



**Njeru v Kamau & 5 others (Environment and Land Appeal
E035 of 2024) [2025] KEELC 92 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 92 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E035 OF 2024
EC CHERONO, J
JANUARY 23, 2025**

BETWEEN

ESTHER WANJIRU NJERU APPLICANT

AND

SALOME KAMAU 1ST RESPONDENT

BEATRICE WANYONYI 2ND RESPONDENT

VERINICA WANGARE 3RD RESPONDENT

BENJAMIN BARASA WAFULA 4TH RESPONDENT

ALFRED MUNDU TERA 5TH RESPONDENT

WALUMOLI WALIKELA MUSUNGU 6TH RESPONDENT

RULING

1. This ruling is in respect of the application dated 12/08/2024 brought Under Article 40 of *the Constitution* of Kenya, 2010, Section 1A, 1B, 3A of the *Civil Procedure Act*, Order 42 of the civil Procedure Rules and Section 26(1) of the *Land Registration Act* and seeks the following orders;
 - a. Spent.
 - b. That pending hearing and determination of this appeal the Court be pleased to direct that the 1st, 2nd and 3rd respondents deposit rent in a joint interest savings account number 0110xxxxxxxxxx at the Co-operative Bank named HERMMERTON/IVAN who are the Advocates of the appellant/applicant and the 5th and 6th respondents or in the alternate rent be deposited under Judiciary accounts.



- c. That pending the hearing and determination of the appeal the court do grant a stay of execution pending appeal of the judgment delivered on 08/07/2024 delivered in Kimilili ELC 26 of 2019.
 - d. The costs of this application be borne by the respondents.
2. The application is premised on the grounds apparent on the face thereof supported by the affidavit of Esther Wanjiru Njeru, the Applicant herein.
 3. The Applicant's case is that she holds letters of administration ad-litem for the estate of Micheal Kairu Ngeru-deceased who is the registered proprietor of L.R No. KIMILILI/KIMILILI/875/19("the suit land") having purchased the same from one Mukholi Tela Kisaka-deceased who acknowledged payment of the full consideration and executed transfer instruments. That all applicable taxes have since been settled by the said Micheal Kairu Ngeru who invested heavily on the suit land and the developments thereon have been the family's source of income. That on 08/07/2024, the certificate of title for the suit land was cancelled and reverted back to Tela Kisaka. That the instant appeal was preferred after the Applicant/Appellant was dissatisfied with the decision of the trial court. The Applicant argued that she stands to suffer irreparable loss and damages and therefore urged this court to intervene by issuing the orders sought.
 4. The 5th and 6th Respondents filed grounds of opposition dated 21/08/2024 and a Replying affidavit sworn the same date in response thereto and averred that they represent the estates of Simeon Walukhela Musungu and Mukholi Kisala respectively. They argued that the judgment delivered on 08/07/2024 simply dismissed the case before it and allowed their counter-claim which was unopposed. That the implication of the account as proposed by the applicant vanished with the termination of proceedings before the subordinate court and similarly the orders of 28/01/2023 by the subordinate court were discharged upon delivery of the abovementioned judgment and therefore there is no basis for the 5th and 6th Respondents to continue paying rent. It was further deposed that despite the interim orders for payment of rent in the said joint account, the 1st, 2nd and 3rd Respondent never paid the same. Lastly, that the 6th Respondent is capable of making good any damages the Applicant would suffer if at all the orders sought are not granted.
 5. The 1st and 2nd Respondents in opposition filed a replying affidavit sworn on 07/11/2024 where they deposed that they are the tenants of the 6th Respondent on the Northern half of the suit land i.e Kimilili Township 19A by virtue of a tenancy agreement entered in the years 1992 and 1993 between themselves and the 6th Respondent's deceased father. That they initially paid rent to the deceased for over 30 years and upon his demise, continued paying to the 6th Respondent until the interim orders of 28/01/2023. The 1st and 2nd Respondents argued that the implications of the judgment delivered on 08/07/2024 was a dismissal of the Appellant/Applicant's claim and allowing the 5th and 6th Respondents' counter-claim which was unopposed.
 6. The Applicant filed two supplementary affidavits in response to the various responses by the Respondents sworn on 14/11/2024 and 02/09/2024. He denied the 5th Respondent's capacity as a representative of the estate of Mukholi Kisaka and further averred that the bank account mentioned is active with monies collected from the 1st, 2nd and 3rd Respondents.
 7. The 4th Respondent filed a document labelled as a notice of preliminary objection which did not spell out the grounds of objection together with a replying affidavit and counter-claim dated 13/09/2024. He equally filed further documents labelled as a preliminary objection and grounds of opposition and what is christened as "amended counterclaim" dated 03/10/2024. The statements in the ground of



appeal and replying affidavit do not appear to address the issues raised in the current application and seemingly go into the crux of the appeal. Upon review of the Respondent's documents in their entirety, this court observes that the Respondent simultaneously seeks to have the judgment of the trial court upheld, an order requiring the 1st, 2nd, and 3rd Respondents to deposit rent with the court, and an order compelling the Applicant and 6th Respondent to reimburse all collected rent along with general damages.

8. The 1st and 2nd Respondents filed written submissions dated 07/11/2024 where they submitted on two issues. First, it was submitted that the orders sought by the Applicants were vague and untenable. It was further submitted that the Applicant has not met the conditions for the grant of stay of execution orders pending appeal and that the application is one that ought to be dismissed.

9. I have carefully read and considered all the pleadings, the submissions, authorities relied upon and the relevant provisions of the laws. In order to arrive at an informed decision, I have identified the following issues for determination;

a. Whether the applicant have established the requirements of being granted stay of execution pending appeal.

b. Whether the applicant has made a case for orders

c. Who will bear the Costs of the application?

10. On the first issue, the purpose of an application for stay of execution is to preserve the subject matter in dispute so that the undoubted right of the Appellant/Applicant is safeguarded. (See the case of Consolidated Marine – Versus - Namprijad An. Civil Appeal No. 93 of 1989. The law governing stay of execution pending appeal is as set out in). Order 42 Rule (6) (1) of the Civil Procedure Rules which provides as follows;

“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 an 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”.

10. On the other hand, Order 42 rule (6)(6) of the CPR provides as follows;

“Notwithstanding anything contained in Sub-rule (1) of the rule the High Court shall have power in exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from the sub-ordinate Court or tribunal has been complied with.

11. In Civil Appeal No. 107 of 2015 – Masisi Mwita –VS_ Damaris Wanjiku Njeri [2016] eKLR where the court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of “Halal & Another –VS- Thornton & Turpin Ltd. where the Court of Appeal Gicheru J.A., Chesoni & Coker AG 1A) held that: “The High Courts discretion to order stay of execution of its order or Decree is fettered by three (3) conditions namely:-



Sufficient Cause, substantial loss would ensue from a refusal to grant stay the Applicant must furnish security, the application may be made without unreasonable delay. In addition the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakolo –VS- Straman E.A. Ltd.[2013] as follows:-

“In addition the Appellant must prove that if the orders sought are not granted and his Appeal eventually succeeded then the same shall have been rendered nugatory”. These twin principles go hand in hand and failure to prove one dislodges the other. The court notes with great humility the Plaintiff/Applicant agrees with it by citing the case of Vishram Rouji Halal –VS- Thrornton & Turpour Civil Appeal No. 15 of [1990] KLR 365,

12. In deciding an application such as before me, the court is mandated to exercise its discretion judiciously and always opt for the lower rather than the highest risk of injustice.
13. The first requirement is that the applicant must prove that they stand to suffer substantial loss if the order is not granted. In David Kipkoskei Kimeli Vs Titus Barmasai [2019] e KLR, it was held that:

“The most important limb of the application for stay of execution is proof of substantial loss and it should be noted that mere mention or alleging that an applicant will suffer substantial loss is not enough.”
14. The applicant in this case argue that she is the widow and legal representative of the estate of Micheal Kairu Ngeru-deceased who was the registered proprietor of the suit land and that with the subordinate court having delivered a judgment to the extent that the registration of land parcel no. Kimilili/ Kimilili/ 875/19 in the name of Michel Kairu Njeru be cancelled and revert to the name Tela Kisaka alias Mukhooli Kisaka. The Applicant therefore argue that she stands to suffer substantial loss if orders of stay are not granted since the cancellation of her title deed will take effect rendering her destitute.
15. On the second issue, the Applicant is required to show that the application was made without undue delay. From the evidence, the judgement was delivered on 08/07/2024 and the present application was filed on 12/08/2024, 1 month 4 days later. Guided by the findings in the case of Jaber Mohsen Ali & Another...Vs...Priscillah Boit & Another, ELC No.200 of 2012 (2014) eKLR, it is my view this delay is not inordinate, therefore excusable.
16. The third condition is security. The decision in Equity Bank Ltd Vs Taiga Adams Company Ltd [2006] eKLR suggests that where an order as to security has not been made, the Applicant ought to raise it and express their willingness to abide by the conditions given. The Applicant in this application is silent on the issue of security.
17. The Applicants have also argued that they have an arguable Appeal. I have had a chance to peruse the memorandum of appeal filed in this matter dated 29/07/2024 which sets out sixteen (16) grounds of appeal. Without saying much so as not to appear to delve into the merits of the appeal bearing in mind that the intended appeal need not necessarily succeed in the ultimate, I find that this appeal is arguable. In the case of Mohamed Salim T/A Choice Butchery vs Nasserpuria Memon Jamat [2013] eKLR the Court held;

“That right of Appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right...”
18. The Applicant has also requested to have the rent collected in the rental units on the suit land to be deposited with the court or in a joint interest earning account in the name of the concerned advocates.



I note that the parties do not dispute the existence of the account. The 5th and 6th Respondents' issue is that the 1st, 2nd and 3rd Respondents have not been depositing their respective monthly rent in the account.

19. I would therefore exercise my discretion in favour of the Applicant and allow the application for stay but on condition that the Applicant gives security. Arising from the above analysis, the following consequential orders are hereby issued:
- a. There shall be stay of execution of the judgment delivered on 08/07/2024 at Kimilili SPM-ELC No.26 of 2019 pending hearing and determination of this appeal.
 - b. That the Applicant to deposit the certificate of lease of land parcel no. Kimilili/Kimilili/875/19 in court as security within fourteen (14) days from the date hereof.
 - c. 1st, 2nd and 3rd Respondents are hereby ordered to deposit monthly rent in the joint interest earning account number 0110xxxxxxxxx at the Co-operative Bank under the names of HERMMERTON/IVAN pending hearing and determination of this appeal.
 - d. The applicant/appellant shall compile, file and serve a record of appeal within 45 days and move the court appropriately towards finalization of this appeal.
 - e. In default of the conditions above the conditional stay of execution shall automatically lapse.
 - f. Costs shall be in the appeal.
20. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 23RD.DAY OF JANUARY, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of

1. Mr. Oira for the Appellant
2. Mr. Maloba for the 5th & 6th Respondents
3. 1st Respondent-present.
4. 2nd Respondent-present.
5. 3rd Respondent-present.
6. 4th Respondent-absent.
7. Bett C/A

