



**Isiye v Kennedy & another (Environment and Land Appeal  
E075 of 2024) [2025] KEELC 4855 (KLR) (24 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4855 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E075 OF 2024**

**A NYUKURI, J**

**JUNE 24, 2025**

**BETWEEN**

**MORRIS MUNAMEZA ISIYE ..... PLAINTIFF**

**AND**

**ANYULA KENNEDY ..... 1<sup>ST</sup> RESPONDENT**

**JOYCE KAOME KANALE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. Before court is a Notice of Motion dated 6<sup>th</sup> May, 2025 filed by the appellant seeking an order of stay of execution of the order dated 15<sup>th</sup> November 2024 pending hearing of this appeal. He also sought costs.
2. The application is anchored on the affidavit sworn by the applicant dated 6<sup>th</sup> May, 2025. The applicant's case is that on 23<sup>rd</sup> October 2024 the court made a ruling in favour of the 1<sup>st</sup> Respondent allowing the 1<sup>st</sup> Respondent to proceed with execution. That the appeal herein is against that ruling. That he has been served with a notice to auction his property being Kabras/Shamberere/1166 and that he risks losing his property if stay is not granted. Further that if stay is not granted he will suffer irreparable loss.
3. The application was opposed. The 1<sup>st</sup> respondent filed a Notice of Preliminary Objection dated 24<sup>th</sup> May, 2025 on appeal and the application. He stated that the ruling appealed against was a determination on a Notice to Show Cause pursuant to order 22 Rules 18 and 19 of the Civil Procedure Rules and that no appeal lies against such ruling as of right but an appeal can only be filed with leave of court, and that in this case no leave of court was sought. He further argued that the appeal was incompetent and that therefore the court had no jurisdiction to entertain the appeal.



4. Besides, the 1<sup>st</sup> respondent also filed a replying affidavit dated 26<sup>th</sup> May 2025 opposing the application. He stated that judgment was entered in Butali MC ELC 45 of 2019 in 2022 and that the decree required the appellant and the 2<sup>nd</sup> respondents who were defendants therein to pay the appellant a decretal sum of kshs. 4,027,833 plus costs and interest.
5. He stated that he instructed Balusi Advocate to apply for execution of the decree. That he applied for execution and a Notice to Show Cause dated 5<sup>th</sup> August 2024 was issued. That the application for Notice to Show Cause was adjourned on 4<sup>th</sup> September 2024 at the instance of the defendant's course. That when the matter came up for Notice to Show Cause on 16<sup>th</sup> October 2024 the appellant Morris Munameza Isiye sought for 6 months to sell his property himself before the process of public auction could proceed. That the proposal of 6 months was rejected by the 1<sup>st</sup> respondent who made a counter offer of 1 month and since the parties failed to agree the trial magistrate fixed the matter for ruling on 23.10.2024 on the notice to show cause. That on that date the learned trial magistrate posted the ruling on e-filing platform and none of the parties sought to appeal against the same. He also stated that the firm of Awuonda Frankline & Co. Advocates now representing the appellant herein never represented any party in the lower court and that it is not true that the court granted the appellant 30 days leave to appeal.
6. He maintained that since the appellant needed six months to settle the decree, his prayer was indirectly granted when the respondent delayed in extracting warrants of attachment and sale, since it is now 7 months. He stated that he paid the appellant the entire purchase price of kshs. 2,200,000 in 2019 and that the appellant had insisted at the trial that he was able to refund the consideration, he must keep his land and he should not keep the land and the money as that will be unfair. He lamented that it was now 5 years since the appellant received the purchase price and that he is using the court process to evade execution. He urged the court to order the appellant to first pay 4,027,833/= before the orders sought are granted.
7. No response was filed by the 2<sup>nd</sup> respondent. The application was disposed by way of written submissions. On record are submissions filed by the applicant dated 9<sup>th</sup> May 2025 and those of respondent dated 26<sup>th</sup> May, 2025 both of which this court has duly considered.

### **Analysis and determination**

8. The court has carefully considered the application, response and submissions. In my considered view, two issues arise for the court's determination, namely;
  - a. Whether the appeal before court is incompetent for want of leave to appeal out of time.
  - b. Whether the appellant has met the threshold for grant of stay of execution pending appeal.
9. Order 43 of the *Civil Procedure Rules* provides for instances where an appeal shall lie as of right and where leave must first be obtained before an appeal is filed. In regard to orders issued under Order 22, an appeal shall lie as of right in respect of orders issued under Order 22 Rules 25, 57, 61 (3) and 73 (orders in execution). In this case, the memorandum of appeal show that the appellant appealed against the order of the trial court made on 23<sup>rd</sup> October 2024. Having considered the application and replying affidavit, it is clear that none of the parties attached the ruling and or order appealed against and therefore this court has no advantage of knowing under which legal provision the order was made. In the premises, the court cannot tell whether or not the appellant needed leave to appeal against the order of 23<sup>rd</sup> October 2024. Therefore, in premises the plea that the appeal is incompetent as of now has not been demonstrated by the respondent.



10. On whether the appellant is entitled to an order of stay of execution of the order dated 15<sup>th</sup> November 2024, it is trite that the court has power to order stay pending appeal.
11. Order 42 Rule 6 of the *Civil Procedure Rules* provides for the jurisdiction of the court to grant orders of stay of execution pending appeal as follows;

Stay in case of appeal [Order 42, rule 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 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.
12. Essentially, imminent execution in itself cannot be a basis for grant of stay of execution pending appeal, as execution is a lawful process that follows grant of an order, judgment or decree by a court. Therefore, for an applicant to succeed in seeking stay pending appeal, they must demonstrate that they stand to suffer substantial loss if stay is not granted; that they have sought for stay without unreasonable delay and show willingness to provide security for the due performance of the decree that may issue against them.
13. The Court of Appeal enunciated principles to be considered in determining whether to grant or refuse stay of execution pending appeal in *Butt vs Rent Restriction Tribunal* [1979]KLR as follows:
  - a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
  - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
  - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.



- d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

14. In this case, while the appellant sought for stay of execution of the order dated 15<sup>th</sup> November 2024, but did not attach the said order. Besides, in his affidavit he never referred to the order dated 15<sup>th</sup> November 2024, but referred to the order of 23<sup>rd</sup> October 2024, which he also did not attach. Not every order issued by court is capable of, and or should be stayed. In the absence of the order sought to be stayed, this court cannot appreciate the basis of the appellant's application.

15. For those reasons, I find no merit in the application dated 6<sup>th</sup> May 2025 which I hereby dismiss with costs to the respondent.

16. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 24<sup>TH</sup> DAY OF JUNE, 2025**

**A. NYUKURI**

**JUDGE**

In the presence of

Mr. Awuondo for the appellant

Mr. Balusi for the 1<sup>st</sup> respondent

No appearance for the 2<sup>nd</sup> respondent

Court Assistant: M. Nguyai

