefore has a duty to pursue the prosecution of his or her case, and to constantly check with the advocate on the progress of his case. This principle was enunciated in the Court of Appeal in Habo Agencies Limited vs Wilfred Odhiambo Musingo (2015) eKLR where the court stated:-

> " It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."

20. That notwithstanding, there is hope for the Applicant under Order 50 Rule 4 on computation of time, which provides that:-

> 4. When time does not run [Order 50, Rule 4]
>
> Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act.

21. Excluding the time exempted by that provision, I would hold that in the circumstances, the Plaintiff only took about two weeks to bring the said Motion, which period, in my opinion would then be justified.

22. Substantial loss has been held to be a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted. Musinga J (as he then was) in case of Dr. Daniel Chebutuk Rotich vs Morgan Kimaset Chebutuk (Minor suing through his father and next friend Daniel Chebutuk Rotich) (2005) KEHC 601 (KLR) expounded on the issue of substantial loss as follows:-

> " It is not enough for an applicant to merely state that it is likely to suffer substantial loss, it must make effort to demonstrate how the same is likely to occur. Disruption of business and loss of reputation can only be suffered if stay of execution was refused and the applicant refused to pay or became unable to pay and auctioneers had to move in to carry out

execution. 'Substantial loss' is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted..."

23. Under this head, the Plaintiff has only stated that he is under threat of execution arising out of the Judgment and decree of 16th December, 2024 in respect of the suit land, which is his only resource. On this however, I am find that I am persuaded by the decision of the High Court in James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) eKLR, where it was held that:-

> 11. 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. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma v Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:
>
> > " ...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'."

24. In any event, the judgment did not evict the Plaintiff from the suit property. He is still entitled to his share of the suit land, to use as he desires and without any interference from the Defendants. I am therefore not convinced that the Plaintiff herein stands to suffer substantial loss if the orders sought herein are not granted.

25. I must now consider whether the Plaintiff's Appeal will be rendered nugatory if the stay order is not granted as alleged. Notably, there has been no explanation given to show how the appeal will be rendered nugatory if this application is not allowed. Furthermore, Order 42 Rule 4 of the Civil procedure Rules provides that:-

> For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

26. I have scoured the Court file and have not seen any Notice of Appeal filed by the Plaintiff. The Appeal Case Cited is not an appeal per se, but a Civil Application seeking for orders this court is not aware of.

27. In addition, the Memorandum of Appeal filed appears to be an annexure to an Affidavit sworn on 15th January, 2025. The same is undated and unsigned, and although the Plaintiff was not clear on the same, I would only presume that it was filed in the Court of Appeal Civil Application mentioned above. Even after the issue was raised in the Defendants' Reply, the Plaintiff swore and filed a Supplementary Affidavit and still did not annex a Notice of Appeal to show that an Appeal had been properly lodged in the Court of Appeal.

28. The only logical conclusion to be reached, therefore, is that there is currently no appeal filed against the judgment and decree of this court made on 16th December, 2024. The Court in the James Wangalwa Case (Supra) further held that:-

> "With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under order 42 Rule 6 of the CPR only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above."

29. In the same breadth, a non-existent appeal cannot be rendered nugatory. In the absence of proof that an appeal has been lodged in the Court of Appeal, the Plaintiff cannot be heard to say that his appeal shall be rendered nugatory.

30. On the issue of security for the due performance of the decree, going by the provisions of Order 42 rule 6(2)(b), the court has unfettered discretion where security is concerned. The court's discretion extends to the type of security that should be given as may ultimately be binding on the applicant. However, parties offer security as a sign of good faith, demonstrating that the Applicant is ready and willing to commit to giving security.

31. Notably, the Plaintiff has not offered or proposed any security for the due performance of the decree of this court. The failure by the Plaintiff to offer security for the due performance of the decree, does not bode well for him in this application.

32. Be that as it may, having failed to demonstrate substantial loss, or that there is an appeal that would be rendered nugatory, the issue of security further becomes mute.

33. It goes without saying that the onus was on the Plaintiff to meet all the conditions stipulated hereinabove. In the circumstances of this case however, the Plaintiff has not demonstrated that he stands to suffer substantial loss, or that there exists an appeal that will be rendered nugatory. The Plaintiff also failed on the requirement for security. Consequently, I must find that the Plaintiff has failed to demonstrate that he is entitled to the order of stay.

Orders:

34. The upshot is that I find no merit in the Plaintiff's application dated 27th January, 2025. It is therefore dismissed with costs to the Defendants.

35. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 18TH DAY OF SEPTEMBER, 2025 VIDE MICROSOFT TEAMS.

HON. C. K. YANO

ELC, JUDGE

In the presence of;

Mr. Cheptarus for the Plaintiff/Applicant.

Mr. Tanui holding brief for Mr. Ngigi for the Defendants.

Court Assistant - Laban.