



Gatiba & 2 others (Suing as the Legal Administrators Ad Litem of Joseph Mwaura Thuo (Deceased)) v Kahenya & 2 others (Environment and Land Case 160 of 2012 & 85 of 2014 (Consolidated)) [2025] KEELC 6228 (KLR) (25 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6228 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE 160 OF 2012 & 85 OF 2014 (CONSOLIDATED)
A OMBWAYO, J
SEPTEMBER 25, 2025

BETWEEN

ANN WAITHERA GATIBA 1ST PLAINTIFF
DUNCAN KAMAU MWANGI 2ND PLAINTIFF
SUING AS THE LEGAL ADMINISTRATORS AD LITEM OF JOSEPH MWAURA THUO (DECEASED)

AND

LOISE WAMBUI KAHENYA DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND CASE 85 OF 2014

BETWEEN

LOISE WAMBUI KAHENYA PLAINTIFF

AND

DOROTHY NYOKABI KIMANI 1ST DEFENDANT
JOSHUA GITIHA NGANGA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE SYBELLA WANJIKU GITIHA) ... 2ND DEFENDANT

RULING

1. This ruling is in respect of the Plaintiffs/Applicants Notice of Motion application dated 20th May, 2025 which sought the following orders;



1. Spent.
 2. Spent.
 3. That the honourable court be pleased to order for stay of execution of the judgment/decree herein delivered and dated 9th May, 2025 and all the consequential orders thereto pending the hearing and determination of the intended appeal from the decree herein to the Court of Appeal.
 4. That costs of the application be provided for.
2. The application was supported by the affidavit of Dorothy Nyokabi Kimani sworn on 20th May, 2025. She stated that judgment was delivered on 9th May, 2025 against her. She further stated that being aggrieved with the said judgment, they preferred an appeal vide a notice of appeal dated 12th May, 2025. She added that they were in the process of obtaining certified copies of the typed proceedings to enable them prepare the record of appeal. She stated that the appeal was arguable on the basis that the Respondent illegally obtained titles to the suit property. She went on to state that they were apprehensive that the Respondents may at any time before hearing and determination of the appeal, commence execution. She stated that they would then be evicted from the suit parcel rendering the appeal nugatory. She also stated that no prejudice will be suffered by the Respondent that cannot be compensated by costs if the application is allowed. She stated that they were ready and willing to provide such security for costs as the court may deem fit. She further stated that the application was brought without undue delay.

Response

3. The Respondent filed her replying affidavit sworn on 3rd June, 2025 where she averred that the application was an abuse of the court process. She averred that there was nothing to stay since the court dismissed the Plaintiff's suit a negative order incapable of execution. She further averred that the Respondent was not a party in the suit and has since not shown how she is aggrieved by the judgment as she was only a 1st Defendant in ELC 85 of 2014. She averred that the 2nd Defendant/Applicant in ELC 85 of 2014 never entered appearance nor filed any defence to the Respondent's claim thus he cannot intend to appeal against a suit he never challenged. She added that the Applicants have failed to offer any security for costs. She also averred that the Applicants failed to meet the threshold for grant of the orders sought. In conclusion, she urged the court to dismiss the application with costs.

Submissions

4. Counsel for the Applicant filed his submissions dated 25th June, 2025 where he identified one issue for determination being whether or not the application is merited. He relied on the case of *Tabro Transporter Ltd V Absalom Dova Lumbasi* [2012] eKLR which cited with approval in *Cartridge and Print Services (K) Limited V Techno Service Limited* (Civil Appeal E037 of 2021) [2021] KEHC 295 (KLR).
5. It was his submission that the application was filed without undue delay. He further submits that the Applicants stood to suffer irreparable harm if the stay orders are not granted since they are in possession of the suit parcel. He added that if the orders are not granted, the Respondent would evict them thus rendering them homeless. He submits that it would be a violation of their constitutional right of appeal if eviction is allowed without having confirmed whether the judgment would be upheld or set aside by the Court of Appeal. He added that the suit parcel may be wasted to an extent that the Respondent won't be in a position to compensate the Applicants in the event the appeal succeeds. It



was counsel's submission that the Respondent does not stand to suffer irreparably if execution is stayed as compared to the Applicants who stood to suffer irreparably if the execution subsists but the appeal succeeds. He relied on a number of cases including *Nyatera V Nyakundi* (Civil Appeal E033 of 2022) [2023] KEHC 3086 (KLR) and *National Industrial Credit Bank Limited V Aquinas Francis Wasike & Another* Nairobi Civil Application No. 238 of 2005 (UR). Counsel submits that if the orders sought are not granted, the Applicants stood to suffer substantially on account of being disposed of the land which the beneficiaries of the deceased's estate have drawn their livelihood.

6. He submits that the appeal is not monetary thus in the event execution is effected and the appeal succeeds, it would highly prejudice the Applicants which action cannot be compensated by costs. He relied on the case of *Butt V Rent Restriction Tribunal* (1979) eKLR. It was his submission that the Applicants have demonstrated that they are willing to meet the conditions and/or security the court may order.
7. Counsel for the Respondent filed his submissions dated 20th June, 2025 where he reiterated the contents of the Respondent's replying affidavit. He submits that the 2nd Defendant in ELC 85 of 2014 had not opposed the Applicant's claim in ELC 85 of 2014 but only as an applicant in the present application. He further submits that the Applicant cannot purport to appeal against the judgments arising therefrom as it would not be sustainable. He submits that the application had not met the threshold for grant of stay of execution since the court had dismissed the suit thus there was nothing capable of execution. He relied on the case of *Mbaraka Said Al and another V Sultan Palace Development Limited* [2021] KECA 443 (KLR) which cited with approval the case of *Western College of Arts and Applied Sciences V EP Oranga & 3 Others* [1976] eKLR. He submits that the application lacked merit and urged the court to dismiss it with costs.

Analysis and determination

8. This court has carefully considered the application and the main issue for determination is whether the order for stay of execution pending appeal should issue.
9. In this case, it is not in contention that was delivered on 9th May, 2025. In the said judgment the court dismissed the Plaintiff's case. The Plaintiff/Applicant filed a Notice of Appeal dated 12th May, 2025 against the said ruling.
10. In the case of *Gitundu V Watbuku* [2022] KECA 959 (KLR), the court held as follows:

Additionally, even if we had the requisite jurisdiction, this Court has said time without number that stay orders cannot issue in respect of negative orders, where the court has not ordered any of the parties to perform any task."

11. Further, in the case of *Raymond M. Omboga V Austine Pyan Maranga* Kisii HCCA No 15 of 2010 the court held that:

The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court..."



12. It is not in dispute that the Plaintiff/Applicant is seeking to stay a dismissal of a preliminary objection. It is this court's view that the said order in its nature is a negative order incapable of execution.
13. In view of the above, this court cannot stay an action unless there exists a positive order which if executed will result in a loss to the other party.
14. The upshot of the above is that this court cannot stay a negative order of dismissal. The application is therefore without merit and is dismissed with costs. It is so ordered.

RULING DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 25TH DAY OF SEPTEMBER 2025.

A.O.OMBWAYO

JUDGE

