



REPUBLIC OF KENYA



**Ongeri v County Government of Nyamira (Environment & Land
Case 38 of 2021) [2025] KEELC 4823 (KLR) (30 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4823 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 38 OF 2021**

**DO OHUNGO, J
JUNE 30, 2025**

BETWEEN

GESAKA ONGERI PLAINTIFF

AND

COUNTY GOVERNMENT OF NYAMIRA DEFENDANT

RULING

1. Judgment was delivered in this matter on 14th March 2024, in favour of the Plaintiff. The full scope of the judgment was reduced into decree given on 14th March 2024, as follows:

By Judgment of this Court dated the 14th day of March 2024, it is ordered and decreed that: -

- i. A permanent injunction is hereby issued restraining the defendant, her agents and/or servants from any further trespass into Plot No. 32A - Metamaywa Market with a view of causing further excavation and/pr earth-pushing to create an illegal road on the Estate of a deceased person;
- ii. The Plaintiff is awarded special damages of Ksh 1,050,000/= made as follows:
 - a. Demolitions - Ksh 750,000/=;
 - b. Loss of income not proved
 - c. Loss of building materials - Ksh 200,000/=;
 - d. Stolen materials not proved
 - e. Damages for trespass - Ksh 100,000/=;Total - Ksh 1,050,000/=



- iii. The Plaintiff is awarded costs plus interest on the same from the date of filing suit till payment in full;

Given under my Hand and Seal of this Honourable court this 14th day of March, 2024.

Hon. Mugo Kamau

Judge

Issued at Nyamira this 31st day of May 2024

Deputy Registrar

Environment & Land Court At Nyamira.

2. Following delivery of the judgment, the Plaintiff filed Party and Party Bill of Costs which was taxed by the Deputy Registrar on 8th July 2024 in the sum of KShs 214,215 (Two Hundred Fourteen Thousand, Two Hundred Fifteen) and a Certificate of Costs dated 13th August 2024 duly issued.
3. Additionally, a “Certificate of Order against the County Government” was issued on 28th November 2024 in the following terms:

By a judgment of this Honorable Court dated 14th March 2024, it was adjudged and decreed that: -

- A. A permanent injunction to restrain the defendant, her agents and/or servants from any further trespass into Plot No. 32A - Metamaywa Market with a view of causing further excavation and/or earth-pushing to create an illegal road on the Estate of a deceased person.
- B. In the case of special damages, I will award Kshs. 1,050,000/= made as follows:-
Demolitions – Kshs. 750,000/=Loss of income not provedLoss of building materials Kshs. 200,000/=Stolen materials not proved
Total – Ksh. 950,000/=
- C. I will also give Damages for trespass of Kshs. 100,000/= bringing the total figure of Kshs. 1,050,000/=.
- D. Costs of the same to the plaintiff plus interest on the same from the date of filing suit till payment in full.

Particulars:

- a. Special Damages Kshs. 1,050,000/=
- b. Interest from the date of filing suit till payment in full Kshs. 1,225,000/=
- c. Assessed costs Kshs. 214,215/=
- Total Kshs 2,489,215/=.

4. Subsequently, the Defendant filed Notice of Motion dated 13th April 2025, which is the subject of this ruling. The following orders were sought in the application:

1. The instant Application be certified as urgent for hearing and determination on priority basis;



2. Pending inter partes hearing and determination of the instant application, there be temporary stay of execution of the judgement and decree herein;
3. Pending inter partes hearing and determination the appeal in Kisumu COACA/E143/2024 (Citation: Nyamira County Government VS Gesaka Ongeri), there be temporary stay of execution of the judgement and decree herein;
4. The Honourable Court be pleased to recall, review and set aside the Certificate of Order against Government herein issued on 28.11.2024;
5. Costs of the instant Application abide by the outcome of the appeal in Kisumu COACA/E143/2024 (Citation: Nyamira County Government VS Gesaka Ongeri);
5. The application is based on the grounds listed on its face and is supported by an affidavit sworn by Zachariah Ocharo, the Defendant's Director of Land Administration. He deposed that the Defendant appealed against the judgment through Kisumu COACA/E143/2024 (Citation: Nyamira County Government vs Gesaka Ongeri) and that the appeal is pending determination. That in a bid to execute the judgment, the Plaintiff obtained an order of Mandamus in Nyamira ELCJR No E001 of 2025 compelling the Defendant to pay KShs 2,489,215 and that execution of the decree herein as well as the order of Mandamus was imminent. He further deposed that there was likely to be substantial loss to the Defendant if stay is not granted since the Plaintiff was a person whose financial means and status was unknown and that the Plaintiff had not given any security for restitution of the decretal sum in the event the appeal is allowed. Additionally, he contended that the Certificate of Order against the Government was defective since it computed interest in excess of 6 years contrary to Section 4 (4) of the Limitation of Actions Act.
6. The Plaintiff opposed the application through a replying affidavit in which he deposed that the Defendant had failed to pay the decretal sum and had disregarded the permanent injunction. He added that he was a businessman and he together with members of the family of the late Ongeri Ogucha would readily refund the decretal sum if the appeal succeeded. That having filed a Notice of Appeal on 28th March 2024, nothing prevented the Defendant from seeking stay without unreasonable delay. The Plaintiff further deposed that the quantum of interest in the Certificate of Order against the Government was lawfully and professionally computed by the Deputy Registrar.
7. Directions were given that the application be canvassed through written submissions. The Defendant/applicant filed submissions dated 13th May 2025 while the Plaintiff opted to rely entirely on his replying affidavit.
8. I have carefully considered the application, the affidavits and the submissions. The sole issue for determination is whether the orders sought should issue.
9. There is no dispute that the Defendant has appealed to the Court of Appeal, against the judgment herein. The appeal is Kisumu COACA No. E143 of 2024 and is pending hearing and determination before the said Court. A perusal of the record herein shows that the Defendant lodged Notice of Appeal against the judgment with the Deputy Registrar of this Court on 5th April 2024. The Notice of Appeal is dated 27th March 2024.
10. It is also not contested that in an effort to recover the decretal sum stated in the Certificate of Order against the Government, the Plaintiff filed Nyamira ELCJR No E001 of 2025 and that on 19th March 2025, this Court delivered judgment in the said matter and granted an order of mandamus compelling the Defendant to pay KShs 2,489,215 to the Plaintiff in satisfaction of the decree and Certificate of Order against the Government. It is important to note that as of the date of the judgment in Nyamira



ELCJR No E001 of 2025, there was no order staying execution of the judgment and decree in this matter. Equally, there was no challenge on the Certificate of Order against the Government.

11. This Court's jurisdiction to grant stay of execution pending appeal is codified within the four walls of Order 42 rule 6 (1) and (2) of the Civil Procedure Rules which provide as follows:

6.

(1) 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 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 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.

12. Consequently, a litigant seeking stay pending appeal must demonstrate that substantial loss will result to him if stay is not granted, and that the application has been made without unreasonable delay. Such a litigant is also required to give such security as the court may order for the due performance of the decree. See *Kenya Power & Lighting Co. Ltd v Kigaita Ngare Unduthu & 36 others* [2020] eKLR and *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR. It must be emphasised that substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is virtually impossible for such an application to succeed if an applicant fails to demonstrate that he will suffer substantial loss if stay is not granted.

13. Despite the acknowledged existence of an appeal, the Defendant must surmount the other limbs of the test for granting stay pending appeal. Has the Defendant moved the Court without unreasonable delay? I answer firmly in the negative. Despite lodging Notice of Appeal against the judgment with the Deputy Registrar of this Court on 5th April 2024, the Defendant did not file the present application until 16th April 2025, over one year and one month after delivery of the judgment. It failed to act despite there being litigation in Nyamira ELCJR No E001 of 2025, arising from the judgment. No explanation has been offered for the unreasonable delay.

14. The other consideration is whether substantial loss may result to the Defendant unless the order of stay is made. The Defendant has argued that there is risk of public funds not being recovered from the Plaintiff. Beyond citing what it refers to as risk, the Defendant has not offered any tangible evidence regarding its claims that the Plaintiff would be unable to refund. The burden of proof on that issue is upon the Defendant.

15. The Defendant has also cast doubt on legality of the Certificate of Order against the Government, particularly as regards calculation of interest. Two reasons make me not venture into the discussion at this point. Firstly, the entire decree, including the issue of interest, is currently subject of proceedings



before the Court of Appeal. The parties should canvass all aspects of the decree before the said Court. Secondly, there is already judgment in Nyamira ELCJR No E001 of 2025, on the strength of the Certificate of Order against the Government. If I were to interfere with the Certificate of Order against the Government at this stage, where does it leave the judgment in Nyamira ELCJR No E001 of 2025? It would only result in more confusion. A Court of law must never issue orders in vain.

16. The Defendant has passionately argued on the need to safeguard public funds. I agree entirely. That said, the safeguarding of public funds must be done procedurally and in a just manner. If any public funds are lost in this case, it will be due to the Defendant's own inaction, be it deliberate or otherwise. This Court cannot keep the Plaintiff from accessing the fruits of his successful litigation, especially where there are no valid grounds for granting stay of execution. If the Defendant is still convinced that it merits stay pending appeal, all is not lost. It may try again in the Court of Appeal, as indeed Order 42 rule 6 (1) of the Civil Procedure Rules permits it to do.
17. In view of the foregoing, I find no merit in Notice of Motion dated 13th April 2025, and I therefore dismiss it with costs to the Plaintiff.

DATED, SIGNED, AND DELIVERED AT NYAMIRA, THIS 30TH DAY OF JUNE 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Mr Bigogo for the Plaintiff

No appearance for the Defendant

Court Assistant: B Kerubo

