



REPUBLIC OF KENYA



KENYA LAW
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**Karanja v Ndungu (Environment and Land Appeal E090 of 2024)
[2025] KEELC 4897 (KLR) (25 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4897 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E090 OF 2024
JM ONYANGO, J
JUNE 25, 2025
FORMERLY HCCA NO. 107 OF 2024**

BETWEEN

TERESIAH NYAMBURA KARANJA APPELLANT

AND

MICHAEL MWAURA NDUNGU RESPONDENT

RULING

1. This ruling is in respect of two applications filed by the Appellant dated 4th June 2024 and 10th June 2024 respectively. In the application dated 4.6.24, the Appellant seeks a stay of execution of the judgment and decree/orders of the lower court issued in Thika CMELC Case No. 153 of 2018 on 22.5.2024. It is premised on the Applicant's supporting affidavit sworn on 4th June 2024. When the said application came up for directions on 5.6.2024 the Applicant was granted a stay of execution on condition that she deposits half the decretal sum in court within 30 days failing which the orders would be vacated. These orders were issued pending the inter partes hearing of the application on 16.7.24.
2. Before the said application came up for inter partes hearing, the Applicant filed the second application dated 10.6.24 seeking a review of the orders issued on 6.6.24. On 24.6.24, the court noted that the Respondent had not responded to the application for review and upon considering the applicant's plea that she was unable to deposit the sum of Kshs. 7.5million, reviewed the amount to Kshs. 4.5 million to be deposited within 21 days. Needless to say, the Applicant has not yet deposited the said amount.
3. Both applications are opposed by the Respondent through his Grounds of Opposition dated 4th July 2024 and Replying affidavits dated 24th October 2024 in which he states that the application is an abuse of the court process as the Appellant filed an application in the lower court for setting aside and/or review of the judgment which is the subject of this appeal. He deposed that he acquired the suit property through a public auction way back in 2004 and the same was registered in his name but the



Appellant has refused to vacate the suit property and has engaged in protracted litigation to frustrate the Respondent.

4. The Respondent also filed a Notice of Preliminary Objection challenging the jurisdiction of the court as the appeal had initially been filed in the High Court. However, the appeal was transferred to this court for hearing and disposal and the Preliminary Objection was abandoned.
5. The court directed that the two applications be consolidated and that they be canvassed through written submissions. Both parties complied with the court's directions by filing their submissions.

Appellant's Submissions

6. In his submissions, learned counsel for the Appellant submitted that the suit property is matrimonial property which the Appellant and her husband have developed and which their children have known as their home and it is not clear how the Appellant offered it as security for a loan as her husband is of unsound mind. He submitted that the appeal raises triable issues with high chances of success. It is his further submission that if the application is not granted the Appellant and her family will be forced to vacate the suit property.
7. On the issue of delay, he submitted that the application was filed without any undue delay as judgment was delivered on 22nd May while the application was filed on 4th June 2024. He relied on the case of [*Cecilia Wanja Waweru v Jackson Wainaina Muiruri & Another*](#) (2014) eKLR.
8. With regard to security for costs, he submitted that the Appellant has applied for extension of time within which to deposit the amount ordered by the court as she was not able to deposit it within the timeframe given. He finally submitted that the Respondent would not suffer any prejudice if the application was granted.

Respondent's Submissions

9. It was submitted for the Respondent that the Appellant has not met the threshold for the grant of a stay of execution as she has failed to satisfy the three conditions in order 42 Rule 6 of the [*Civil Procedure Rules*](#).
10. With regard to substantial loss, learned counsel for the Respondent submitted that the Appellant had not demonstrated that she would suffer substantial loss as in her supporting affidavit to the application dated 4th June 2024, she merely expresses the fear that the Respondent may proceed to execute the judgment. He relied on the case of [*James Wangalwa & Another v Agnes Naliaka Cheseto*](#) (2012) eKLR where the court held that:

“No doubt in law, the fact that the process of execution is likely to be put in motion, by itself, is not a ground for granting stay of execution. Even when execution has been levied and completed, that is to say, the attached goods have been sold as is the case here, that 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. This is what substantial loss would entail...”

11. Counsel pointed out that it was only in the Appellant's submissions that it was mentioned that the suit property was the Appellant's matrimonial home. He relied on the case of [*Chege v Gachora*](#) Civil Appeal No. 265 of 2023 [2024] KEHC 1994 KLR where the court observed that the Applicant had



only tried to demonstrate how he would suffer substantial loss in this submissions as opposed to his supporting affidavit.

12. On the question of security for costs, it was submitted that the Appellant had failed to meet the condition imposed by the court on 5th June 2024 when the Appellant was directed to deposit half the decretal sum in court. Counsel submitted that in defiance of this order, the Appellant filed another application seeking a review of the security terms without demonstrating that she was willing to provide security. He relied on the case of *MN v TAN & Another* (2015) eKLR where the court held that a party who is unwilling to comply with an order of the court is undeserving of discretionary relief.
13. Submitting that all the conditions under order 42 Rule 6 of the *Civil Procedure Rules* needed to be met simultaneously, counsel relied on the case of *G. N Muema P/A Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & Another* (2018) eKLR and concluded that the Appellant's application had failed to meet the necessary threshold.

Analysis and Determination

14. Having considered the applications, Grounds of Opposition and rival submissions the main issue for determination is whether the applicant ought to be granted a stay of execution and if so, whether the Applicant ought to be granted more time to deposit the security for costs.
15. It is a fundamental principle that every party aggrieved with a decision of a Court has a natural and undoubted right to seek the intervention of the Court of Appeal, which right should not be unnecessarily hindered. Thus the purpose of stay of execution, is to preserve the subject matter of the appeal to ensure this right is not hindered and so that the appeal, if successful, is not rendered nugatory.
16. At the same time, a successful party is prima facie entitled to the fruits of his judgment. The court is supposed to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoying the fruits of his judgement. Although the power of a court to grant stay of execution is discretionary, Order 42 Rule 6 of the *Civil Procedure Rules* which governs the grant stay of execution pending appeal provides 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 appeal case of 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.”
17. I will now proceed to determine whether the Appellant has met the conditions for stay of execution under Order 42 Rule 6 of the *Civil Procedure Rules*.



18. I have gone through the Appellant’s supporting affidavit sworn on 4th June 2024 and at paragraph 4 thereof she has deposed that she fears that the Respondent may proceed to execute the judgment. However, she has not demonstrated that she will suffer substantial loss. As was held in the case of *Wangalwa (supra)*, in order to establish substantial loss one must establish “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”
19. It was incumbent upon the Appellant to present compelling evidence to demonstrate that she would suffer substantial loss. This she failed to do. Although learned counsel for the Appellant submitted that the suit property is the Appellant’s matrimonial property, this cannot be considered as the appellant’s evidence as it is trite that submissions are not evidence.
20. With regard to timeliness, I agree with counsel for the Applicant that the application was made without undue delay as it was filed 13 days after the judgment was delivered.
21. With regard to security for costs, there is nothing in the Appellant’s supporting affidavit to show that she is willing to furnish security for costs. Additionally, after the court granted the Appellant an interim stay on condition that she deposits half the decretal sum, she failed to do so and instead filed the application dated 10th June 2024 seeking a review of the said orders. At paragraph 6 of her supporting affidavit sworn on 10th June 2024, she merely stated that she cannot afford the said amount within the stipulated period without stating how much she is willing to deposit and within what period.
22. It is not lost on me that even after the court in its directions issued on 24.6.2024 reduced the amount to Kshs. 4.5 million to be paid within 21 days, the Appellant still made no effort to deposit the said amount.
23. From the foregoing, it is clear that Appellant has failed to meet all the three conditions for stay pending appeal laid down in Order 42 Rule 6 which must be met simultaneously. Furthermore, she has failed to demonstrate that she is willing to abide by any conditions that the court may impose.
24. Consequently, the applications dated June 4, 2024 and June 10, 2024 lack merit and they are hereby dismissed. The costs of the applications shall abide the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF JUNE 2025.

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J. M ONYANGO

JUDGE

In the presence of :

Miss Karuga for Miss Gathoni for the Appellants

Mr. Omalla for Mr. Kimondo for the Respondent

Court Assistant: Hinga

