



**Okong'o v Kiguru (Environment and Land Appeal E111 of 2024)
[2025] KEELC 4111 (KLR) (20 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4111 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E111 OF 2024**

JA MOGENI, J

MAY 20, 2025

BETWEEN

GEORGE ELIJAH OKONG'O APPLICANT

AND

JEDIDA GATHONI KIGURU RESPONDENT

(Being an Application for stay of execution pending hearing and determination of an appeal from the Judgment made by the Magistrate's Court at Milimani (Hon S.A Opande) dated the 15th July 2024 in MCELC No. E4178 of 2022)

RULING

1. Vide a Ruling delivered on 15/07/2022 in the Magistrate's Court at Milimani MCELC Case No. E4178 of 2022, the Trial Magistrate dismissed the Applicant's suit dated 18/08/2022 in which the Applicant sought to permanently restrain the Respondent from entering, encroaching upon, trespassing or in any way interfering with the Plaintiff's possession and physical occupation of Plot V7329 (Parcel No. Nairobi/Block 136/8477. A declaration that the Plaintiff is the Bonafide and lawful owner and allottee by Embakasi Ranching of the suit property.
2. The Defendant filed a Counter-claim in which she laid claim to the suit property as the rightful registered proprietor. In dismissing the suit by the Applicant the Learned Magistrate found for the Defendant through the Counter-claim ordering the Applicant to pay Kesh 2,500,000 for trespass on the suit property. It is this Judgment that is the subject of the Appeal and the reason for the Application for stay of the said Judgment.
3. The grounds in support of the Application are on the face of it supported by the Affidavit sworn by George Elijah Okong'o the Appellant/Applicant on 31/07/3024 which has an annexure of 7 documents that the Applicant avers attest to his being the owner of the suit property as was decreed by the trial Court.



4. In response to the Notice of Motion Application the Respondent filed Grounds of Opposition dated 1/11/2024 where he raised points of law as articulated in Order 42 Rule 6 (2) and argued that the Applicant has not satisfied the conditions that would warrant granting of stay of the Judgment. Further the Application is premised on denying the Respondent from enjoying the fruits of the Judgment.
5. At the same time the Respondent swore a Replying Affidavit sworn on even date and averred that the Appellant admitted as laying claim to a property that does not belong to him since he needed to have sued Embakasi Ranching which made the mistake of double allocation.
6. When the parties appeared in Court on 8/10/2024 directions for disposal of the suit were issued.

Analysis and Determination

7. I have given due consideration to the Application and the submissions made by the parties in support of their respective cases. The sole issue arising from the instant Application and the law applicable in respect thereof, is whether the Applicant has made up a case for being granted an order of stay of the decision of the lower Court.
8. As pointed out herein above, the Application is premised on the ground that the Applicant is apprehensive that unless stay is granted, the Applicant may be evicted from the suit property. In addressing that concern or fear, I have read the decision of the lower Court and established that the Court did not issue any order of eviction of the Applicant from the suit property. However the Court found in favour of the Respondent's Counter-claim where the Respondent had sought to be declared the owner of the suit property. The Applicant however alleges that the Respondent has already issued him with eviction orders seeking to have him vacate the suit property.
9. The Applicant's Application basically seeks for an order of stay of execution of the Judgment issued on 15/07/2024 pending determination of this Appeal. The same is therefore premised on Order 42 Rule 6 of the Civil Procedure Rules which specifies the circumstances under which this Court may order stay of execution of a Decree or Order pending an Appeal.
10. Rule 6(2) lays down the conditions which an Applicant must satisfy in order to deserve orders of stay of execution pending an Appeal. The Applicant must satisfy the Court that he or she stands to suffer substantial loss if stay is not granted and that the Application has been filed without unreasonable delay. The Applicant must also show that he/she is willing to offer such security as may be ordered by the Court.
11. As regards the time taken by the Applicant to lodge the Application, I note that the Judgment was issued on 15/07/2024. The Applicant filed the present Application on 17/07/2024 simultaneously with the Memorandum of Appeal. It is clear therefore that the Application was filed in about two days, hence I find the Application was filed without unreasonable delay.
12. As pointed out herein above, the Application is premised on the ground that the Applicant is apprehensive that unless stay is granted, the Respondent may be evicted from the suit property. Although the lower Court did not order for the eviction of the Applicant from the suit property, it is the Applicant who contends that the Respondent has commenced the process of execution of the Judgment and she has issued a demand to the Applicant to immediately vacate the property in line with the Judgment. To support this averment the Applicant attached annexure "GEOS" a copy of the Notice to Vacate Land dated 31/07/2024.



13. In the case of Halai & Another v Thornton & Turpin [1963] Ltd [1990] eKLR the Court of Appeal held inter-alia:-

“The Superior Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the Applicant must establish a sufficient cause, secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the Applicant must furnish security. The Application must of course be made without unreasonable delay.”

14. It is evident from the above provisions of law that the grant of orders of stay of execution are subject to the Court’s discretion:- the Court being guided in this regard by the provisions of Order 42 of the Civil Procedure Rules. The question of how the Court should exercise this discretion was extensively discussed by the Court of Appeal in the case of Butt Vs Rent Restriction Tribunal (1982) KLR 417, where the Court gave guidance on how a Court should exercise discretion in an Application for stay of execution and held in part as follows:-

- 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 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.
- iii. A judge should not refuse a stay if there is good grounds of granting it merely because in his opinion a better remedy may be available to the Applicant at the end of the proceedings.
- iv. The Court in exercising its powers under Order XLI Rule 4 (2) (b) of the CPR can order security upon Application by either party or on its own motion. Failure to put in security for costs as ordered will cause the order of stay of execution to lapse.

15. The Court will now consider whether the Applicant has met the prerequisites to warrant an order of stay of execution as sought by them.

16. The Applicant has moved this Court for stay of execution pending Appeal on the basis that the Defendant/Respondent has sought eviction orders against him. As discussed above, the Defendant/Respondent was the successful party in the MCELC No. E4178 OF 2022 in the Magistrate’s Court, and it is only fair that he be given an opportunity to enjoy the fruits of the Judgment. On the other hand, the Plaintiff/Applicant avers that they have a beneficial interest, stemming from having purchased the suit property from Embakasi Ranching Company having paid fully for the suit property. Further that they have lived on the suit property since 2006 and now he is required to demolish the house that he lived in and also pay damages for trespass of Kshs 2,000,000.

17. The Supreme Court in Application No 5 of 2014 Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR, held that an Applicant must satisfy the Court that (i) the appeal or intended appeal is arguable and not frivolous; and that (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory. The principles were also echoed in the Court of Appeal Case of Butt v Rent Restriction Tribunal [Supra].



18. The first aspect is the issue of sufficient cause which should be established by an Applicant. This was discussed in the case of Antoine Ndiaye v African Virtual University [2015]eKLR , as follows:

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the Court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules.”

19. The three conditions for granting stay to wit, substantial loss on the part of the Applicant; that Application is made without delay and the Applicant to furnish such security as will be directed by Court.

20. The first condition is that the Application should be brought without unreasonable delay. What amounts to inordinate delay differs from case to case. However, this Court is guided by the holding in Nairobi Civ No. 32 of 2010, Utalii Transport Company Limited & 3 Others v Nic Bank Limited & Another [2014]eKLR, where the Court while considering what amounted to inordinate delay stated as follows:-

“Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore, inexcusable.”

21. This Court notes that Judgment was entered in MCELC No. E4178 of 2022 on 15/07/2024, while the eviction orders issued are dated 31/07/2024. The present Application to stay the eviction order was made on 17/07/2024. On this issue, the Court finds that the Application was made without undue delay.

22. The second issue is in relation to substantial loss. What amounts to substantial loss was expressed by the Court of Appeal in the case of Rhoda Mukuma v John Abuoga[1988] eKLR, as follows:

“Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the Application is made without delay; and (b) the Applicant has given security. The discretion under rule 5(2) (b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory”

23. Substantial loss refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value is a loss that is merely nominal as was held in Tropical Commodities Suppliers Limited 7 Others v International Credit Bank Ltd (in liquidation) [2004] 2 EA 331).

24. In the present case, the substantial loss herein is that the Applicant stands to lose the suit property which he avers he is the rightfully registered proprietor and that change of ownership was being facilitated while the suit had already been filed. He averred that he has lived on the suit property from



2006 and has built his family home thereupon. From the proceedings presented before the Court, it is evident that the Plaintiff/Applicant has been served with summons for eviction proceedings, and an eviction notice dated 31/07/2024.

25. Thus, the Court finds that the Plaintiff/Applicant has demonstrated that there is an imminent danger of eviction from the portion of the suit property that he occupies. Therefore, this Court is satisfied that substantial loss has been established.

26. The final condition related to the provision of security for costs. Order 42 Rule 6(2)(b) of the Civil Procedure Rules, is couched in mandatory terms to the effect that the Applicant must furnish security for the due performance of the Order or Decree. In the case of *Arun C Sharma v Ashana Raikundalia T/A Raikundalia & Co. Advocates & 2 Others* [2014] eKLR, the Court held that;

“The purpose of the security under Order 42 is to guarantee 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 Applicant 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 a security for the 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.”

27. The Plaintiff/Applicant have not provided security for the due performance of the order but has expressed willingness to abide by all the terms that will be issued by the Honorable Court for grant of the orders sought. He also implored the Court to consider the hard economic times although he did not file any documents to support the averment. Maybe he expected the Court to take judicial notice of a situation that does not call for judicial notice. Be as it may the willingness to abide by the Court’s terms signifies the Applicant’s readiness to offer security as may be binding on him for the due performance of the order. Order 22 Rule 3 of the Civil Procedure Rules provides that “before making an order to stay execution or for the restitution of property or the discharge of the Judgment – debtor, the Court may require such security, or impose such conditions upon, the Judgment-debtor as it thinks fit”. This Court will therefore grant stay of execution on condition that the Applicant deposits in Court security of Kshs. 200,000/= within forty five (45) days from the date of this Ruling.

28. In view of the foregoing, I find that the Applicant has satisfied the requirements of stay of execution under Order 42 Rule 6 of the Civil Procedure Rules. The Applicant’s Application dated 17/07/2024 is allowed in terms of prayers 3 and 4 thereof in the following terms:-

- a. Stay of execution of the Judgment delivered on 15/07/2024 is granted pending hearing and determination of the Appeal herein.
- b. The stay granted in (a) above is granted on condition that the Applicant deposits in Court security in the sum of Kshs. 200,000/= (Two Hundred Thousand Shillings Only) within forty five (45) days from the date hereof, in default, the order of stay of execution will lapse.
- c. Costs of the Application to the Respondent in any event.

29. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 20TH DAY OF MAY 2025 VIA MICROSOFT TEAMS.

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MOGENI J



JUDGE

In the presence of:

Mr. Wanga for the Appellant/Applicant

Mr. Hiram Gachuki for the Respondent

Mr. Melita – Court Assistant

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MOGENI J

JUDGE

