



**Ituiku Farmers Co Ltd v Misoi & 2 others (Environment & Land
Case 58 of 2017) [2025] KEELC 4028 (KLR) (20 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4028 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 58 OF 2017**

LN GACHERU, J

MAY 20, 2025

BETWEEN

ITUIKU FARMERS CO LTD PLAINTIFF

AND

ELIJAH MISOI 1ST DEFENDANT

SIMON KIMETTO 2ND DEFENDANT

JOSEPH KOECH 3RD DEFENDANT

RULING

1. The Plaintiff/Applicant herein Ituiku Farmers Co. Ltd brought this Notice of Motion Application dated 23rd December, 2024 and sought for the following Orders;
 - i. That pending the hearing and determination of the intended Appeal, this court be pleased to stay the execution of the Judgment and/or decree dated and delivered on 16th December 2024, and all other consequential orders arising therefrom and in particular order (II) for specific performance.
 - ii. That costs be in the cause.
2. The said Application is supported by the grounds set out on the face of the application, and on the Supporting Affidavit of Geoffrey Mungai Kabua. These grounds are;
 - a. The Plaintiff/Applicant filed a suit against the Defendants vide a Plaint dated 13th November, 2013 and a Judgment was delivered on 16th December, 2024.
 - b. In the said Judgment, the court found in favour of the Defendants/Respondents and now the Defendants/Respondents intends to subdivide the suit land and sell the subdivisions to third parties.



- c. Further that if the said Judgment of this court is executed, it will render the intended Appeal nugatory and a mere academic exercise, and hence the need for stay of execution of the said judgment,
 - d. That it is in the interest of justice that this court do consider the application herein and allow the stay of execution.
3. In his Supporting Affidavit Geoffrey Mungai Kabua, the Chairman of the Board of Directors of the Plaintiff Company averred that upon delivery of the Judgment of this court on 16th December, 2024, the Plaintiff/Applicant felt aggrieved and intends to file an appeal against the said judgment.
 4. He also averred that if the said Judgment is executed, and the suit land transferred to the Defendants/ Respondents, then the entire substratum of the Appeal will be lost, as the Defendants/Respondents intention is to have the said land subdivided and transferred to its members. It was his contention that he is ready and willing to abide by such reasonable conditions as the court may find fit to grant.
 5. The Application is opposed vide the Replying Affidavit of Elijah Misoi, the 1st Defendant/Respondent who swore the said Replying Affidavit on behalf of the other Respondents. He admitted that he is aware that the Plaintiff/ Applicant has lodged the Notice of Appeal against the Judgment of this court dated 16th December, 2024.
 6. He also averred that his advocate has advised him that since the Defendants/Respondents have neither extracted nor commenced the process of execution of the Decree of the court arising from the said Judgment delivered on 16th December, 2024 then there is no imminent risk of execution and this application is premature.
 7. The deponent further averred that the Plaintiff/Applicant has not satisfied the grounds for grant of stay of execution such as; the Plaintiff/ Applicant stands to be prejudiced if stay orders are not granted; that the intended Appeal has prospects of success and that the Plaintiff/ Applicant has not attached the draft Memorandum of Appeal to demonstrate that the intended Appeal raises arguable or triable issues with probability of success.
 8. The deponent further argued that there is no evidence tendered to demonstrate that the Plaintiff/ Applicant intended Appeal will be rendered nugatory, or that it stands to suffer substantial loss or prejudice if the orders sought herein are not granted.
 9. It was also deposed that the instant application is frivolous, vexatious and an abuse of the court process which is filed with the sole objective of denying the Defendants/Respondents the fruits of their judgment.
 10. The Defendants/ Respondents further deposed that the application herein is a desperate attempt to defeat the ends of justice. Consequently, the court was urged to dismiss the instant application with costs.
 11. The Application was canvassed by way of written submissions. The Plaintiff/Applicant through Mirugi Kariuki & Co. Advocates filed its written submissions dated 20th March 2025, and urged the court to allow its application as prayed.
 12. The Defendants/Respondents failed to file their written submissions as directed by the court. On 1st April 2025, when this matter came up for mention for purposes of confirming filing of written submissions, the Defendants were absent, and so was their advocate.



13. Therefore, this court will consider the instant Application, the Replying Affidavit in opposition, and the written submissions by the Plaintiff/ Applicant in determining whether to stay the said Judgement or not.
14. In its written submissions, the Plaintiff/Applicant set out two issues for determination being;
 - i. whether the application is merited
 - ii. who should pay costs the application.
15. On whether the application is merited or not, the Plaintiff/Application relied on the provisions of Order 42 Rule 6(1)&(2) of the Court Procedure Rules 2010 and various decided cases among them being; Runda Water Ltd & Another vs Timothy John Nicklin & another [2017]eKLR; RWW vs EKW [2019]eKLR where the court held that; -

“ the primary objective of stay orders is to preserve the subject matter of the appeal so that the Appellant’s right of Appeal is not rendered illusory.”
16. On the issue of costs, the Plaintiff/Applicant urged the court to allow the application with costs to itself
17. The court has carefully considered the application herein, the pleadings in totality and the law on stay of execution as is provided for in Order 42 Rule 6(2) of the Civil Procedure Rules which states;

“(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.”
18. From the above provisions of law, it is evident that no stay of execution shall be issued unless the applicant has satisfied the court that failure to grant such order will result in substantial loss; the application has been made without unreasonable delay; and provision of such security.
19. These principles were enunciated in the case of Butt vs Rent Restriction Tribunal [1979], where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. These principles are: -
 - a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 - b. Secondly, 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 the appeal court reverse the judge’s discretion.
 - c. Thirdly, 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.
 - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its



powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

20. The primary purpose of stay of execution is to preserve the status quo/ subject matter pending the hearing of the appeal so that the intended Appeal is not rendered nugatory. See the case of [RWW v EKW](#) [2019] eKLR; where the court observed that:

“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.”

21. There is no doubt that the Plaintiff/Applicant filed this suit on 13th November 2013, and sought for an Order of eviction of the Defendants/Respondents from the suit property being Narok/Cis-Mara/Ololulunga/137, on allegations that it was the registered owner of the said suit property which measures 82 Hectares.
22. Further, the Plaintiff/ Applicant alleged that its former Chairman purported to enter into a sale agreement with the Defendants/ Respondents, but there was no resolution of the Plaintiff’s Board of Directors to appoint the advocate who undertook the conveyance for purposes of the sale, and there was no resolution to sell the land. The Plaintiff also alleged that the Defendants have been claiming ownership of the suit property which allegation has interfered with the Plaintiff/Applicant’s quiet possession, ownership and use of the suit land.
23. On their parts, the Defendant/Respondents filed their Defence and denied the Plaintiff’s claim, and averred that they purchased the suit property for Kshs.4,000,000/= from the Plaintiff’s agents. They also averred that the Plaintiff deliberately failed to seek and obtain the requisite consent to effect the transfer of the suit land to the Defendants, who paid the full purchase price. The Defendants/ Respondents urged the court to allow their Counter-claim.
24. The court in its Judgement of 16th December 2024, dismissed the Plaintiff’s claim for lack of merit, and proceeded to allow the Defendants/Respondents prayer of specific performance as sought in their Counter- Claim by compelling the Plaintiff/Applicant to apply and obtain the requisite Land Control Board’s Consent to transfer the suit property to the Defendants.
25. The Plaintiff/Applicant filed a Notice of Appeal dated 20th December 2024, which in itself is enough to confirm that the Plaintiff/Applicant intends to appeal the decision of this court. See the case of [Equity Bank Limited v West Link MBO Limited](#) Civil Application No NAI 78 of 2011 (UR. 53/2011); where the Court of Appeal held;

“The first step in instituting an appeal is the filing of a notice of appeal. Therefore, as soon as a notice of appeal is lawfully filed, an appeal is deemed to be in existence and a litigant could move the Court of Appeal for the grant of order of stay under Rule 5(2)(b) of the Court of Appeal Rules.”

26. Though the Plaintiff/ Applicant has not attached a draft Memo of Appeal, that cannot hinder this court from holding that the Plaintiff/Applicant intends to file an appeal against the Judgement of



this court of 16th December 2024. See the case *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR, where the court held

“... that failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other proceedings relied upon by such an applicant that the intended appeal is safe.”

27. However, filing of an Appeal is not an automatic stay of the judgement appealed against as provided by Order 42 Rule 6(1) of the *Civil Procedure Rules*. The Applicant who seeks for stay of execution must demonstrate that it will suffer substantial loss. Demonstrating substantial loss is key to grant of stay of execution pending Appeal. See the case of *Silvestein vs N. Chesoni* [2002] KLR 867, where the court held that;

“.....the issue of substantial loss is the cornerstone of both jurisdiction. Substantial loss is what has to be prevented by preventing the status quo because such loss would render the appeal nugatory.”

28. It is not in doubt that the Defendants/Respondents are in occupation of the portions of land in dispute herein. The court directed that the Plaintiff/Applicant be compelled to apply and obtain Land Control Board Consent for transfer of the said portion of land for to the Defendants/Respondents herein.

29. The Plaintiff/Applicant is claiming ownership of the said portion of land; and has denied having entered into a valid sale agreement with the Defendants. If the said portion of land is transferred to the Defendants/Respondents, and subdivisions of the said land is effected, the Defendants might sell their respective portions to third parties before the Appeal is finalized. If the suit property is sold to third parties, and the Plaintiff/ Applicant succeeds in the Appeal, it might be difficult to recover the said land, thus rendering the Appeal nugatory.

30. Given that recovery of such land might be difficult and/ or might result in incurring of further costs, then it is clear that the Plaintiff/ Applicant might suffer substantial loss if orders sought are not granted. Therefore, the court finds and holds that the Plaintiff/Applicant has demonstrated this ground of it will suffer substantial loss.

31. On whether the application was filed without unreasonable delay, it is evident that the impugned judgment was delivered on 16th December 2024, and this Application was filed on 23rd December 2024. There is indeed no delay in filing this Application; as it was filed within the specified time of filing such an Appeal.

32. On the issue of such security for the due performance of such Decree, the court has noted that the Plaintiff/Applicant averred that it is willing to abide by such reasonable condition that the court may impose as security pending the hearing and determination of the Appeal.

33. Having now carefully considered the instant application, the court finds that the Plaintiff/Applicant has met the conditions for stay of execution as provided by Order 42 Rule 6 of the *Civil Procedure Rules*, and being persuaded by holding of the court in the case of *Elena D. Korir vs Kenyatta University* [2012] eKLR; where the court held; -

“the application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & another v Thornton & Turpin Ltd* where the Court of Appeal (Gicheru JA, 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.”(Emphasis mine).”

34. For the above reasons, this court finds and holds that the Notice of Motion Application dated 23rd December, 2024 is merited, and the said application is allowed in terms of prayer No.4 with costs to the Plaintiff/ Applicant.
35. Further the court directs the Plaintiff/Applicant to deposit Ksh.500,000/= in court as security for the due performance of the Decree Appealed from. The said deposit to be done within a period of 30 days from the date hereof.
36. Failure to deposit such security as directed by the court, then the stay of execution granted herein will lapse automatically.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK THIS 20TH DAY OF MAY, 2025.

L. GACHERU

JUDGE

20 /5/2025

Delivered online in the presence of

Meyoki – Court Assistant

M/s Karugu for the Plaintiff/Applicant

N/A for the Defendants/Respondents

L. GACHERU

JUDGE

20 /5/2025

