



REPUBLIC OF KENYA



KENYA LAW
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**Mbwiria v Githire (Environment and Land Appeal E208 of 2024)
[2025] KEELC 4951 (KLR) (25 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4951 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E208 OF 2024**

**TW MURIGI, J
JUNE 25, 2025**

BETWEEN

SEVERINA MBWIRIA APPLICANT

AND

MARIA WANJIKU GITHIRE RESPONDENT

RULING

1. Before me for determination is a Notice of Motion dated 20th December 2024 in which the Appellant seeks the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That the Honourable Court be pleased to order for stay of execution of the judgement by Hon. Gakuhi Chege, Chairperson Business Premises Rent Tribunal delivered virtually on 22nd November 2024 where the Tribunal awarded the Respondent Kshs. 1,364,190/= and costs pending the hearing and determination of the appeal herein.
 - d. That this Honourable Court be pleased to grant such orders as it deems fit in the circumstances.
 - e. That the costs of the application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the Appellant sworn on even date.



The Appellant's Case

3. The Applicant averred that she is aggrieved by the judgment delivered on 22nd November 2024 by Hon. Gakuhi Chege, the Chairperson Business Premises Rent Tribunal. She further averred that she will suffer irreparable loss if the orders sought are not granted as the Respondent will execute the judgment.
4. The Applicant argued that the Respondent will be unable to refund the decretal sum in the event that the appeal is determined in her favour. She further argued that the Appeal herein raises triable issues with high chances of success which may be rendered nugatory if stay of execution is not granted.
5. In conclusion, the Applicant urged the Court to allow the application as prayed.

The Respondent's Case

6. The Respondent filed a replying affidavit dated 28th January 2025 in opposition to the application. She averred that the decretal sum was rightfully awarded to her by the tribunal. She further averred that the Appellant has not offered security for the due performance of the decree. The Respondent contends that the Appellant has not demonstrated that she will suffer substantial loss if the order of stay is not granted.
7. The application was canvassed by way of written submissions.

The Appellant/Applicant's Submissions

8. The Applicant filed her submissions dated 12th February 2025. On behalf of the Applicant, Counsel submitted that the only issue for determination is whether an order of stay of execution pending appeal should be granted.
9. Counsel relied on Order 42 Rule 6(2) of the Civil Procedure Rules and on the cases of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR and Benjo (K) Ltd v Rono [2024] KEHC 1470 (KLR), to submit that the instant application was filed without delay.
10. Counsel further submitted that the Applicant will suffer substantial loss if stay of execution is not granted since she is unable to raise the decretal sum awarded to the Respondent.
11. In conclusion, Counsel urged the Court to exercise its discretion by either doing away with the requirement for security entirely or order for an alternative security.

The Respondent's Submissions

12. The Respondent filed her submissions dated 18th February 2025. On behalf of the Respondent, Counsel outlined the following issues for the court's determination: -
 - a) Whether the prayer for stay of execution pending appeal is merited?
 - b) Who shall bear the costs?
13. On the first issue, Counsel relied on Order 42 Rule 6(2) of the Civil Procedure Rules and the cases of Antoine Ndiaye v African Virtual University [2015] KEHC 6783 (KLR), Chege v Gachora [2024] KEHC 1994 (KLR) and RWW v EKW [2019] KEHC 6523 (KLR), to submit that execution is a lawful process and is not a basis for granting stay of execution.
14. Counsel further submitted that the Appellant has not demonstrated that she will suffer irreparable loss or that the appeal will be rendered nugatory if stay of execution is not granted. It was further



submitted that in deciding whether to grant the orders sought, the Court must balance the interest of the Appellant with those of the Respondent.

15. Counsel submitted that the purpose of security is to guarantee the performance of a decree. To buttress this point, Counsel relied on the cases of *Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014] KEHC 2430 (KLR) and *Samvir Trustees Limited v Guardian Bank Limited* [2007] eKLR. It was further submitted that the right of appeal must be balanced against the right of the Respondent to enjoy the fruits of her judgement.

Analysis and Determination

16. Having considered the application, the respective affidavits and the rival submissions, the issue that arises for determination is whether the Applicant has satisfied the conditions for the grant of stay of execution appeal pending appeal.
17. Order 42 Rule 6 of the Civil Procedure Rules outlines the guiding principles to be met for the grant of stay and provides as follows: -
 - 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.
18. The power to grant or refuse an application for stay of execution is discretionary. In the case of *Butt vs Rent Restriction Tribunal* (1982) KLR 417 the Court of Appeal gave the following guidelines on how a court should exercise its discretion;

“The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

19. Similarly, in the case of *RWW vs EKW* (2019) eKLR the Court held that;

“...the purpose of an application for stay of execution pending an appeal is to preserve the subject 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 the 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 damages.”



20. This Court is therefore called upon to balance both the rights of the successful party so as not to hinder her from enjoying the fruits of her judgment and those of the Appellant whose Appeal may succeed and be rendered nugatory if stay of execution is not granted.
21. The purpose of stay of execution is to preserve the substratum of the case. In the case of Consolidated Marine vs Nampijja & Another Civil App No. 93 of 1989 (Nairobi) the Court held that;

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”
22. The Court will now determine whether the Applicant has satisfied the conditions upon which the orders can be granted.
23. On the first condition of proving that substantial loss may result unless stay orders are granted, the Applicant should not only state that she is likely to suffer substantial loss, she must prove that she will suffer substantial loss if stay orders are not granted.
24. In the case of Charles Wahome Gethi vs Angela Wairimu Gethi (2008) eKLR the Court of Appeal held that;

“...it is not enough for the Applicants to say that they live or reside on the suit land and they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”
25. What amounts to substantial loss was expressed by the Court of Appeal in the case of Mukuma vs Abuoga (1988) KLR where the Court held that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.
26. The Appellant contends that she will suffer irreparable loss as she is unable to raise the decretal sum which in her view was erroneously awarded to the Respondent. The Respondent on the other hand contends that the Appellant has neither demonstrated that she will suffer substantial loss nor provided any security for the due performance of the decree.
27. From the material presented before me, I find that the Applicant has not demonstrated the loss that she is likely to suffer in the event that the orders of stay are not granted.
28. In an application for stay of execution pending Appeal, an Applicant must also satisfy the Court that the application has been made without unreasonable delay. The judgment against which the appeal lies was delivered on 22nd November 2024. The instant application was filed on 20th December 2024. I find that the application was filed without delay.
29. On the last condition as to the provision of security for costs, Order 42 Rule 6 (2) (b) of the Civil Procedure Rules is couched in mandatory terms to the effect that the Applicant must furnish security for the performance of the order or decree. In the case of Arun C Sharma Vs Ashana Rakundalia T/A Raikundalia & Co. Advocates & 2 Others (2014) eKLR, the court held that;

“The purpose of the security under Order 42 is to guarantee 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 applicant 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 a security for the 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.”

30. The Respondent contends that the Appellant has not offered any security for the due performance of the decree. The Appellant on the other hand urged the Court to do away with the requirement for security or make an order for alternative security.
31. The Applicant has not expressed her willingness to provide security for due performance of the decree.
32. From the foregoing, I find that the Applicant has not met the threshold for the grant of stay of execution pending appeal
33. However, in the interest of justice, I will allow the application in the following terms: -
 - a. Stay of execution of the judgment delivered on 22nd November 2024 is granted pending the hearing and determination of the appeal.
 - b. The Appellant to provide a bank guarantee of the decretal sum within 30 days from the date of this ruling.
 - c. In default of order (b) above the stay shall automatically lapse.
 - d. Costs to abide with the outcome of the appeal.

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

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HON. T. MURIGI

JUDGE

In the presence of: -

Kemboi holding brief for Waceke for the Respondent

Ochieng for the Applicant

Ahmed – Court Assistant

