



**Karimi & 2 others (Sued in their capacity as trustees of Majengo Muslim Women’s Group) v Kagendo & 3 others (Environment and Land Appeal E040 of 2022) [2024] KEELC 5193 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5193 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E040 OF 2022**

**CK YANO, J  
JULY 11, 2024**

**BETWEEN**

**TIME KARIMI, MAIMUNA HEMED AND JULIUA KARUTA (SUED IN THEIR CAPACITY AS TRUSTEES OF MAJENGO MUSLIM WOMEN’S GROUP) ..... APPELLANT**

**AND**

**EVELYN KALLEN KAGENDO ..... 1<sup>ST</sup> RESPONDENT  
MUTEMBEI NTWIGA ..... 2<sup>ND</sup> RESPONDENT  
COUNTY LAND REGISTRAR MERU ..... 3<sup>RD</sup> RESPONDENT  
ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of two applications dated 7<sup>th</sup> December, 2023 and 19<sup>th</sup> December, 2023.

**The Notice of Motion Dated 7<sup>th</sup> December, 2023**

2. The application is brought under Section 1A, 1B and 3A of the *Civil Procedure Act* Articles 10 (2) (b) and 159 of *the Constitution*, Order 9 Rule 9, and Order 42 Rule 6 of the *Civil Procedure Rules* and seeks various prayers, but the outstanding prayers are prayers 2 and 4 which seek leave to the firm of Charles Kariuki & Kiome Associates Advocates to come on record for the applicants in place of the firm of Okubasu & Munene Co. Advocates and prayer 4 which seeks stay of execution of the judgment/decree of this court delivered on 23<sup>rd</sup> November, 2023 pending the hearing and determination of the intended appeal.



### Notice of Motion Dated 19<sup>th</sup> December, 2023

3. The application is also brought under the same provisions and seeks leave for the firm of Charles Kariuki & Kiome Associates Advocates to come on record for the applicant in place of the firm of Okubasu & Munene & co. advocates and the outstanding prayer is prayer 4 which seeks stay of execution of the decree of the lower court issued on 12<sup>th</sup> August 2023 pending hearing and determination of the intended appeal.
4. Both applications were supported by the affidavits of Maimuna Hamed. It is averred inter alia that judgment in this matter was delivered on 23<sup>rd</sup> November, 2023 and the applicants appeal was dismissed. That the firm of Charles Kariuki & Kiome associates was instructed after the judgment to take over the matter and proceed with the intended appeal, thus, necessitating the prayer for leave.
5. The applicants aver that they were dissatisfied with the decision of this court and have filed a notice of appeal to the court of appeal. That the applicants are apprehensive that the respondents shall interfere with the property subject of the intended appeal and the applicants will suffer hardship and the intended appeal rendered nugatory as a result of which the applicants shall suffer substantial loss. It is the applicants' contention that they have an arguable case which the applicants shall suffer substantial loss. It is the applicants' contention that they have an arguable case which has high probability of success and urged this court to issue stay of execution to preserve the suit property pending the hearing and determination of the intended appeal. That the application has been filed timeously and the same has merit and no person shall be prejudiced if the order for stay pending the hearing and determination of the intended appeal is granted.
6. It was deposed that Majengo Muslim Women's Group is the registered proprietor of Meru Municipality Block 11/804 having been duly registered and issued with a certificate of lease on 16<sup>th</sup> February 2000. That the applicants have been in actual and exclusive possession of the commercial plot located within the central business District of Meru town since mid 1990's wherein they have established extensive developments comprising permanent rental premises for commercial purposes and have been using the rental income for their use. That if the respondents are allowed to enter and take possession of the suit premises, the applicants and their families are bound to loss income of about kshs. 36,000/= per month. Copies of the judgment and decree, the notice of appeal and draft memorandum of appeal, certificate of lease and ejection notice have been annexed.
7. The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the two applications and filed a replying affidavit sworn on 17<sup>th</sup> January, 2024 by Mutembei Ntwiga. It is their contention that once the appeal herein was dismissed, the court became functus officio. That the dismissal of the appeal was a negative order which is not only incapable of being stayed but the court also lacks jurisdiction to stay. That there is no positive order that has been given by this court capable of execution and thus capable of being stayed.
8. The respondents added that the applicants have not demonstrated that they will suffer substantial loss and what substantial loss they will suffer nor have they shown how they will suffer substantial loss. That the applicants have also not demonstrated that they have an arguable appeal with chances of success since the draft memorandum of appeal exhibited is premised on issues of fact and not law.
9. The applications were canvassed by way of written submissions which were duly filed by the advocates for the parties and which I have read and considered and I need not reproduce in this ruling.
10. I have considered the two applications, the response and the submissions filed. There are only three issues for determination.



- i. Whether the court should grant leave to the firm of Charles Kariuki & Kiome Associates to come on record for the applicants, in place of the firm of Okubasu & Munene Co. Advocates.
- ii. Whether the court should grant orders of stay of execution of the decree of the lower court issued on 12<sup>th</sup> August 2022.
- iii. Whether the court should grant orders of stay of execution of the judgment/decreed of the court delivered on the 23<sup>rd</sup> of November, 2023 pending the hearing and determination of the intended appeal.

**Whether the court shall grant leave for the firm of Charles Kariuki & Kiome Associates advocates to come on record for the applicants in place of the firm of Okubasu & Munene Co. Advocates.**

11. The firm of Charles Kariuki & Kiome Associates Advocates have sought for leave to come on record for the appellants/applicants in the place of Okubasu & Munene Co. advocates who previously represented the applicants.
12. It is not in dispute that the said advocates came on record after the delivery of judgment and need to seek leave of court as per the provisions of Order 9 rule 9 of the Civil Procedure Rules which provides that-;
 

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-;

Upon an application with notice to all the parties, or

Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
13. The provisions of Order 9 Rule 9 allow the court to grant leave upon an application with notice to all the parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person. Rule 10 allows the said prayer seeking leave to be brought together with other prayers.
14. I have perused the applications herein and the response and confirm that the prayer for leave for the firm of Charles Kariuki & Kiome associates advocates to come on record has not been contested, thus the said firm is granted leave to come on record in terms of prayer 2 of the applications herein.

**Whether the court should grant orders of stay of execution of the decree of the lower court issued on 12<sup>th</sup> August 2022 and of the judgment/decreed of the court delivered on the 23<sup>rd</sup> of November 2023 pending the hearing and determination of the intended appeal**

15. The principles upon which stay of execution pending appeal may be allowed are now well settled from the authorities from this court and from the superior courts. Generally, stay of execution is provided for under Order 42 Rules 6 of the [Civil Procedure Rules](#) which gives the court discretionary powers to stay execution and provide as follows-;
 

“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 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.”

16. The court of appeal in the case of *Butt Vs Rent Restriction 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 of the case and unique requirements. The special circumstances in this case was 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 power under Order XLI Rule 4 (2) 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 for stay of execution to lapse.”

17. In the case of *RWW vs EKW* (2019) eKLR it was stated that-;

“ The purpose of an application for stay of execution pending 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 it 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.”



18. Therefore, for an applicant to move the court into exercising its discretion to stay execution pending appeal, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for the due performance of the decree.
19. The purpose of stay pending appeal is also to preserve the substratum of the case while the appeal is pending so that the appeal may not be rendered nugatory. However, in exercising its discretion on whether or not to grant stay, the court should weigh the rights of both the appellant against the successful litigant who should not be deprived from enjoying the fruits of his judgment.
20. In the case of *Victory Construction V BM (a minor suing through next friend one PMM)* (2019) eKLR, the court stated that “The court in deciding whether or not to grant a stay of execution, the overriding objective stipulated in section 1A and 1B of the *Civil Procedure Act* should also be taken into consideration”. The court further stated that a court is no longer limited to the provisions of Order 42 Rule 6, adding that the courts are now enjoined to give effect to the overriding objective of the Act and Rules in the exercise of its power under the *Civil Procedure Act* or interpretation of any of its provisions.
21. On the first criterion as set out in Order 42 Rule 6 that is whether the applications have been brought without unreasonable delay, the judgment of the lower court was delivered on 12<sup>th</sup> August 2022 while the applications herein were filed on 7<sup>th</sup> December, 2023 and 19<sup>th</sup> December, 2023, which is a period of over one year and four months. I find that there was inordinate delay in filing an application for stay of execution of the decree of the lower court pending the appeal. Moreover, the appeal herein has since been heard and determined on 23<sup>rd</sup> November, 2023, therefore there is no appeal pending before this court. Therefore, the application for stay in my view is an afterthought and has been overtaken by events.
22. Whereas the application for stay of execution of the judgment and decree of this court pending the intended appeal in the Court of Appeal may be said to have been brought timeously, I find that this court merely dismissed the applicant’s appeal. That was a negative order. Where a negative order has been given, the question of substantial loss or the intended appeal being rendered nugatory does not arise since there was no positive order given that is capable of execution, save for costs. The orders sought are discretionary.
23. Having considered the material on record, I am not satisfied that the applicants have demonstrated that they have met the threshold for grant of orders of stay of execution. This is because of the fact that in the event the respondents take possession of the suit premises and the applicants are evicted, and the applicants’ intended appeal is successful, the respondents can still be ordered to give back possession of the suit premises and have the applicants reinstated. It follows therefore that the chances of suffering substantial loss or the intended appeal being rendered nugatory is remote.
24. By reasons of the foregoing, it is my finding that the applications dated 7<sup>th</sup> and 19<sup>th</sup> December, 2023 are devoid of merit and are dismissed with costs, save for prayers 2 thereof.
25. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 11<sup>TH</sup> DAY OF JULY 2024.**

In the presence of

Court assistant – Tupet

Ms Otieno holding brief for Ms Gikunda for appellant

**C.K. YANO**



**JUDGE**

