



Republic v County Secretary, County Government of Machakos & another; Mbondo & another (Exparte) (Suing on behalf of the Estate of Elijah Mbondo Ntheketha) (Environment and Land Judicial Review Case E011 of 2021) [2025] KEELC 3878 (KLR) (13 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3878 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E011 OF 2021**

**AY KOROSS, J
MAY 13, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

**THE COUNTY SECRETARY, COUNTY GOVERNMENT OF
MACHAKOS 1ST RESPONDENT**

**THE CHIEF OFFICER, FINANCE COUNTY GOVERNMENT OF
MACHAKOS 2ND RESPONDENT**

AND

SERAH MUTHIO MBONDO EXPARTE

RICHARD MUEMA MBONDO EXPARTE

SUING ON BEHALF OF THE ESTATE OF ELIJAH MBONDO NTHEKETHA

RULING

Respondents' case

1. The respondents moved this court under several provisions of law in filing the instant notice of motion that is the subject of determination, which is dated 26/08/2024. Some of the reliefs sought have been spent, and the substantive reliefs pending determination are as follows: -
 - a. That there be a stay of execution pending the hearing and determination of Nairobi Civil Appeal No. E098 of 2024 County Government of Machakos Vs. Serah Muthio Mbondo & 2 Others.
 - b. That the costs of this application be provided for.



2. The application was premised on the grounds set out on the face thereof and on the affidavit of Julius Kassanga, who holds the 2nd respondent's office, which he deposed on the instant date.
3. In summary, it was averred there was a subsisting appeal in the Court of Appeal, being Nairobi Civil Appeal No. E098 of 2024 – County Government of Machakos Vs. Serah Muthio Mbondo & 2 Others (“Appeal case”) against the decision of this court, and the appeal was at an advanced stage.
4. It was argued that, given this appeal case was arguable, with high chances of success, and any further execution would render the said appeal case nugatory and an academic exercise, there was a need for a stay order to be granted.
5. Furthermore, it was maintained that the decretal sums were colossal, and other parties had also questioned the payments of the decretal sums.

Ex parte applicants' case

6. In opposition and through their law firm on record of M/s. Nzei & Company Advocates, the ex parte applicants' legal representative, filed grounds of opposition dated 8/10/2024, which raised the following grounds: -
 - a. The motion was incurably defective, incompetent and was otherwise an abuse of the court's process.
 - b. There was no appeal and/or intended appeal against the judgment in Machakos ELC Case No. 181 of 2014 or the judgment entered in the instant proceedings. As such, the provisions of Order 42 Rule 6 of the Civil Procedure Rules were inapplicable to the judgment in the aforementioned Machakos ELC Case No. 181 of 2014 dated 18/09/2020 or to the Judgment entered herein on 12/10/2022.
 - c. There must be an end to litigation.
7. It is worth noting that another set of grounds of opposition was filed by the law firm of M/s. Gitonga Muriuki & Co. Advocates dated 11/10/2024. In them, they purported to act for Alice Mwelu Mbondo, whom they described as either an interested party, respondent or decree holder.
8. From the record, Alice Mwelu Mbondo is a stranger to the proceedings as she has never prosecuted her application dated 2/06/2023 for joinder to date. Consequently, this court hereby expunges her grounds of opposition from the record.

Submissions

9. When Mr. Mutua, counsel for the respondents, appeared before this court on 11/02/2025 and sought an extension of time to file his submissions, the court declined his request.
10. The ex parte applicant's counsel also filed written submissions dated 11/10/2025, which have been considered by this court, and they framed one issue for determination: whether the motion was merited.

Issues for Determination, Analysis, and Determination

11. Having carefully considered the motion, affidavit, ex parte applicant's grounds of opposition, as well as submissions, the court adopts the ex parte applicant's issue for determination, which was whether the motion is merited.



12. As rightfully pointed out, when dealing with applications for a stay of execution pending appeal, this court has to satisfy itself that the principles enunciated in Order 42 Rule 6 (2) of the Civil Procedure Rules (CPR) have been met, and it provides as follows:
- “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.”
Emphasis added.
13. In agreement with the ex parte applicant’s submissions, being the court from whose decision an appeal has been preferred against, the principles that the respondents, who are the applicants, were obliged to satisfy were the criteria set out in Order 42 Rule 6(2) of the CPR.
14. And they are (a) that substantial loss to the applicants would arise unless the order is made, (b) that the motion has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicants have been given.
15. Thus, being a court against whose decision an appeal has been preferred, its discretion is essentially limited to such conditions as substantial loss, security, and unreasonable delay, and such discretion has to be exercised judiciously. However, at times this court is called upon to give effect to the overriding objective of the Civil Procedure Act as set out in Sections 1A and 1B thereof.
16. These provisions of the law were expounded in the Court of Appeal decision of Halai and Another vs. Thornton & Turpin [1963] Limited [1990] eKLR, where the court stated: -
- “Thus, the Superior Court’s discretion 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.”
17. In considering the motion, this court has to bear in mind that though it has unfettered discretion, it must exercise its judicious discretion that is anchored on reason, material, and evidence placed before it. Since the circumstances of each case are unique, as even a singular day could be tantamount to delay, each case has to be considered on its own set of conditions.
18. Since the Court of Appeal is the court to which the decision of this court has been preferred, it has a wider discretion than this court, and some of the principles that guide such an appellate court include whether the appeal is arguable or will be rendered nugatory.
19. Therefore, it follows that the respondents’ assertions before this court that the appeal will be rendered nugatory and grounds of appeal are meritorious and arguable are misplaced; they are the preserve of the Court of Appeal.
20. As seen from the memorandum of appeal in the appeal case, the County Government of Machakos has appealed against the ruling of this court rendered on 16/10/2023 in Machakos ELC Case No. 181



of 2014 between the ex parte applicants as plaintiffs and the County Government of Machakos as the defendant.

21. Turning to the merits of this motion and as rightfully pointed out by the ex parte applicants, the respondents have not preferred an appeal against the judgment in this matter that was rendered on 12/10/2022 or has the County Government of Machakos appealed against the judgment in Machakos ELC Case No. 181 of 2014.
22. In fact, a close scrutiny of the supporting affidavit reveals the 2nd respondent was less than candid as he misled the court to believe the appeal was against the judgment in Machakos ELC Case No. 181 of 2014 and it is only on reading the memorandum of appeal that it becomes apparent of what the subject matter of the appeal is.
23. Be that as it may, taking into consideration the disposal orders that were issued in the ruling rendered on 16/10/2023 by this court in Machakos ELC Case No. 181 of 2014, this court is constrained from applying the tests of a stay of execution because it merely dismissed the County Government of Machakos's notice of motion dated 27/03/2023.
24. As a result, there is nothing to be executed or capable of being stayed. In this regard, reliance is placed on the persuasive decision of *Western College Farts and Applied Sciences vs. Oranga & Others* [1976] KLR 63 that was cited with approval by the Court of Appeal decision of *Kaushik Panchamatia & 3 others v Prime Bank Limited & another* [2020] KECA 418 (KLR). In this *Western College* (Supra) decision, the court stated as follows, which I hereby adopt: -

“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”

Given the above, this court need not say more. Thus, it finds the notice of motion dated 26/08/2024 is not merited, and it is hereby dismissed with costs to the ex parte applicants. In the end, this court hereby issues the following final orders: -

- a. That the notice of motion dated August 26, 2024 is hereby dismissed with costs to the ex parte applicants.
- b. The file is hereby effectively marked as closed.

It is so ordered.

DELIVERED AND DATED AT MACHAKOS THIS 13TH DAY OF MAY, 2025.

HON. A. Y. KOROSS

JUDGE

13. 05.2025

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Mr. Mutua for applicant



Mr. Mundia holding brief for Mr. B. M. Nzei for exparte applicant.

Mr. Muriuki for the interested party.

Mr. Abdisalam - Court Assistant

