



REPUBLIC OF KENYA



**KENYA LAW**  
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**Munge v Nairobi City County & 3 others (Civil Suit 155 of 2021)  
[2025] KEELC 1141 (KLR) (21 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 1141 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
CIVIL SUIT 155 OF 2021  
JO MBOYA, J  
JANUARY 21, 2025**

**BETWEEN**

**CHARLES MUNGE ..... PLAINTIFF**

**AND**

**NAIROBI CITY COUNTY ..... 1<sup>ST</sup> DEFENDANT**

**JOYCE MUNJIRU MWANGI (BEING THE ADMINISTRATOR OF THE ESTATE  
OF PAUL MWANGI NGUTHE) ..... 2<sup>ND</sup> DEFENDANT**

**JANE WAMBUI ..... 3<sup>RD</sup> DEFENDANT**

**CHIEF LANDS REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction and Background**

1. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants [hereinafter referred to as the Applicants] have approached the court vide Notice of motion application dated the 30<sup>th</sup> July 2024 and in respect of which the Applicant has sought for the following reliefs;
  - i. That the instant Application be certified as urgent and heard Ex-parte in the first instance
  - ii. That there be a stay of execution of the Judgment delivered on 10th July 2024; and any resultant decree thereof pending the filing, hearing and final determination of an intended Appeal in the Court of Appeal against the said Judgment
  - iii. That pending the hearing of the instant Application inter-parties, there be an interim order in terms of prayer 2 hereinabove.
  - iv. That the costs of this Application do abide the outcome of the intended Appeal.



- v. That the court be at liberty to issue such other or further order as it shall deem appropriate in the circumstances.
2. The instant application is premised and anchored on various grounds which have been enumerated in the body thereof. Furthermore, the application is further supported by the affidavit by the 2<sup>nd</sup> Applicant, namely, Joyce Munjuru Mwangi sworn on even dated and a supplementary affidavit sworn on the 3<sup>rd</sup> October 2024. The supplementary affidavit has annexed various documents including a copy of the record of appeal that has since been file at the court of appeal.
3. Upon being served with the instant application, the Plaintiff/Respondent filed a Replying affidavit sworn on the 23<sup>rd</sup> September 2024; and wherein the Plaintiff/Respondent has contended inter-alia that the Applicant herein has neither demonstrated nor established the requisite ingredient[s] for the grant of an order of stay of execution pending the hearing and determination of the pending appeal. Moreover, it has been contended that the intended appeal does not raise any arguable grounds.
4. The 1<sup>st</sup> and 4<sup>th</sup> Defendants do not appear to have filed any response to the application. For good measure, there is no Replying affidavit or grounds of opposition that is traceable to the e-platform of the court.
5. The subject application came up for hearing on the 24<sup>th</sup> October 2024; whereupon the advocates for the parties covenanted to canvass and dispose of the application by way of written submissions. To this end, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.
6. Suffice it to state that the Applicants filed written submission dated the 16<sup>th</sup> October 2024; whereas the Plaintiff/Respondent filed write submissions dated the 28<sup>th</sup> November 2024. For coherence, both sets of written submissions are on record.

### **Parties' Submissions:**

#### **a. Applicants' Submissions:**

7. The Applicants filed written submissions dated the 16<sup>th</sup> October 2024; wherein same have adopted the averments contained in the body of the supporting affidavit sworn on 30<sup>th</sup> July 2024; and the further affidavit sworn on 3<sup>rd</sup> October 2024. In addition, the Applicants herein have raised and canvassed three [3] salient issues for consideration by the court.
8. Firstly, learned counsel for the Applicants has submitted that the Applicants were aggrieved by and dissatisfied with the Judgment and decree of the court which was delivered on the 10<sup>th</sup> July 2024. In this regard, learned counsel for the Applicants has contended that the Applicants thereafter instructed same [learned counsel] to proceed and file a Notice of appeal.
9. Moreover, learned counsel for the Applicants has submitted that pursuant to and in accordance with the instructions of the Applicants, a Notice of appeal was duly filed and lodged with the registry of this court. In any event, it has also been contended that subsequently, the Applicants have filed the record of appeal at the Court of Appeal.
10. Arising from the foregoing, learned counsel for the Applicants has therefore submitted that the Applicants herein have established and demonstrated the existence of sufficient cause to warrant the grant of an order of stay of execution pending the hearing and determination of the appeal before the Court of Appeal.



11. Secondly, learned counsel for the Applicants has submitted that the orders of the court which are the subject of the intended appeal decreed the cancellation of the certificate of title belonging to and registered in the name of the 2<sup>nd</sup> Defendant and the consequential sub-divisions arising therefrom. In this regard, learned counsel for the Applicants has submitted that the implementation and execution of the decree of the court shall occasion substantial loss to the Applicants herein.
12. Furthermore, it has been submitted that insofar as the court has since declared the Plaintiff/Respondent to be the lawful and legitimate proprietor of the suit property, the Plaintiff/Respondent shall therefore be at liberty to enter upon and take possession of the suit property. In this regard, it has been posited that in the event that the Plaintiff/ Respondent proceeds to and commence[s] the process of taking of possession, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants shall be exposed to eviction from the suit property.
13. Thirdly, learned counsel has submitted that the Applicants herein are ready and willing to provide such security as the court may deem appropriate. Nevertheless, the Applicants have contended that the circumstances obtaining in respect of the instant mater would however necessitate the granting of an order of stay of execution without decreeing/ directing provision of security.
14. In support of the foregoing submissions, learned counsel for the Applicants has cited and referenced various decisions including *RWW v EKN* [2019]Eklr and *Nairobi City County v Mwangi King'ori* [2024]KEELC 1367[KLR].

**b. Plaintiff's/Respondent's Submissions:**

15. The Plaintiff/Respondent herein filed written submissions dated the 28<sup>th</sup> November 2024 and wherein the Plaintiff/Respondent has adopted and reiterated the contents of the Replying affidavit sworn on the 23<sup>rd</sup> September 2024. Furthermore, the Plaintiff/Respondent has ventured forward and highlighted two [2] salient issues for consideration and determination by the court.
16. First and foremost, learned counsel for the Plaintiff/Respondent has submitted that the Applicants herein have neither established nor demonstrated the existence of a sufficient cause to warrant the grant of an order of stay of execution pending the hearing and determination of the intended appeal.
17. In any event, it has been posited that the intended appeal which has been referenced by the Applicants does not even raise any arguable ground of appeal. Simply put, it has been submitted that the Appeal referenced is frivolous and doomed to fail.
18. Secondly, learned counsel for the Plaintiff/Respondent has submitted that the Applicants herein have not provided any evidence to substantiate the claim/allegations that same [Applicants] shall be disposed to suffer substantial loss in the event that the orders of stay sought are not granted.
19. Additionally, it has been submitted that the title held by the 2<sup>nd</sup> Defendant/Applicant having been found to be a nullity, the Applicants herein have no demonstrable rights over and in respect of the suit property capable of being protected vide an order of stay of execution of the Judgment pending the determination of the Appeal; or at all.
20. Premised on the foregoing, learned counsel for the Plaintiff/Respondent has therefore implored the court to find and hold that the Applicants have neither established nor proven the requisite ingredients to warrant the grant of the orders of stay of execution, either in the manner sought or at all.



21. Arising from the foregoing, learned counsel for the Plaintiff/Respondent has invited the court to find and hold that the application beforehand is therefore devoid of merits and thus ought to be dismissed with costs to the Respondent.

### **Issues for Determination:**

22. Having reviewed the Application beforehand; the response thereto and upon consideration of the written submissions filed on behalf of the respective parties, the following issues do emerge [crystalize] and are thus worthy of determination;
  - i. Whether the Applicants have demonstrated the existence of sufficient cause.
  - ii. Whether the Applicants shall be disposed to suffer substantial loss if the orders sought are not granted.
  - iii. What security, if any; ought to issue.

### **Analysis and Determination**

#### **Issue Number 1**

Whether the Applicants have demonstrated the existence of Sufficient cause.

23. The application beforehand seeks for an order of stay of execution of the Judgment and decree that was issued by this court on the 10<sup>th</sup> July 2024. In this regard, there is no gainsaying that the application under reference is predicated and anchored on the basis of the provisions of Order 42 Rule 6[1] and 6[2] of the Civil Procedure Rules 2010.
24. To the extent that the application beforehand seeks the orders of stay of execution pending the hearing and determination of the intended appeal, it suffices to underscore that it is incumbent upon the Applicant to establish the existence of three [3] critical ingredients, namely, the existence of sufficient cause; the fact that the application has been mounted without unreasonable delay; and finally, the likelihood of substantial loss arising, in the event the Orders sought are not granted.
25. Pertinently, the obligation cast upon the Applicants to establish/demonstrate the existence of sufficient cause is anchored on the provisions of Order 42 Rule 6[1] of the Civil Procedure Rules 2010 which highlights sufficient cause as the launch pad, precursor or prelude to partaking of an order of stay of execution.
26. Given the significance of the provisions of Order 42 Rule 6[1] of the Civil Procedure Rules, it is apposite to reproduce same.
27. In this regard, the said provisions are reproduced as hereunder
  6. 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.



28. Bearing the provisions of Order 42 Rule 6[1] [supra] in mind, it is now apposite to revert to the instant and discern whether the Applicants herein have established and demonstrated the existence of sufficient cause. For good measure, there is no gainsaying that the Applicants herein filed a Notice of appeal demonstrating their intention to pursue their undoubted right of appeal to the Court of Appeal.
29. Moreover, it is also worthy to recall that the 2<sup>nd</sup> Defendant/applicant also swore a Supplementary affidavit and wherein same [2<sup>nd</sup> Applicant] availed to the court evidence of the record of appeal which has since been filed. In this regard, it is common ground that there is an appeal which has since been filed.
30. To my mind, the filing and lodgment of an appeal by and on behalf of the Applicants herein demonstrates and constitutes sufficient cause which should act as a precursor to the granting of an order of stay, subject however to the Applicants surmounting the hurdle[s] of substantial loss; and essentially, meeting the grounds highlighted at the foot of Order 42 Rule 6[2] of the Civil Procedure Rules, 2010.
31. Nevertheless, it is imperative to underscore that whether or not the appeal which has since been lodged before the Court of Appeal espouses arguable grounds or otherwise, does not fall for the determination of this court. Instructively, such a determination belongs to the Court of appeal and not otherwise.
32. Owing to the foregoing exposition of the law, I therefore find and hold that the elaborate arguments by and on behalf of the Plaintiff/Respondent based on the contention that the intended appeal is not arguable; or better still, is not arguable, do not lie. To say the least, the said arguments are misplaced and misconceived.
33. Moreover, the said submissions are premature and misconceived.

## **Issue Number 2**

### **Whether the Applicants shall be disposed to suffer substantial loss if the orders sought are not granted.**

34. Having established and proven the existence of sufficient cause [which has been addressed at the foot of issue One hereof], it behooves the Applicants to venture forward and to prove that same [Applicants] shall be disposed to suffer substantial loss in the event that orders sought are not granted. Instructively, substantial loss has been described as the fulcrum and the cornerstone upon which an order for stay of execution pending appeal is predicated.
35. Put differently, an Applicant desirous to partake of and or benefit from an order of stay of execution pending the hearing and determination of an appeal or better still, an intended appeal, must prove that same [Applicant] shall suffer substantial loss. For coherence, substantial loss denotes such loss that is likely to occasion irredeemable harm, injury and/or damage to the livelihood and welfare of the Applicant.
36. Moreover, it is apposite to state and underscore that substantial loss is such loss that is not readily compensable and/or remediable by monetary compensation. However, it is not lost on the court that the mere threat of execution of a lawful court decree does not by and of itself constitute substantial loss. [See the decision in James Wangalwa versus Agnes Naliaka Cheseto [2012] eKLR]
37. Arising from the foregoing, it is therefore important to amplify that it is not enough for an Applicant to contend that the decree holder [in this case] the Plaintiff/Respondent is on the verge of executing



the decree of the court. For good measure, the Applicant must go forward to articulate factors that will impact upon the Applicant negatively in the event that the execution or threatened execution is undertaken.

38. Regarding the importance of substantial loss to an application for stay of execution, it is important to cite and reference the holding in the case of *Kenya Shell Ltd v Benjamin Karuga Kibiru & Another* [1986] eKLR, where the court of appeal [per Plat JA] stated thus;

It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.

39. The primacy of substantial loss was also highlighted by the court in the case of *James Wangalwa v Agnes Naliaka Cheseto* [2012]eKLR, where the court stated as hereunder;

11. 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

...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.”

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under order 42 Rule 6of the CPR only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above.

12. The Applicants in their Memorandum of Appeal have raised a question of res judicata. They alleged that the case being appealed against is res judicata since the same issues were determined in *Sirisia Magistrate’s Court Miscellaneous Application No. 4 of 2001*. That is an arguable point of law except the proceedings with regard to *Sirisia Magistrate Miscellaneous Application No. 4 of 2001* were not annexed.
40. Back to the instant matter. It is worthy to recall that the dispute beforehand touches on and concerns ownership of the suit property. Suffice it to state that the suit property was being claimed by the Plaintiff/Respondent on one hand and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants on the other hand.



41. It is also important to reiterate that upon the hearing and determination of the instant matter, the court found and held that the suit property lawfully belongs to the Plaintiff/Respondent. To this end, the court ventured forward and granted a plethora of reliefs including the cancellation of the certificate of titles held by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and the eviction of same [2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants] from the suit property.
42. No doubt the implementation and/or execution of the Judgment and decree of the court shall culminate into the eviction and consequential removal of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants from the suit property. Such actions, will indeed occasion and expose the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants to substantial loss.
43. Moreover, having been declared to be the lawful and legitimate owner of the suit property, the Plaintiff/Respondent herein has therefore accrued the statutory rights and privileges underpinned by the provisions of Sections 24 and 25 of the Land Registration Act 2012. In this regard, there is no gainsaying that having been declared as the legitimate owner of the suit property, the Plaintiff/Respondent may very well proceed to exercise his rights to the suit property including alienating, selling and/or charging same where apposite.
44. Suffice it to state that in the event the Plaintiff/Respondent were to undertake either of the acts alluded to and highlighted in the preceding paragraph, the substratum/ crux of the appeal would dissipate. In this regard, the loss that may accrue and/or arise is ex-facie substantial.
45. From the foregoing analysis, my answer to issue number two [2] is to the effect that the Applicants herein have equally proven and established that there is a likelihood of substantial loss to accrue and/or arise in the event the orders sought are not granted.

### **Issue Number 3**

#### **What security, if any; ought to issue.**

46. Having found and held that the Applicants herein have proved and established the existence of substantial loss, the final question that the court is obligated to engage with is the question/issue of security for the due performance of the decree that may ultimately ensue.
47. To start with, it is common ground that the Applicants herein are pursuing their undoubted right of appeal. To this end, it behooves the court to secure the Applicants pursuit of the right of appeal which constitutes one of the critical components/ tenets of the right of access to justice [See Article 48 of the Constitution, 2010].
48. On the other hand, it is not lost on this court that the Plaintiff/Respondent has a lawful decree and hence same [Plaintiff/Respondent] is entitled/enjoined to benefit from the fruits of the decree. Pertinently, the right of a party to partake of the fruit of a lawful decree cannot be over-stated.[ See the decision in the case of Joh Patrick Machira versus The East African Standard Limited [2002] eklr]
49. Arising from the foregoing, what comes to the fore is a scenario where there two competing interests and claims underpinned by concept of the due process of the law. In this regard, a court of law is enjoined to undertake a delicate balance with a view to vindicating the rights of both parties in equal measure. [See the provisions of Article 27[1] and [2] of the Constitution, 2010; which underpins the right of Every person to equal benefit and protection of the Law]
50. In the circumstances, it behooves the court which is inclined to grant stay to also proceed and ensure that the accrued rights of the judgment creditor [decree holder] are not rendered otiose.



51. In a nutshell, the foundation upon which a court of law grants an order for the provisions of security for the due performance of the decree that may ultimately ensue is to protect the accrued rights. In this regard, the nature and type of security to be decreed must therefore be reasonable and tangible. Security must not be fanciful or one that will at the tail end culminate into further litigation by the successful party.
52. The essence of security in application for stay of execution pending the hearing and determination of an appeal or an intended appeal; whichever is the case, was elaborated upon in the case of *Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014 eKLR, where the court stated thus;

I, therefore, hold that the security offered is not suitable for purposes of Order 42 rule 6 of the CPR. The Court should always remember that both the Applicants and the Respondent have rights. The Applicant has a right to his appeal and the prospects that it shall not be reduced to pious aspiration or a barren result if they pay out the decretal sum to a person who may not make a refund. The Respondent, on the other hand, has a right to the fruits of its judgment which should not be taken away; and where the right is postponed, it can only be upon adequate security for the due performance of such decree or order as may ultimately be binding on the Applicant. There is no legally binding assignment of the proprietary rights in the proposed security which the court may consider adequate to secure the due performance of such decree or order as may ultimately be binding on the Applicant. What is also startling is that the Applicants have even deposed that they may not be possessed of sufficient means to pay the decretal sum which they say is colossal. The defendants' generally based their application on alleged difficulties especially of the 1<sup>st</sup> defendant who stated has not practiced law in a long time, and that she will be rendered destitute if the execution of the warrants was allowed to take place. This not being a bankruptcy cause, the said argument can only work against the judgment-debtor as it depicts not quite bona fide intention in applying for stay. In any event, she did not provide the Court with any material to prove the difficulties she was allegedly facing in raising the decretal sum and I am not able to make any finding on those allegations.

[See also the decision of the Court of Appeal in *Nduhiu Gitahi versus Warugongo* [1988] eKLR].

53. Persuaded by the reasoning in the decision [supra] which reflect the correct interpretation of Order 42 Rule 6[2] of the Civil Procedure Rules 2010, I come to the conclusion that it is incumbent upon the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/applicants to provide security for the due performance of the Decree that may ultimately ensue/ arise.
54. In a nutshell, I am minded to and do hereby proclaim that the Applicants herein shall provide security in the sum of Kshs.1, 000, 000/= only to be deposited into an Escrow account in the name[s] of the advocates for the respective parties.

#### **Final Disposition:**

55. For the reasons which have been highlighted/ elaborated upon in the body of the Ruling hereof, there is no gainsaying that the application under reference is meritorious. In this respect, the court is persuaded to grant/allow same.
56. Consequently, and in the premises, the final orders of the court are as hereunder;



- i. The Application dated the 30<sup>th</sup> July 2024 be and is hereby allowed.
- ii. There be and is hereby granted an order of stay of execution of the Judgment dated the 10<sup>th</sup> July 2024 and the resultant decree arising therefrom pending the hearing and determination of the appeal to the court of appeal.
- iii. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants be and are hereby ordered to provide security for the due performance of the Decree that may ultimately arise.
- iv. The Applicants herein shall provide security in the sum of Kshs.1, 000, 000/= Only [One Million] to be deposited in an Escrow account in the names for the advocates for the Plaintiff/Respondent and the Applicants herein.
- v. The security in terms of clause [iii] shall be deposited in a reputable bank/financial institution to be agreed upon by the designated advocates within 30 days of the date hereof.
- vi. In default by the Applicants to comply with the terms hereof, the orders of stay shall automatically lapse and the Plaintiff/Respondent shall be at liberty to proceed with execution.
- vii. Costs of the Application shall abide the outcome of the Appeal.

57. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JANUARY 2025.**

**OGUTTU MBOYA**

**JUDGE.**

In the presence of

Benson/Mutuma Court Assistant

Mr. JM Njenga for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants

Mr. Delson Ojong'a for the 1<sup>st</sup> Defendant/Respondent

N/A for the Plaintiff/Respondent

N/A for the 4<sup>th</sup> Defendant/Respondent

