



Garden Estate Company Limited v Mohamed & 5 others (Environment & Land Case 446 of 2008) [2025] KEELC 4880 (KLR) (30 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4880 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 446 OF 2008**

**JG KEMEI, J
JUNE 30, 2025**

BETWEEN

GARDEN ESTATE COMPANY LIMITED PLAINTIFF

AND

GULBANU HUSSEIN MOHAMED 1ST RESPONDENT

AMIRAL AKBARALI GULAM 2ND RESPONDENT

HUSSEIN NANJI 3RD RESPONDENT

GHUSSEIN NANJI 4TH RESPONDENT

FIROZ AKNBARALI GULAM 5TH RESPONDENT

HUSSEON NANJI 6TH RESPONDENT

RULING

1. Vide the Notice of Motion application dated 3/4/2025, which is expressed to be brought under the provisions of Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, the Applicant substantively seeks the following orders;
 - a. That pending the hearing and determination of the Intended Appeal the Honourable Court be pleased to grant stay of execution orders of the judgement and orders of the Honourable Court dated 7th March, 2025.
 - b. That the costs of the application be in the cause.
2. The application is premised on the grounds on the face of it and further supported by the Affidavit of Robert Otachi, the Plaintiff's Director, sworn on even date. The deponent avers that Judgment was entered against the Applicant on 7/03/2025 in favour of the Defendant decreeing that the Applicant vacates from the suit property, LR No. 209/2069/5, and offer vacant possession to the Respondents



within 60 days from the date of Judgment. He avers that the Applicant is aggrieved by the said Judgment and has preferred an appeal by duly filing a Notice of Appeal.

3. The deponent further avers that the Applicant is in occupation of the suit property and has invested heavily on the same which investment is a source of livelihood for the retired Directors. Further, that the suit property is leased to third parties whose Lease Agreements' termination period runs to 2027 and 2028. That any termination before then would expose the Applicant to law suits on breach of contract yet the Intended Appeal shall be pending determination.
4. The Applicant argues that the intended appeal has high chances of success based on the grounds set out in the application that inter alia the Learned Judge erred in law and fact by failing to hold that the Counterclaim was time-barred given the provisions of the *Limitation of Actions Act*.
5. He deposed that the Applicant is apprehensive that unless stay of execution of the said Judgment and the decree is granted, the Applicant's intended appeal shall be rendered nugatory. That the Applicant stands to suffer substantial loss and irreparable harm as the Respondent is likely to execute the decree before the determination of the intended appeal and the expiry of the 60 days granted to the Applicant to vacate. Further, that the Respondents are likely to deal adversely with the suit premises once they take possession.
6. He further states that the Applicant cannot be compensated by way of damages in the event the Applicant succeeds in the intended appeal. That the Respondent's will not suffer any prejudice if the stay orders are granted. He urged that it is in the interest of justice that the orders sought be granted.
7. The application is opposed by the Respondents through the Replying Affidavit of the 3RD Respondent, one Firoz Akbarali Gulamhussein Nanji sworn on 27/05/2025. The Respondents contend that there are no sufficient grounds to grant a stay of execution pending appeal. He averred that the Applicant has not demonstrated any substantial loss as the alleged potential claims by the Tenants are speculative. He states that in any event the alleged leases have not been registered against the title and cannot therefore be enforced against the Defendant.
8. He further deposes that the purported leases were entered into during the pendency of the suit with the aim of defeating the Defendants' claim. That the Applicant cannot rely on illegal contracts entered into with third parties as the basis of loss likely to be suffered. He urged that granting the orders would amount to the Court sanctioning an illegality as the Applicant shall continue benefiting from the illegal contracts it has with third parties.
9. The deponent states that it is in fact the Respondents who have suffered irreparable loss having been unlawfully deprived of the use and benefit of the suit property for over two decades. He therefore urges the Court to dismiss the application.
10. He further avers that in the event the Court is inclined to grant the orders sought, Isaac Miano Ngéthe be appointed as the receiver of the suit property to collect all rental revenue being paid by the alleged tenants and keep such rent in an account, less his expenses, pending the hearing and determination of the intended appeal.

Directions

11. By consent of the parties, the Court directed that the application be canvassed by way of written submissions. Parties complied. The Applicants' filed submissions dated 3/06/2025 whereas the Respondents' submissions are dated 10/06/2025. I have read and considered the submissions and I thank Counsels for their highlights. Analysis and Determination



12. I have carefully considered the Application, Supporting Affidavit, and the Respondent's Replying Affidavit. The only issue which arises for determination is whether this Court should grant stay of execution of the Judgment 7/03/2025.
13. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the Court to order stay of execution are provided for under Order 42 rule 6 of the Civil Procedure Rules. An Applicant for an order of stay of execution of a decree or an order pending appeal is obligated under Order 42 rule 6(2), to satisfy the following conditions, namely:
 - a. That substantial loss may result to the Applicant unless the order is granted.
 - b. That the application 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 Applicant has been given.
14. These principles were enunciated in *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. The Court said that: -
 - 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.
15. Execution is a lawful process and it is not a ground for granting stay of execution. The Applicant is required to show how execution shall irreparably affect him or will alter the status quo to his detriment therefore rendering the appeal nugatory. With that in mind, I will proceed and determine each condition vis-a- vis the Applicant's assertions.
16. As to whether the Application has been filed without undue delay, judgment was entered on 7/3/2025. The application was filed on 3/4/2025, which is within one month. This Court thus finds that the application has been filed without undue delay.
17. On the issue of substantial loss, the Court in *Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 stated that:

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”



18. In the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR the Court expressed itself as hereunder:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process. The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

19. The Applicant contends that it stands to suffer irreparably if the Respondents levy execution against it as it has heavily invested in the suit property and leased out some premises to third parties. Therefore, if the orders sought are not granted, the tenants may be evicted exposing it to potential suits. The Respondents on the other hand argues that the Lease Agreements have not been registered against the suit property hence cannot be enforced. Further, that the tenancy was executed during the pendency of the suit thus offending the doctrine of lis pendens.
20. At this instant, it is not for the Court to speculate on the outcome of the issue of ownership by the Court of Appeal. As it stands, the Respondents have been declared as the owners of the suit property herein. That judgment has not been overturned by the Appellate Court. The Applicant bears the burden of proving that by refusal to grant stay of execution they stand to suffer substantial loss. The Applicant argues that it has heavily invested on the suit premises and leased them out to third parties. I have perused the Judgment of the Court; those arguments were raised before the Learned Judge. In my view, the very arguments are not available to the Applicant now particularly since the parties went through a full hearing before the trial Court rendered itself on the merits of the case. This Court is therefore not convinced that the Applicant has demonstrated the substantial loss that may result to it should the order of stay be denied.
21. To this end, I am persuaded by decision of the Court in *Olutukei v King'ori* (Environment and Land Appeal E011 of 2023) [2023] KEELC 16829 (KLR) (17 April 2023) (Ruling) where the Court stated that;

“The Applicant has stated that he has been in the suit property for more than five years and that he has invested heavily and uses some of the structures to conduct his businesses. Those arguments in my view are not available to the applicable particularly where the parties went through a full hearing before the trial Court rendered itself on the merits of the case. In an application of this nature, the Applicant must go beyond and demonstrate how he would suffer substantial loss if the order for stay is not granted since by granting stay would mean that the status quo should remain as it were before the judgment and that would be denying a successful litigant the fruits of his judgment. The mere fact that the appellant/Applicant has been in possession and occupation of land for five years which the trial Court after a full hearing found the property to belong to the Respondent is not a ground for stay pending appeal.”

22. An Applicant seeking stay of execution pending appeal is also required to provide security for the due performance of such decree or order as may ultimately be binding on him. Under the provisions of



Order 42 rule 6 (1) (2) of the Civil Procedure Rules, a party seeking a stay must offer such security for the due performance of the orders as may ultimately be binding on the Appellant.

23. In the instant matter, I find no reason why the Applicant did not provide the actual security for consideration by the Court as to its sufficiency. In the case of Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates & 2 others (2014) eKLR the Court held that:

“The purpose of the security needed under Order 42 is to guarantee the 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 Applicants 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 security for due 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.”

24. That said, the Applicant has stated that it is willing to abide by any condition that may be given by this Honourable Court for granting the stay orders. On this undertaking, I find that the appellant/Applicant has satisfied this Court on the third condition.

25. It is however trite law that in order to succeed in an application for stay pending appeal under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant must meet all the three conditions set out thereunder sequentially. The Applicant has not proved all the three conditions to warrant the exercise of its discretion in favour of the Applicant.

26. Final orders for Disposal

- a. Having considered all the matters stated hereinabove, I find the Notice of Motion application dated 3/4/2025 without merit and the same is hereby dismissed with costs.

orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF JUNE 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the presence of:

Mr. Manyara for the Applicant

Mr. Oyare HB for Mr. Mwihuri for the Respondents

CA- Ms. Yvette Njoroge

