



**Ashiono v Lihutsu & 3 others (Environment & Land Case
8 of 2020) [2025] KEELC 4637 (KLR) (18 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4637 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 8 OF 2020**

**A NYUKURI, J
JUNE 18, 2025**

BETWEEN

JOHN LIHUTSU ASHIONO PLAINTIFF

AND

BERNETTA MUSANGA LIHUTSU 1ST DEFENDANT

RITA MACHESO LUYINGWA 2ND DEFENDANT

DYPHINA DIBISI LIHUTSU 3RD DEFENDANT

WILSON PETER KHAKALI 4TH DEFENDANT

RULING

1. Before court is a Notice of Motion dated 21st January, 2025 filed by the plaintiff seeking orders that there be stay of execution of the judgment herein delivered on 24th October, 2024 pending hearing and determination of the appeal. He further sought costs. The application is anchored on a supporting affidavit sworn by John Lihutsu Ashiono, the applicant in this matter dated 21st January, 2025.
2. It was the applicant's case that having been dissatisfied with the judgment of this court dated 24th October, 2024 the applicant filed an appeal before the Court of Appeal. That the appeal will be rendered nugatory and the applicant shall suffer substantial loss if the execution is not stayed. He stated that the 4th defendant was intending to attach his moveable property. That he was willing to abide by conditions that may be set by the court.
3. He attached a Notice of Appeal dated 10th November, 2024 and filed on 19th November, 2024; a proclamation notice from Dimonde Auctioneers and warrants of attachment.
4. The application was opposed. The respondents filed grounds of opposition dated 30th January, 2025. They stated that the application was incompetent, irregular, mischievous, frivolous, vexatious and an abuse of the court process. That costs were taxed on 13th September, 2023 and the application to set



aside the decree was dismissed on 24th October, 2024, hence the present application was unduly delayed with no explanation.

5. The maintained that the plaintiff failed to disclose the basis for grant of orders sought and that the intended appeal has no chance of success. That the court cannot stay execution in respect of taxed costs when there is no appeal on costs.
6. The application was disposed by way of written submissions and on record are the respondent's submissions dated 30th January, 2025 which the court had duly considered.

Analysis and determination.

7. Having carefully considered the application, response thereto and submissions, the sole issue for the court's determination is whether the applicant has met the threshold for grant of orders of stay of execution pending appeal.
8. Order 42 Rule 6 provides for the court's power to grant 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.
(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.

9. Therefore, orders of stay of execution are discretionary orders which may only issue where an applicant demonstrates that they have filed an appeal against the decision sought to be stayed; 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.
10. In the instant matter, the applicants seek for “orders of stay of execution of the judgment herein by Honourable Justice DALMAS OHUNGO delivered on 24th day of October 2024 pending hearing and determination of the appeal herein.”
11. The record herein shows that this suit was dismissed for non attendance by the plaintiff on 18th January 2023. The defendant’s costs were taxed on 13th September 2023. On 5th July 2023, the plaintiff filed a notice of motion dated 4th July 2023 seeking orders that the ruling of 18th January 2023 dismissing the suit for non-attendance be reviewed, set aside or varied. On 24th October 2024, the application dated 4th July 2023 was dismissed with costs. Clearly, there is no judgment on record dated 24th October 2024 and what was determined on that date was the application of 4th July 2024 which was dismissed with costs.
12. The notice of appeal filed herein is not in regard to the judgment made on 18th January 2023 but in regard to the dismissal order of 24th October 2024. Therefore, as both the judgment and the order of 24th October 2024 are both negative orders, there is nothing to be stayed. In any case, no appeal against the judgment has been filed. As regards the execution of the defendant’s costs, I take the view that since there is no appeal pending in regard to the taxation of the defendant’s costs, provisions of order 42 Rule 6 of the Civil Procedure Rules are inapplicable in the circumstances of this case and no stay pending appeal can be granted in regard to a decision not appealed against.
13. In the premises, I find no merit in the application dated 21st January 2025 which I dismiss with costs to the respondents
14. It is so ordered.



DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 18TH DAY OF JUNE, 2025.

A. NYUKURI

JUDGE

In the presence of;

Mr. Akwala for the defendants/respondents

No appearance for the applicant

Court Assistant: M. Nguyai

