



Ulungalu Na Utanu Yatta Trading Industry and Transport Co. Ltd v Francis Mutua Mboya p/a Mutua Mboya & Nzissi Advocates & another (Environment and Land Case 72 of 2003) [2025] KEELC 4731 (KLR) (24 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4731 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE 72 OF 2003
NA MATHEKA, J
JUNE 24, 2025**

BETWEEN

**ULUNGALU NA UTANU YATTA TRADING INDUSTRY AND TRANSPORT
CO. LTD PLAINTIFF**

AND

**FRANCIS MUTUA MBOYA P/A MUTUA MBOYA & NZISSI
ADVOCATES 1ST DEFENDANT**

**NGANGA NGIGI P/A NGANGA NGIGI COMPANY ADVOCATES 2ND
DEFENDANT**

RULING

1. The application is dated 16th April 2024 and is brought under Section 3A, 63 (c) and (e) of the [Civil Procedure Act](#) Cap 21 Laws of Kenya, Order 42 Rule 6 of the [Civil Procedure Rules 2010](#) seeking the following orders;
 1. That this application be certified urgent and heard ex-parte in the first instance and inter-partes hearing be as the court may direct.
 2. That pending the hearing and determination of this application there be a stay of the revocation and the cancellation of LR. No. Titles Machakos/Matuu/5955, 5956, 5957, 5958, 5959 and 5960.
 3. That pending the hearing and determination of the Applicant's intended Appeal to the Court of Appeal, there be a stay of the revocation and the cancellation of Titles LR. No. Machakos/Matuu/5955, 5956, 5957, 5958, 5959 and 5960.



4. That pending the hearing and determination of the Applicant's intended Appeal there be a stay of this court's orders contained in the Judgment delivered on 4th April, 2024.
5. That the costs of this application be costs in the cause.
2. It is grounded on the grounds that on 4th April, 2024 this court delivered its Judgment in this matter and the Applicant is aggrieved by the entire Judgment, and has already filed a Notice of Appeal. That the Applicant's intended Appeal has strong and/or arguable grounds of appeal which he prays to argue in the intended Appeal and the granting of orders for stay of execution will advance his inalienable right to prosecute an affective appeal as recognized under Article 50 of the Constitution. That titles LR. No. Machakos/Matuu 5955, 5956, 5957, 5958, 5959 and 5960 are owned by persons not parties in this matter who stand to suffer substantial loss who have no knowledge or notice of this court's adverse orders issued on 4th April, 2024. That this court's orders contained in the Judgment delivered on the 4th April, 2024 stand to seriously prejudice persons not before court and who will have no recourse in law as they did not purchase the plots from the parties before court. If the grant of stay orders is delayed it is likely that six (6) registered titles will be revoked and cancelled and in the event the Judgment and orders appealed against are overturned the registered owners of the six titles who are not party to the proceedings herein will not be able to get their property back and this will invariably render the intended Appeal nugatory. The balance of convenience clearly weighs in favour of granting a stay of execution orders in this matter as the revocation and cancellation of titles will take the subject of the Appellants appeal beyond any redemption and Applicant's appeal will be an exercise in futility. No prejudice will be visited upon the Respondents if stay of execution is granted as the property the subject of the appeal has not been in their name for more than twenty (20) years.
3. This court has considered the application and the submissions therein. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the Civil Procedure Rules as follows;

“No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”
4. Order 42, rule 6 states:

“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.”
5. The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:



1. Substantial loss may result to the applicant unless the order is made.
 2. The application has been made without unreasonable delay, and
 3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.
6. The principles governing the exercise of the court’s jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicant must show that they have an arguable appeal and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of *Reliance Bank Ltd (In Liquidation) vs Norlake Investments Ltd* – Civil Appl. No. Nai. 93/02 (UR), thus;

Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,
2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”

7. The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in *Chris Munga N. Bichange vs Richard Nyagaka Tongi & 2 Others* eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus;

..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

8. In the case of *Mohamed Salim T/A Choice Butchery vs Nasserpuria Memon Jamat* (2013) eKLR, the court stated that;

That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right

9. We are further guided by the court’s decision in *Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others* Civil Appeal No. 291 of 1997, at Page 4 as follows:

... the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . . the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”



10. As to whether the Application has been filed without undue delay, judgment was entered on 4th April 2024. The application was filed on 16th April 2024, within one month. This court thus finds that the application for stay of execution has been filed without undue delay.
11. On substantial loss, the Respondent stated that there is no appeal to be argued as the Applicant has not attached a draft memorandum of appeal but only a notice of appeal. That the Applicant has been holding on to the Respondent's titles and land for more than 23 years. That substantial loss has not been established. I find that the Applicant has not established an arguable appeal. The draft grounds of appeal have not been disclosed and hence this court is not sure what there are. From the pleadings it appears that the Applicant deliberately transferred the titles of the suit land to third parties during the pendency of this suit knowing very well there was a dispute. Granting stay in this matter would lead to further delay and inconvenience to the Respondent who requires to enjoy the fruits of their judgment. It is trite law that litigation must come to an end and thus it would be more prejudicial to the Respondent if the orders of stay are granted.
12. Further, I am not persuaded that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the Applicant has not fulfilled the above grounds mentioned to enable me grant the stay. I find that the application is unmerited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 24TH DAY OF JUNE 2025.

N.A. MATHEKA

JUDGE

