



**Gitau v Nyambura (Environment and Land Appeal E049 of 2024)  
[2025] KEELC 3971 (KLR) (20 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3971 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E049 OF 2024**

**JA MOGENI, J  
MAY 20, 2025**

**BETWEEN**

**JOHN MBARI GITAU ..... APPELLANT**

**AND**

**KENNEDY NDUNGU NYAMBURA ..... RESPONDENT**

**RULING**

1. Coming up before me for determination is the Appellant’s Application dated 29/07/2024 filed under the provisions of Order 22 Rule 25 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Sections 1A,1B, of the Civil Procedure Act. The Appellant/Applicant seeks the following orders;
  - a. Spent.
  - b. That pending the hearing and determination of this Application, this Honorable Court be pleased to grant a stay of execution against the subordinate Court Judgment dated 30/04/2024 in Limuru CMELC No. E002 of 2020
  - c. That pending the hearing and determination of the Appeal hereof, this Honorable Court be pleased to grant a stay of execution against the subordinate Court Judgment dated 30/04/2024 in Limuru CMELC No. E002 of 2020
  - d. That this Honorable Court be pleased to issue any other order as it may seem just and expedient in the interests of justice and fairness.
  - e. That the costs of this Application be provided for.
2. The grounds are on the face of the Application and are listed as in paragraph (1) - (10). The Application is further supported by the Affidavit sworn by John Gitau Mbari, sworn on 29/07/2024.



3. In a nutshell, the Applicant asserts ownership of LR No. Limuru/ Ngecha/4361, currently in possession. He also filed a Counter-claim seeking declaration that he was the bona fide owner of the suit property by way of adverse possession. However pursuant to the Court Judgment delivered by the Senior Resident Magistrate Brenda Jaluha Ofisi delivered on 30/04/2024 in CMELC E002 of 2020. The Court declared the Plaintiff as the owner of the suit property.
4. In response to the Application the Defendant/Respondent who was the Plaintiff in the suit in the lower Court filed a Replying Affidavit sworn on 30/09/2024. He averred that the Judgment delivered was procedural and legal and obtained after a fair hearing and that the resultant orders issued are lawful, binding and enforceable.
5. That the Applicant was given a period of 90 days within which to comply which lapsed on 30/07/2024 but he has failed to comply. That on his part he has made all necessary arrangements to comply with the Court order following the laid down procedures. It is his contention that despite the fact that he is not a resident in the country his right to own property as enshrined in Article 40 of the Constitution should not be violated.
6. It is his contention that the Application is frivolous, vexatious and an abuse of the Court process and thus should be dismissed. Further that the Applicant has not satisfied the conditions stipulated under Order 42 Rule 6 of the Civil Procedure Rules. He has not demonstrated how he stands to suffer substantial loss as stated in Kenya Shell Limited v Kibiru & Another [1986] KLR.
7. Further that the Applicant has failed to provide security yet this is key as was stated in G.N Muema P/A (Sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bisbar & Another [2018]eKLR. Thus the Applicant should be ordered to deposit security costs as a precondition of the stay.
8. He also stated that the Application has not been made in good faith as was stated in Butt v Rent Restriction Tribunal. That the rights of the successful party should not be prejudiced. It is his contention that the appeal lodged lacks merit.
9. The successful litigant stated that he had made arrangements to execute the Judgment and further delay will lead to injustice and financial loss for him.
10. Both parties filed their submissions which I have considered. The Applicant's submissions are dated 2/05/2025 whereas the Respondent's submissions are dated 19/02/2025. The parties have relied on key decisions from the Courts which I have indeed looked into.

### **Issues for Determination**

11. Having carefully read and considered both Applications, the rival Affidavits and the submissions thereto, I find that the following issue stands out for determination; whether the Appellant has made a case for the grant of an order of stay of execution.

### **Analysis and Determination**

12. Whether the Appellant has made a case for the grant of an order for Stay of execution.
13. An Application for stay invokes the discretionary powers of this Court under Order 42 Rule 6(1) of the Civil Procedure Rules that empowers the Court to stay execution, either of its Judgment or that of a Court whose decision is being appealed from, pending Appeal. The conditions to be met before stay is granted are provided for under Rule 6(2) of Order 42 and states as follows:

“(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
  - b. that the Application has been made without unreasonable delay; and
  - c. 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. It will be seen that the above provisions are couched in mandatory terms and three conditions must thus be satisfied before an Applicant succeeds on an Application for stay pending Appeal. First, the Court must be satisfied that substantial loss will be occasioned to the Applicant unless the order of stay is made. Secondly, the Application for stay pending Appeal must be made without unreasonable delay; and finally, there must be security for the due performance of the Decree.
15. I have already set out the three elements required in Order 42 Rule 6. I opt to start with the issue of delay. The Judgment in the lower Court was delivered on 30/04/2024 and the Application for stay was filed on 29/07/2024. A period of eighty-nine (89) days or so can be said to have been inordinate. This Court has noted that the present Application was filed with undue delay which the Applicant did not address in his Application.
16. The Court of Appeal in the case of *Butt v Rent Restriction Tribunal* Civil App No. NAI 6 of 1979, Madan, Miller and Porter JJA, while considering an Application of this nature, had this to say:-
- i. The power of the Court to grant or refuse an Application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  - ii. The general principal 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.
  - iii. 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.
  - iv. The Court in exercising its discretion whether to grant or refuse an Application for stay will consider the special circumstances of the case and its unique requirements.
17. Substantial loss is a factual issue which must be raised in the Supporting Affidavit and further supported by evidence. In the case of *Machira T/A Machira & Co. Advocates v East Africa Standard* [2002] eKLR Kuloba J. as he then was held that an Applicant’s ground for substantial loss must be specific and detailed as it is not enough merely stating that substantial loss will result or that if the Appeal is successful, it will be rendered nugatory.
18. Ogolla, J in *Tropical Commodities Suppliers Ltd & Others v. International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 on the same issue of substantial loss stated thus:
- “Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”



19. The Court in the case of *James Wangalwa & Another v. Agnes Naliaka Cheseto* [2012] eKLR expressed itself on the same issue as hereunder:-

“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.”

20. The same position was adopted by Kimaru, J (as he then was) in *Century Oil Trading Company Ltd v. Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007 where he stated that:

“The word “substantial” cannot mean the ordinary loss to which every Judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the Applicant will suffer substantial loss, the financial position of the Applicant and that of the Respondent becomes an issue. The Court cannot shut its eyes where it appears the possibility is doubtful of the Respondent refunding the decretal sum in the event that the Applicant is successful in his appeal. The Court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his Judgement.”

21. The Applicant deponed that the Judgment made on 30/04/2024 granted an Order of eviction against the Appellant which would take effect after Ninety (90) days. That the Respondent (Judgment Holder) even before expiry of 90 days has already sent goons to threaten the Appellant with eviction. Further that the Applicant avers that he has been living on the suit property for over 40 years.
22. The Applicant also stated that the Respondent is currently residing out of the country and that he has no urgent emergency to take possession of the suit parcel and so no prejudice will be occasioned to the Respondent if the stay is granted. That the Application has been brought without undue delay.
23. At this instant, it is not for the Court to speculate on the outcome of the issue of ownership by the Court of Appeal. As it stands, the Respondent has been declared as the owner of the suit property in CMELC No. E002 of 2020. That Judgment has not been overturned by the Appellate Court. The Applicant bears the burden of proving that by refusal to grant stay of execution he stands to suffer substantial loss. This Court is therefore not convinced that the Applicant has demonstrated the substantial loss that may result to them should the order of stay be denied.
24. The Applicant also alleges that the Respondent has sent goons to threaten the Appellant with eviction but provides no proof. As a matter of fact, the Court order that the Respondent seeks to implement is a lawful order issued by the Court.



25. It is trite that an Applicant seeking stay pending Appeal is also required to provide security for the due performance of such Decree or Order as may ultimately be binding on him. I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. In the case of Aron C. Sharma v. Ashana Raikundalia T/A Rairundalia & Co. Advocates the Court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the Judgment debtor ... Civil process is quite different because in civil process the Judgment is like a debt hence the Applicants become and are Judgment debtors in relation to the Respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

26. Under the provisions of Order 42 rule 6 (1) (2) of the Civil Procedure Rules, a party seeking a stay must offer such security for the due performance of the orders as may ultimately be binding on the Appellant. In the case of Equity Bank Ltd v Taiga Adams Company Ltd [2006] eKLR it was held that: -

“of even greater impact is the fact that an Applicant has not offered security at all, and this is one of the mandatory tenets under which the Application is brought ...let me conclude by stressing that of all the four, not one or some, must be met before this Court can grant an order of stay...”

which principle was also emphasized in Carter & Sons Ltd v Deposit Protection Fund Board & 3 Others.”

27. In the instant matter, the Applicant has not offered any security or an undertaking that they are ready and willing to pay the same if ordered by this Honourable Court.

28. Further, the Applicant moved to this Court one day short of three months after the Judgment herein. That is clearly unreasonable delay which has not been explained. Finally, the Applicant has not offered any security. The totality of all the above is that the Applicant has not met the threshold for the grant of an order of stay of execution of the Judgment pending Appeal. That Application is therefore for dismissal.

29. In the end, the Applicant has failed to satisfy this Court on the conditions for the grant of the orders sought. Consequently, the Notice of Motion Application dated 25/01/2024 must fail and the same is hereby dismissed with costs to the Respondent.

30. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 20<sup>TH</sup> DAY OF MAY 2025  
VIA MICROSOFT TEAMS.**

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**MOGENI J**

**JUDGE**

In the presence of:

Appellant – Absent



Mr. Munene for the Respondent

Mr. Melita – Court Assistant

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**MOGENI J**

**JUDGE**

