



REPUBLIC OF KENYA



**Oduol v Yuala (Environment & Land Case 51 of 2024)
[2025] KEELC 4594 (KLR) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4594 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 51 OF 2024**

**AE DENA, J
JUNE 19, 2025**

BETWEEN

ALFRED OGOLLA ODUOL PLAINTIFF

AND

JOSEPH ONYANGO YUALA DEFENDANT

RULING

1. The application the subject of this ruling is the Notice of Motion dated 2/10/2024 by the Plaintiff. The application seeks the following orders:-
 1. That pending interpartes hearing of this application, there be a stay of execution of the decree as a result of judgment delivered on 19th September 2024.
 2. That there be an order of stay of execution of the decree pending hearing and determination of the Appeal to the Court of Appeal.
 3. Costs occasioned by the instant application abide the outcome of the Appeal.

Order No.1 is spent.

2. The application is premised on the grounds on its face and the averments in the supporting affidavit of Alfred Ogolla Adol the applicant. It is deponed that this matter being Siaya ELC Case No. 51 of 2021 was heard by this court and judgement delivered on 19th September 2024. That being aggrieved by the Judgment/Decision the applicant preferred an Appeal against the said judgment/decision by filing a Notice of Appeal. A copy of the Notice of Appeal is annexed as AOA- 1.
3. It is deponed that the Respondent/Defendant is likely to evict the applicant from the suit land and/or interfere with the same based on the said judgement. The appeal would therefore be rendered nugatory should the Honorable court fail to grant a stay of execution of the decree.



4. It is averred that the orders sought are in the best interest of justice and if the Honourable court delays to consider the Application, substantial loss shall be occasioned to the applicant together with his family may be evicted and/or rendered homeless as the Defendant/Respondent is likely to evict them from the suit land and/or subdivide the same and/or dispose of it.
5. It is reiterated that the effect of the judgement would be to render the applicant homeless and/or transferring and/or evicting him from the suit land. The applicant avers that no prejudice will be occasioned to the Defendant/Respondent as he is occupying a portion of the suit parcel.
6. The application is opposed by the replying affidavit of Joseph Onyango Yuaya the Defendant/Respondent sworn on 24/10/2024. It is deponed that the plaintiff does not have or possess any home in the land parcel E/Ugenya/Kathieno B/694 and 695 and is lying to the court. That the plaintiff is settled in parcel E/Ugenya/Kathieno B/657 where he has a home alongside other properties. A copy of a green card is annexed as JOY1. That the plaintiff has sold off part of his land and was now under pressure to encroach into the defendants parcels.
7. It is further averred that the court directed the plaintiff to meet the costs of the suit regardless of the Notice of Appeal. The plaintiff will not suffer any loss since he is peacefully settled in his own land. Further that the District surveyor together with the chief visited the site and made their reports. The court is urged to dismiss the application.
8. I note that the record bears another replying affidavit sworn on 7/02/2025 by Joseph Onyango Yuaya and filed on even date and it is not clear the circumstances under which it was filed. I have not seen the leave of the court in this regard. I'm inclined to disregard the affidavit.
9. A further affidavit is sworn by the applicant on 18/02/2025 which seems to be in response to the replying affidavit above. I will also disregard the same.

Submissions

10. The application was canvassed by way of written submissions. The plaintiff/applicants' submissions are dated 18/02/2025. Mr. Ombito for the respondent informed the court that he would rely on the replying affidavit. The court has considered the submissions and the replying affidavit.

Analysis And Determination

11. I have considered the application, the replying affidavit and the submissions on record and in my view the main issue is whether the application has satisfied the requirements for grant of orders of stay of execution.
12. The application is brought under the provisions of Article 50 (1) and 159 (2) of *the Constitution* of Kenya 2010, Section 1A & B and 63 of the *Civil Procedure Act* and Order 42, Rules 6 (1) of the Civil Procedure Rules 2010 and all other enabling provisions of the law.
13. Order 42 Rule 6 of the Civil Procedure Rules, 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 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.
14. As correctly submitted by the applicant three essential principles arise from the above provisions namely, substantial loss may result to an applicant if stay is not granted, the application is made without unreasonable delay and the applicant has given such security as the court orders for the due performance of such decree. I have also seen what was outlined by the Court of Appeal decision in Butt Vs Rent Tribunal cited by the applicant.
15. The Court of Appeal in Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365, had this to say; -

‘whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 (sic) rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.’
16. Applying the above principles to the present application I will proceed to first determine if substantial loss has been demonstrated. The Court of Appeal in Kenya Shell Limited –vs- Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018 stated that “Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.’
17. Substantial loss was further explained in the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, thus: -

“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 ... 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.”
18. It is the applicants case that he lives in the suit property and the effect of the judgement will be to render him and his family homeless. It is submitted at paragraph 8 of the applicants submissions that the respondent had actually based on the decree started cutting down the applicants trees, uprooting crops and was currently in the process of demolishing houses erected by the applicant and his family in the suit property.
19. My review of the supporting affidavit of the applicant sworn on 2nd September 2024 does not contain any depositions confirming these demolitions and cutting of the trees or any evidence in this regard. Firstly it is wrong and unprocedural for the applicant to give evidence through submissions. It is trite



that submissions do not take the place of evidence - see the Court of Appeal dictum in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR .

20. Secondly it is not enough for the applicant to state at paragraph 6 that he stands to suffer substantial loss if execution were to proceed and the appeal were to be determined in his favor. The burden of proof lies squarely on the applicant to show the exceptional inconvenience that he will suffer. I have already observed the alleged occupation and eviction has not been proved.
21. Moreover the court notes that no positive orders were issued in its judgement save for costs. The orders of the court subject of the present application are dated 19/09/2024. The same read;-
 1. That the Applicant the appeal is hereby struck out
 2. That the respondent is awarded costs.
22. Clearly the above orders are incapable of being stayed. In the case of Kenya Commercial Bank Limited Vs Tamarind Meadows & 7 Others (2016)eKLR the learned judge Olga Sewe cited with approval Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah [2008] eKLR, where the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C).”
23. Execution of costs is a lawful process as we have already seen in James Wangalwa & Another vs. Agnes Naliaka Cheseto (supra) and cannot be attributed to substantial loss.
24. The striking out of the appeal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise.
25. I think I have said enough to demonstrate why the application cannot be sustained. It is hereby dismissed. Let each party bear its own costs.

DELIVERED AND DATED AT SIAYA THIS 19TH DAY OF JUNE 2025

HON. LADY JUSTICE A.E. DENA

JUDGE

19/06/2025

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Alfred Ogola Odul the Applicant in person

Mr. Ombito for Defendant/Respondent

Court Assistant: Ishmael Orwa

