



Vision Afrika Housing Co-operative Society Limited & another v Gikonyo & another (Environment and Land Appeal E004 & E005 of 2024 (Consolidated)) [2025] KEELC 4766 (KLR) (Environment and Land) (26 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4766 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E004 & E005 OF 2024 (CONSOLIDATED)**

MC OUNDO, J

JUNE 26, 2025

BETWEEN

**VISION AFRIKA HOUSING CO-OPERATIVE SOCIETY LIMITED 1ST
APPELLANT**

JOSPHAT MICHUKI CHEGE 2ND APPELLANT

AND

STEPHEN KANYUIRA GERALD GIKONYO 1ST RESPONDENT

LAND REGISTRAR, NAIVASHA 2ND RESPONDENT

RULING

1. Pursuant to a Judgment delivered on the 6th February, 2025 in the instant matter, the Applicants have now filed the present Application pursuant to the provisions of Section 13 (7) (a) & (b) together with Section 3 of the Environment and Land Act, Section 3A of the Civil Procedure Act and Order 42 Rule 6(1), 6(2) & 6(4) of the Civil Procedure Rules and all enabling provisions of the laws of Kenya, where they sought that there be a preservative order for maintenance of status quo in respect of occupation and in respect of the land register for the subject parcel Gilgil/Gilgil Block 1/763 (Kikopey) pending the hearing and determination of the intended Appeal lodged by the Appellants/Applicants before the Court of Appeal, Nakuru.
2. The application was supported by the grounds therein as well as by the sworn affidavit of an equal date by Ayub Gatheru Maingi, the 1st Applicant's Chairman and Josphat Michuki Chege, the 2nd Applicant herein who deponed that the Honourable Court had delivered a Judgement on 6th February, 2025 dismissing their respective appeals and thereon paving way for execution of the trial court's judgement



which had revoked the 2nd Appellant's title for parcel No. Gilgil/Gilgil Block 1/763 (Kikopey) (suit property) and directed that the 1st Appellant be evicted from the subject parcel.

3. That both the Appellants having been aggrieved by the said impugned Judgement of the court would wish to exercise their undoubted right of Appeal and had already filed a Notice of Appeal dated 13th February 2025 to initiate an Appeal before the Court of Appeal. That further, on the 13th February 2025, both the Appellants had through their Advocates on record sought for certified copies of the proceedings and judgement of the court for purposes of instituting the record of appeal without delay. That in order to prevent substantial loss from being occasioned on the Appellant/Applicants so that the appeal before the court of appeal was not rendered nugatory, the court should issue a preservative order for maintenance of the current prevailing status quo pending the hearing and determination of the appeal.
4. That in respect of security pending appeal, they were ready and willing to surrender to court the Original Title Deed for the suit parcel in the name of the 2nd Appellant which had been in custody of the 1st Appellant upon purchase of land. That further, they were willing to abide by any condition directed by court so that appropriate orders of status quo could be granted.
5. In response and in opposition to the Appellants/Applicants' Application, the 1st Respondent vide his Replying Affidavit dated 6th March 2025 deponed that the Application was misguided and a blatant abuse of the court process meant to deny him the right to enjoy his property.
6. That the intended Appeal would be limited to the matters law wherein both the Trial Court and the High Court (sic) had made their finding that the title claimed by the 2nd Appellant was tainted from the onset and should be cancelled.
7. That indeed, all the grounds raised by the Appellants herein had been extensively dealt with by both courts hence they had no chances of success in their intended appeal. That litigation must come to an end and a successful litigant must reap the fruits of his success while the unsuccessful one must learn to let go.
8. That in any case, the 1st Appellant had a legal recourse for a refund of the amount that had been paid to the 2nd Appellant for the suit property instead of flogging a dead horse. That the Appellants would not be prejudiced by the execution of the orders of the trial court as the same could be reversed incase their intended appeal succeeds.
9. That there having existed two title wherein the trial court had ordered for the cancellation of the 2nd Appellant's title, that the Appellants had no title to the subject property to deposit to court as security. That it was thus in the interest of justice that the instant Application be dismissed with costs.
10. In a rejoinder, the Appellant through their Supplementary Affidavit dated 14th March, 2025, reiterated that the 2nd Appellant was likely to suffer substantial loss the registration of his title to the suit property was revoked and/or cancelled before the hearing of the intended Appeal. That further, the 1st Appellant was also likely to suffer substantial loss if it was evicted from the suit property before the hearing of the intended appeal at the Court of Appeal.
11. That the draft Memorandum of Appeal annexed herein had exhibited weighty matters of law which ought to be determined with finality by the Court of Appeal, thus necessitating orders for maintenance of status quo pending the hearing and determination of the Applicants' intended Appeal so as not to render it nugatory.



12. That in respect to security pending appeal, they deponed that the original title for the suit parcel was currently in the custody of the 1st Appellant and it was a farfetched argument to suggest that there existed 2 title deeds to the suit property yet it was not disputed that the 1st Respondent's title deed was never authenticated as a genuine title document for which the court of appeal would make the determination with finality the contentious legal positions surrounding the Appellants' matter and the subject title registration.
13. That in any case, they were ready and willing to deposit the taxed/agreed costs of the initial dismissed appeal in a joint account of Advocates or in court pending the hearing and determination of the second appeal before the Court of Appeal. They reiterated that they were willing to abide by any condition directed by court so that appropriate orders for status quo could be granted.
14. Whereas on the 24th March 2025, directions had been taken for the disposal of the application by way of written submissions, which directions had been extended on the 8th April 2025, at the time of writing this Ruling only the Appellants/Applicants had complied wherein upon summarizing the factual background of the matter, they had framed three (3) issues for determination as follows:
 - i. Whether the court has the mandate to grant orders of status quo pending appeal.
 - ii. What principles would be applicable in granting of the status quo pending the second appeal?
 - iii. Whether the court should grant the orders sought.
15. On the first issue for determination as to whether the court had the mandate to grant orders of status quo pending appeal, they hinged their reliance on the provisions of Sections 13 of the *Environment and Land Court Act* to submit that indeed the court had the mandate to order for status quo even after the dismissal of an appeal so as to preserve the interests of parties pending a further appeal to the Court of Appeal.
16. They placed reliance on the decisions in the cases of *Mwalimu & 6 others v Halal & another* (Civil Application E091 of 2022) [2023] KECA 634 (KLR) (26 May 2023) (Ruling) and *Kamlesh Mansukhalal Damji Pattni v Director Of Public Prosecutions & 3 others* [2015] KECA 690 (KLR) to submit that it was evident that the ELC was obligated by the overriding objectives to interpret the law and exercise judicial authority in a manner that would encompass fairness and capture the best interests of parties appearing before it. That despite the fact that the order that had been given for the dismissal of the Appellants' joint appeal had by itself been a negative order incapable of being stayed, the court had the prerogative to grant an order for status quo to ensure that the aggrieved parties were able to exercise their right of appeal while safeguarding the respective divergent interests in the subject matter.
17. On the second issue for determination as to what principles would be applicable in granting of status quo pending a second appeal, they submitted that whereas the principles for granting of status quo pending appeal had not been pronounced in any of our statutes or rules of procedure, the courts had embarked by way of judicial precedents to adopt the same principles which applied in applications for stay pending appeal. That indeed, whilst the Appellants/Applicants had an undoubted right of appeal as guaranteed by statute, there were certain principles which the court ought to consider prior to granting of an application for stay pending appeal.
18. He placed reliance on the provisions of Order 42 Rule 6 (2) and (4) of the Civil Procedure Rules to submit that similar principles applied when an application for stay pending appeal was lodged before the Court of Appeal although the wording of the principles to be considered before the Court of Appeal was a bit different. That the said principles for granting stay of execution by the court of Appeal



as had been enumerated in the decided case of *Balala & Others v Githere and Others* (2005) 2 EA 25 (CAK) were:

- i. The intended Appeal is arguable.
 - ii. The Appeal is likely to be rendered nugatory unless the Order of Stay of execution is granted.
 - iii. The Respondent will not suffer under prejudice if the order of stay was granted.
19. They placed reliance on the provisions of Section 72 (1) of the *Civil Procedure Act* to submit that since the Appellants/Applicants had invoked their right to lodge a second Appeal, then the appeal would only be entertained by the court of appeal if it was based on points of law. That subsequently, the emerging parameters to be considered by the court in the instant cause would be:
- i. Unreasonable delay.
 - ii. Substantial loss.
 - iii. Provision of security.
 - iv. Arguable Appeal on the matters law.
20. On the Application being made without unreasonable delay, they submitted that the impugned judgement of the ELC court had been delivered on 6th February 2025 whereas the application for status quo had been filed on 25th February 2025 after a period of 19 days which period could not be said to be inordinate delay. It was thus their submission that the Application had been duly filled within reasonable time.
21. With regard to the aspect of substantial loss, it was their submission that they had demonstrated that they would be subjected to substantial loss if the orders of status quo were not granted. Reliance was placed on the provisions of Order 42 Rule 6 (2) (a) of the Civil Procedure Rules to submit that they had pointed out that failure to grant the preservatoy orders of status quo would pave way for the execution of the trial court's judgement which would result in eviction of the 1st Appellant from the suit property. That further, the Appellants/Applicants had pointed out that the trial court's judgement had directed that the 2nd Appellant's title registration for the suit parcel ought to be revoked and/or cancelled forthwith.
22. That it was thus obvious that if an order of status quo was not granted, the Appellants' appeal if successful would be rendered nugatory. That there was no guarantee that the process of transfer of the title to the 1st Respondent would be reversed once the Appellants' appeal was successful. That further, there was no guarantee that if the 1st Appellant was evicted, he would be reinstated back to the suit parcel if the appeal was successful especially in the event that the 1st Respondent would have already sold the suit property to third parties. That indeed, it would be fallacious to uphold the 1st Respondent's argument to the effect that there was no substantial loss to be suffered since there was presently no imminent danger of eviction or looming threat of cancellation of title. Reliance was placed in the decided case of *Tropical Commodities Supplies Ltd and Others v International Credit Bank Ltd (in Liquidation)* (2004) 2 EA 331 (HCU) at page 331.
23. It was thus their submission that it would be impossible for the Court of Appeal to hear and determine the Appellants' intended Appeal within a period of 120 days calculated from the date of the impugned judgement delivered on 6th February 2025. That subsequently, the execution of the trial court's judgement was likely to take effect prior to the hearing of the Appellants' appeal thus the appeal would be rendered nugatory unless orders of status quo were granted. That indeed, the court only needed to



- be satisfied that substantial loss may result to the applicants unless the stay order was made and did not necessarily mean that the execution of the trial court's judgement should have taken effect or that the 2nd Applicant's property should have already been subjected to constant and/or immediate threat of execution.
24. That in order for the court to strike a balance between the two competing rights, that is, the right of appeal and the right to enjoy the fruits of judgement, then a preservatory order to maintain status quo ought to be granted pending the hearing and determination of the intended appeal. That the order for status quo would ensure that the Appellants/Applicants, by themselves or through their servants do not interfere with the current ground and registration status of the suit property. Reliance was placed in a combination of decisions in the case of *Mukuma v Abuoga* [1988] KLR pages 645-646, *Mugah v Kunga* [1988] KLR page 748, *Judith Cherono Mosonik v Dickson Kipkemoi Changwony Nakuru ELC Land Case No. 25 of 2015* (unreported) and *Hamisi Salim Mwawimo v Julius Wambugu* [3003] KEHC 888 (KLR) at page 1 to submit that it was clear beyond peradventure that the Applicants had satisfied the primary condition of substantial loss thus necessitating the granting of orders for status quo pending appeal. That it was thus apparent that the Appellants/Applicants would suffer substantial loss if status quo was not granted.
 25. Regarding the condition on deposit of security, they submitted that it was not a rule of thumb that the court must order for the deposits of security in every instance where status quo or stay of execution was sought. That it would always depend on the peculiar circumstances of every case. That in the instant case, the court had in its judgement of 6th February 2025 directed that the Appellants/Applicants pay for the costs of the dismissed appeal.
 26. They placed reliance on the provisions of Order 42 Rule 6 (2) (b) of the Civi Procedure Rules to submit that whereas security may be ordered by the court for due performance of the decree or order, the condition for security was not mandatory depending on the circumstances presented in each case. That nevertheless, they were willing to abide by any condition directed by the court so that appropriate orders for status quo could be granted. That further, in their Supplementary Affidavit, the Appellants had been agreeable to the proposition by the 1st Respondent that the taxed/agreed costs of the dismissed first appeal be deposited in a joint account of advocates or in court pending the hearing and determination of the second appeal before the Court of Appeal.
 27. That it was worth noting that the costs awarded by the trial court had been deposited in court on 24th June, 2024 by consent of parties at a sum of Kshs. 270,000/= which amount was still in the court's custody as security. That in any case, the court had powers to restrain any developments on the suit parcel pending the hearing of the appeal.
 28. They placed reliance in the decided case of *Nakuru Municipal Council v Murima Muturi & Another* [2009] KEHC 3288 (KLR) to submit that the Court had the prerogative to grant orders for deposit of security for costs as it may deem appropriate and that the Appellants were dutifully ready and willing to abide by the condition given.
 29. On the Appeal being arguable on matters law, they placed reliance on the decided case of *Somak Travels Ltd v Gladys Aganyo* [2016] eKLR to submit that the attached Draft Memorandum of Appeal had raised six (6) weighty grounds of appeal remised purely on matters of law as was held in the cases of *Lekishon Olegeem v Peter Nkoidilia & 7 Others* [2009] eKLR, *Ahmed Khalifa v Omar Ali Hemed* [2004] eKLR and *Vision Afrika Housing Co-operative Society Ltd v Stephen Kamau Mwangi & 3 Others* [2020] KEELC 1252.



30. In conclusion, they submitted that their application for a preservative order to maintain status quo pending appeal was merited hence the same should be allowed in the interest of justice.

Determination.

31. I have considered, the Applicants' Application, the supporting affidavit, the Replying Affidavit as well as the written submissions by the Appellants/Applicants. The judgment and decree herein that has led the Appellants/Applicants to seek for orders of maintenance of status quo pending Appeal was delivered by this court on the 6th February, 2025 wherein the court had dismissed the Applicants' Appeal with cost to the Respondents for being unmeritorious.
32. The Applicants contend that unless the court orders that status quo obtaining be maintained pending the hearing and determination of the intended Appeal at the Court of Appeal, the 1st Respondent would proceed to execute the trial court's judgement which had revoked the 2nd Appellant's title for parcel No. Gilgil/Gilgil Block 1/763 (Kikopey) wherein the 1st Appellant would be evicted from the subject parcel. That the 1st Respondent stood to suffer no prejudice were the order of status quo granted since the said orders would ensure sustainable use of the suit property and that the same was not wasted.
33. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that parties who fail to file their submissions on an application as ordered by the court are deemed as parties who have failed to prosecute their application and therefor that application is liable for dismissal. The filing of submissions having been ordered, the failure by the Respondents herein to exercise the leave granted to file written submissions clearly demonstrated inertia and inordinate delay, lack of interest and/or seriousness on their part to defend the Application which is herein deemed as undefended. The court shall however consider it on its merit.
34. It is trite law that an appeal does not operate as an automatic stay of execution. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates 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 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.’



35. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to wit:
- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
 - ii. The application is brought without undue delay and
 - iii. 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.
36. I must state at this juncture and as it has been rightly admitted by the Applicants that this court had in its impugned judgement dismissed the Appellant's suit with costs for being unmeritorious. This in essence was a negative order, incapable of execution hence cannot be stayed. It should be noted that an order of stay of execution seeks to delay the performance of a positive order, that is, either an order that has not been complied with or has partly been complied with.
37. Accordingly, the judgment herein having been negative in nature, I find that there had been no orders flowing from the said judgement in respect of which a stay order could validly be granted. However, I find that the Applicants herein have sought that there be a preservative order for maintenance of status quo in respect of occupation and in respect of the land register for the subject parcel Gilgil/Gilgil Block 1/763 (Kikopey) pending the hearing and determination of the intended Appeal.
38. The Court of Appeal in the case of *Mwalimu & 6 others v Halal & another* (Civil Application E091 of 2022) [2023] KECA 634 (KLR) (26 May 2023) (Ruling) had at paragraph 17 held as follows:
- “In this case, however, the applicant, in prayer 3 of the Motion seeks an order for status quo in respect of Title No. Mombasa Island Block XV/29 & 31. Whereas we have no jurisdiction to stay a negative order, this Court in exercise of its inherent and original jurisdiction has power to grant such orders as will preserve the substratum of the appeal by an order for maintenance of the status quo. In this case, there is no doubt that, whether rightfully or wrongfully, the Applicants have been in possession of the suit property for more than two decades. In our view, this Court ought to issue orders which would best serve the interest of justice in line with the overriding objective of the *Appellate Jurisdiction Act* in Sections 3A and 3B of the said Act....”
39. Further, to this holding and the provisions of Section 1A (2) and 1B of the *Civil Procedure Act*, this court is enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. Subsequently, the Court ought to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.
40. The Applicants herein have argued that they would suffer substantial loss since failure to grant the preservative orders of status quo would pave way for the execution of the trial court's judgement which would result in eviction of the 1st Appellant from the suit property. That further, the trial court's judgement had directed that the 2nd Appellant's title registration for the suit parcel ought to be revoked and/or cancelled forthwith.



41. In the case of *Mukuma v Abuoga* (1988) KLR 645 the court had held as follows;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

42. Indeed, it trite that the Court has to balance the interest of the Applicants who are seeking to preserve the status quo pending the hearing of the Appeal so that their Appeal is not rendered nugatory, and the interest of the 1st Respondent if any. However, whereas the impugned judgement herein had dismissed the Appellant’s Appeal which is a negative order incapable of being stayed, the same had paved way for the execution of the trial court’s judgement that was to the effect that the 2nd Appellant’s title be revoked and the 1st Appellant be evicted from the suit property. This being the case, and while keeping in mind that the 1st Applicant is in possession of the suit property, and further that in exercising the court’s discretion, the court should always opt for the lower rather than the higher risk of injustice, I find that the Applicants have proved that substantial loss may result unless preservatory orders for maintenance of status quo was issued.

43. The impugned judgement herein had dismissed the Appellants’ appeal with costs thus attaching a monetary aspect to it. The Applicants herein have stated that they were willing to abide by any condition directed by the court so that appropriate orders for status quo could be granted. In fact, they are agreeable to the proposition by the 1st Respondent that the taxed/agreed costs of the dismissed appeal herein be deposited in a joint account of advocates or in court pending the hearing and determination of the second appeal before the Court of Appeal.

44. In the case of *Arun C. Sharma vs. Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014] eKLR the court had 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.”

45. In the end, I find that there would be no prejudice occasioned to the 1st Respondent if the preservatory orders of maintenance of status quo pending Appeal was granted. In the circumstance, I make the following orders:

- i. The status quo pertaining on the ground as of the date of this Ruling in respect of occupation and in respect of the land register for the Land Parcel No. Gilgil/Gilgil Block 1/763 (Kikopey) be maintained pending the hearing and determination of the intended Appeal lodged by the Applicants before the Court of Appeal, Nakuru.
- ii. The Applicants shall within 30 days from the date of this ruling deposit Kshs. 500,000/=(five Hundred Thousand) in Court. In default, the stay shall automatically lapse.
- iii. If the Applicants have not been supplied with the proceedings required to prepare the record of Appeal, their Counsel shall liaise with the Deputy Registrar of this court and ensure that the same are supplied within fifteen (15) days of this order.



- iv. The Applicants shall within forty-five (45) days from the date of this ruling compile, file and serve upon the Respondents a complete record of Appeal.
- v. If the Applicants do not file the Appeal within the time stipulated in (iv) above, the window granted to file the Appeal shall automatically lapse.

46. There shall be no Costs.

DATED AND DELIVERED AT NAIVASHA VIA TEAMS MICROSOFT THIS 26TH DAY OF JUNE 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

