



REPUBLIC OF KENYA



KENYA LAW
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**Muchemi v Waithaka & 8 others (Civil Appeal E080 of 2024)
[2025] KEHC 4863 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4863 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E080 OF 2024
EM MURIITHI, J
APRIL 24, 2025**

BETWEEN

ANTONY GIKUNJU MUCHEMI APPELLANT

AND

EJIDIA WANJIKU WAITHAKA 1ST RESPONDENT

EMILY NJERI MIGWI 2ND RESPONDENT

MOSES MUCHEMI MIGWI 3RD RESPONDENT

STEPHEN WAITHAKA MIGWI 4TH RESPONDENT

BRIAN MWANIKI MIGWI 5TH RESPONDENT

PETER JARABU KING'AU 6TH RESPONDENT

NICHOLAS KIRAGU NGACHA 7TH RESPONDENT

GEOFFREY MIGWI MURIITHI 8TH RESPONDENT

SAMWEL MAINA MURIITHI 9TH RESPONDENT

*(An appeal from the judgment of Hon. Grace Waithira - (RM) in
Kerugoya MCCC No. E065 of 2013 delivered on 26th June 2024)*

RULING

1. By Notice of Motion dated 15/2/2025, the applicant seeks an order for stay of execution in specific terms that “this Honourable court be pleased to stay execution of decree that has been issued in respect of the Judgment entered on the 26th June 2024 and any other order that may be issued pursuant thereto, pending he hearing and determination of [the] Appeal.”



2. By its judgment of 26/6/2024, the trial court (Hon. Grace Waithera RM) dismissed the appellant's suit for compensation for destruction of his crops ruled that:
 - i. "41. Although the Plaintiff proved to the satisfaction of this court that his farm had been destroyed, there was no evidence to link the defendants to the destruction. The Plaintiff did not discharge his onus of proof in that regard. His claim against the defendants is therefore dismissed with costs to the defendants."

3. The Appellant filed this appeal on 18/7/2024 by a Memorandum of Appeal dated 17/7/2024 on the following grounds:
 - "1. The learned trial magistrate erred in law and fact in failing to appreciate the proper effect and purport of the evidence and in arriving at a decision which is against the weight of the evidence.
 2. The learned trial magistrate erred in law and fact when she held that the Respondents were not linked to the destruction.
 3. The learned trial magistrate erred in fact and in law by failing to appreciate the evidence tendered by the Appellant.
 4. The learned trial magistrate misdirected herself in failing to make a finding against the defendants.
 5. The learned trial magistrate erred in law and in fact by finding the Plaintiff's case unmeritorious and dismissing the same with costs."

4. This application for stay of execution was clearly prompted by the Defendants' action in seeking to recover costs decreed against the appellants for the defendants/respondents as disclosed in paragraphs 6 and 7 of the Supporting Affidavit where the Applicant depones that "unless the application is allowed, the Respondents are in the process of levying execution against the Applicant. (Annexed herewith and marked 'AGM-02' is a copy of the Notice to Show Cause)" [and] "unless the application is heard as a matter of urgency, the applicant is likely to be committed to civil jail on 17th March 2025."

5. The Court has considered the Supporting Affidavit, the Replying Affidavit sworn on 26/2/2025 and the submissions of the Counsel.

6. The principles for the grant of stay of execution pending appeal are set out in Order 42 Rule 6 of the [Civil Procedure Rules](#) as follows:

"[Order 42, rule 6.] Stay in case of appeal.

 6. No appeal or second appeal shall operate as a stay of execution or proceedings
 - (1) under a decree or order appealed from except appeal case of 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.”
7. The appellant appeals the dismissal of his suit and protests that there is in existence sufficient evidence to support his claim before the trial court. The appellate court has jurisdiction to reevaluate the evidence presented before the trial court and make its own conclusions, only giving allowance that it did not see or hear the witnesses. See *Peters v. Sunday Post Ltd* (1958) EA 424.
8. This Court, therefore, finds that there is an arguable case, not necessarily one that must succeed, whether there was evidence to support the appellant’s claim that the defendants/respondents were involved in the destruction of his crops as set out in paragraphs 1-3 of the Memorandum of Appeal dated 17/7/2024. Consequently, the Court finds sufficient cause to grant stay in terms of Order 42 Rule 6 (1) of the [Civil Procedure Rules](#).
9. As regards the stay of execution application, the applicant would suffer substantial loss if he is placed in civil jail in execution of the decree for costs upon dismissal of his suit.
10. The delay of seven (7) months after the expiry of the thirty (30) days permitted for appeal from judgment of the trial court delivered on 26/6/2024 is not inordinate.
11. The Costs stand at Ksh115,000/-.
12. Both parties agree see paragraphs 10 of the Supporting Affidavit of 15/2/2025 and paragraph 8 of the Replying Affidavit of 26/2/2025 to an order for deposit of in joint interest earning account in the names counsel for the parties.

Orders

13. Accordingly, for the reasons set out above, the court grants an order for stay of execution of the judgment of the trial court of 26/6/2024 on conditions as follows:
1. The Appellant/Applicant shall within fourteen (14) days deposit the entire decretal sum of Ksh.115,000/- into an interest earning account in the names of the advocates for the parties.
 2. The Record of Appeal shall be filed within fourteen (14) days.
 3. In default of the orders in Nos. 1 and 2 above, the order for stay shall lapse and be of no effect.
 14. The costs of the application shall be costs in the Appeal.

Order accordingly.

DATED AND DELIVERED THIS 24TH DAY OF APRIL 2025.

EDWARD M. MURIITHI

JUDGE

Appearance:



Ms. Wandia for the Applicant.

Mr. Magee for Respondents.

