



**Boro & 3 others (Suing for and on Behalf of Emmaus Welfare Society) v Ndung'u  
(As the Chairperson of Urutagwo Mwiruti Women Group) (Environment &  
Land Case 60 of 2015) [2025] KEELC 4859 (KLR) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4859 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 60 OF 2015**

**OA ANGOTE, J**

**JUNE 26, 2025**

**BETWEEN**

**JOHN MBUGUA BORO ..... 1<sup>ST</sup> PLAINTIFF  
NICHOLUS NJUE MATI ..... 2<sup>ND</sup> PLAINTIFF  
JOSEPHAT MICHIRA MOGAKA ..... 3<sup>RD</sup> PLAINTIFF  
GEORGE WAMBIRI NDAMAIYU ..... 4<sup>TH</sup> PLAINTIFF  
SUING FOR AND ON BEHALF OF EMMAUS WELFARE SOCIETY**

**AND**

**ANNE WAIRIMU NDUNG'U ..... DEFENDANT  
AS THE CHAIRPERSON OF URUTAGWO MWIRUTI WOMEN GROUP**

**RULING**

1. Before this court is a Notice of Motion application dated 18<sup>th</sup> February 2025 filed by the 1<sup>st</sup>-4<sup>th</sup> Plaintiffs pursuant to Sections 1A, 1B, 3, 3A and 95 of the [Civil Procedure Act](#) and Order 42 Rule 6(2) and (3), Order 50 Rules 1 to 7 and Order 51 Rule 1 of the Civil Procedure Rules 2010. The Applicants sought the following orders:
  - i. That this Honourable court be pleased to stay execution of the costs taxed at Kshs. 224,270/- vide a ruling delivered on 20<sup>th</sup> November 2024 pending the hearing and determination of the Civil Appeal No. E831 of 2022 filed at the Court of Appeal and now pending hearing.
  - ii. That costs of this application be in the cause.
2. The grounds of the application as set out in the application and the Affidavit sworn by John Mbugua Boro, Chairman of Emmaus Welfare Society, are that the Plaintiffs moved this court vide a Plaint



dated 28<sup>th</sup> January 2015 seeking inter alia, an injunction order to restrain the Respondent/Defendant from trespassing, harassing, evicting, threatening the Plaintiffs with sanctions or interfering with the Plaintiffs' peaceful occupation, use and enjoyment of Land Reference Number 6845/67, the suit property.

3. He averred that on 21<sup>st</sup> April 2022, this court delivered judgment dismissing the suit, having found that the Plaintiffs had not proved their case to the required standards. Through the judgment, this court also awarded costs to the Defendant.
4. The Plaintiffs, being aggrieved by the court's judgment, exercised their right to appeal and lodged a formal appeal at the Court of Appeal on 28<sup>th</sup> November 2022 being Civil Appeal No. E831 of 2022. It was averred that on 4<sup>th</sup> October 2022, the Defendant filed a Party and Party Bill of Costs which was taxed at Kshs. 224, 270/- vide a ruling delivered on 20<sup>th</sup> November 2024.
5. It is the Applicants' case that unless an order of stay of execution of the costs and/or any other mode of execution of the judgment is granted, the outcome of their appeal and proceedings in the Court of Appeal will negatively be affected and will be prejudicial to their rights and interests.
6. Mr. John Boro indicated that the Plaintiffs were ready and willing to abide by the directions of this court in regards to this application as a condition. He also attested that the Appeal as intended is not frivolous and raises arguable points of law and fact with high chances of success.
7. The Respondent/Defendant, Anne Wairimu Ndung'u, vide a Replying Affidavit sworn on 25<sup>th</sup> February 2025, deponed that the application is an abuse of court process and is barred for being res judicata on account of the Plaintiff's application dated 31<sup>st</sup> January 2023, where the subject issue is identical and that there is commonality of parties.
8. She further deponed that there is inordinate delay in the presentation of the application as judgment was rendered on 21<sup>st</sup> April 2022 and the court taxed the Respondents' party and party costs on 20<sup>th</sup> November 2024 in the presence of both counsel for the respective parties.
9. The Respondent urged that this court must balance the Plaintiffs' right to appeal with the decree holders' right to the fruits of his decree and that this court must consider that a decree holder should not be unduly prejudiced or precluded from enjoying the fruits of their judgement.
10. It was further argued that upon the filing of an appeal to the Court of Appeal, this court became functus officio. The Respondent pleaded that this court lacks the competence to issue the orders sought and that the Applicants' remedy lies under Rule 5(2)(b) of the Court of Appeal Rules.
11. Through a Further Affidavit sworn by John Mbugua Boro on 15<sup>th</sup> April 2025, the 4<sup>th</sup> Plaintiff opposed the claim that the application is barred by the doctrine of res judicata. He stated that the application dated 31<sup>st</sup> January 2023 concerned a different cause of action and that the said application was for stay of filing of a Bill of Taxation pending appeal, which application was dismissed on the basis that the process of taxing the bill of costs would not affect the progress of the appeal.
12. In a Supplementary Affidavit sworn by Basil Malela, the Defendant's Advocate, he deponed that the Plaintiff's suit was dismissed with costs on 21<sup>st</sup> April 2022, and the ruling was a negative order against which a stay of execution cannot issue. He urged that a court cannot stay a dismissed suit.
13. He further emphasized that this application is res judicata on account of the motion dated 31<sup>st</sup> January 2023 as there is commonality of parties and issues, as it involves execution of the judgement of this court delivered on 21<sup>st</sup> April 2022.



14. He averred that after dismissal of the application for stay, the only aspect which remained was for taxation of party and party costs which were taxed. He lodged the argument that this court has no discretion or authority to interfere with the taxation certificate properly drawn by the taxing master unless he is moved by way of reference.
15. He additionally deponed that the Plaintiffs are not men of means and they do not have any liquidity known or otherwise capable of satisfying costs of the primary costs of ELC costs of ELC 60 of 2015 or costs of the Appeal in the event of the Defendant is successful at appeal.
16. Furthermore, he submitted that it is a sham that the Plaintiffs are willing to provide security. This is as the Applicants have not indicated the land parcel number of the land they intend on offering as security nor have they attached any valuation report to indicate the value of the land. He contended that the Applicants have no known property capable of being utilized as security for costs.
17. Both parties filed submissions which I have considered.

### **Analysis and Determination**

18. The Plaintiff's application made under Order 42 Rule 6(2) of the Civil Procedure Rules, is for orders of stay of execution of costs, which vide a ruling dated 20<sup>th</sup> November 2024, were taxed at Kshs. 224,270/-. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules state as follows:
  - “(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 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.”
19. The Respondent/Defendant has opposed the jurisdiction of this court to consider the application on two grounds: that this court is functus officio to consider a stay of execution application after the filing of the Appeal before the Court of Appeal and that this application is barred by the doctrine of res judicata.
20. Jurisdiction is everything. This court must then satisfy itself that it is bestowed with the requisite mandate before proceeding to consider the merits of the application.
21. The doctrine of functus officio prevents a court from reopening a suit in which it has delivered final determination. While it bars a merit-based decisional re-engagement with a case once final judgment



is entered, the doctrine of *functus officio* does not preclude a court from dealing with post-judgment applications which naturally arise as a consequence of the final judgement of the court, such as execution proceedings, or applications such as the one before this court, seeking stay of execution of judgment pending appeal.

22. This was held by the court in *Bellevue Development Company Limited vs Vinayak Builders Limited & Another* [2014] eKLR as follows:

“Properly understood, whereas the court becomes *functus officio* when it has exercised its authority over a matter and has completely determined the real issues in controversy, nevertheless, care should be taken not to inadvertently or otherwise overstretch the application of the concept of *functus officio*; for, in all senses of the law, it does not foreclose proceedings which are incidental to or natural consequence of the final decision of the court such as the execution proceedings including contempt of court proceedings, or any other matter on which the court could exercise supplemental jurisdiction. Therefore, in determining whether the court is *functus officio* one should look at the order or relief which is being sought in the case despite that judgment has already been rendered by the court.”

23. An application for stay of execution is a relief sought at the post-judgment stage and by its nature does not necessitate a reconsideration of the merits of the judgment. Such orders of stay may either be sought from this court under Order 42 Rule 6 of the Civil Procedure Rules or before the Court of Appeal under Rule 5(2)(b) of the Court of Appeal Rules.
24. Should a party seek relief under Order 42 Rule 6 of the Civil Procedure Rules, any person aggrieved by the decision of the court can apply to have the said decision considered by the Appellate Court, and that court shall be at liberty to make an order that is just.
25. The Defendant’s argument that the filing of an appeal before the Court of Appeal precludes the Applicants from approaching this court for orders of stay cannot stand because an application for stay of execution or proceedings pending appeal requires a party to establish that an appeal is pending before the Appellate Court.
26. In these circumstances, this court is satisfied that it has the necessary jurisdiction to determine this application, being an application incidental to the process of execution. This court is therefore not barred by the doctrine of *functus officio* from considering the application on its merits.
27. The next issue for determination is whether the application is *res judicata*. The substantive law on *res judicata* is found in Section 7 of the [Civil Procedure Act](#), which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

28. From the foregoing, the doctrine of *res judicata* applies to bar subsequent proceedings when there has been adjudication by a court of competent and/or concurrent jurisdiction which conclusively determined the rights of the parties with regard to all or any matters in controversy.



29. The Court of Appeal in *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] KECA 472 (KLR) distinguished between cause of action *res judicata* and issue *res judicata*:

“Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action *res judicata* extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue *res judicata* may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.”

30. The objection as raised by the Defendant is that this application is barred by issue *res judicata*, as they assert that the applicant made a similar application for stay of execution in their application dated 31<sup>st</sup> January 2023.

31. In applying the doctrine of *res judicata* to applications filed before a court, the Court of Appeal in *Kennedy Mokuia Ongiri vs John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR, stated that a court should consider the decision of the court in contention, in determining whether the issue raised in the subsequent application was settled:

“In order therefore to decide as to whether an issue in a subsequent Application is *res judicata*, a court of law should always look at the Decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain;

- i. what issues were really determined in the previous Application;
- ii. whether they are the same in the subsequent Application and were covered by the decision.
- iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.”

32. The Defendant adduced a copy of the application dated 31<sup>st</sup> January 2023 through which they sought to stay taxation of the Bill of Costs and execution of the judgment delivered on 21<sup>st</sup> April 2022. This application was disposed of in court on 3<sup>rd</sup> October 2023. This court declined to allow the application and pronounced that the taxation of the Bill of Costs will not affect the pending appeal in any way.

33. This earlier determination by the court was with respect to stay of taxation proceedings, which is a separate issue from the outcome of the proceedings. Some courts have held that applications to stay taxation proceedings are by themselves premature. This was observed by the High Court in *NCBA Bank Kenya Limited vs Seaman Building & 3 Others* [2022] eKLR where it was stated that:

“What about the pros and cons? The application is premature, as the applicant does not stand to suffer any prejudice by the mere fact of the taxing of the costs. Those proceedings in my view will not in any way violate the applicant’s right of appeal neither will they in any way render the appeal nugatory. The outcome of taxation proceedings can be dealt with, but by themselves they are not prejudicial to the applicant and in any event no sufficient cause has



been placed before me to show how the proceedings will render the appeal nugatory. It is in my view not in the interests of justice to allow the application for stay of proceedings.”

34. It was also highlighted in the case of *Dickson Sinkeet Mapi vs Naisenyu Pargarna Mutunkei* [2021] eKLR that taxation proceedings are independent and within the mandate of the Taxing Officer.
35. Ultimately, this application is not barred by *res judicata* because the issue herein is separate and distinct from that which was raised in the application dated 31<sup>st</sup> January 2023.
36. Moving on to the substance of the application, the question is whether this court ought to stay the execution of the costs which were taxed at Kshs. 224,270/=.
37. It is trite that the purpose of a stay of execution is to preserve the subject matter of an appeal. The Plaintiff has relied on the case of *RWW vs EKW* [2019] KEHC 6523 (KLR) where it was articulated that:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

38. The judgment in this matter was in the nature of a negative order, as it dismissed the Plaintiff’s suit with costs to the Defendant. Accordingly, the only thing capable of being stayed is the execution for costs.
39. An application under Order 42 Rule 6 should establish that the application has been made without undue delay; that the applicant stands to suffer substantial loss and; the requisite security for the due performance of the decree or order has been given.
40. Substantial loss was clearly explained in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR:-

“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 CPR. 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.”

41. Save for the payment of the taxed costs, the Plaintiffs have not clearly articulated the loss that they stand to suffer should this court decline to allow this application. Indeed, the process of execution itself is lawful and cannot by itself constitute substantial loss. In this regard, the Applicants have not shown that they will suffer substantial loss should this application be disallowed.
42. On the matter of security for due performance of the decree, under Order 42 Rule 6, this court is vested with the authority to order that security be deposited with the courts. The purpose of such security



was explained in the case of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR, as follows;

“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 the 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.”

43. The deposit of security for due performance of a decree is at the discretion of the court and it is sufficient that the Applicant has indicated his willingness to pay the security for costs.
44. In the circumstances of this case, this court allows the Plaintiffs application for stay of execution of the costs taxed of Kshs. 224,270 on condition that the Plaintiffs deposit the said sum of Kshs. 224,270 with the court within 30 days of the date hereof. This shall be held as security for the due performance of the decree of this court with respect to the payment of costs, pending hearing and determination of Civil Appeal No. E.831 of 2022.
45. Accordingly, the Plaintiff's application dated 18<sup>th</sup> February 2025 is allowed on the following terms:
  - a. A stay of execution of the taxed costs is hereby granted on condition that the Plaintiffs deposit the entire taxed costs being Kshs. 224,270/= with the court within 30 days from the date hereof as security pending the hearing and determination of the pending appeal.
  - b. In default of compliance, the stay shall lapse automatically without further reference to this court.
  - c. Costs of this application to be borne by each party.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26<sup>TH</sup> DAY OF JUNE, 2025.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Mburu for Gachie for Plaintiff

No appearance for Defendants

Court Assistant: Tracy

