

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. E079 OF 2021

KEIKO SUGIYAMA.....

PLAINTIFF

-VERSUS-

PARTRICK KAMAU NG'ANG'A1ST

DEFENDANT

JAMES KIMANI GITHONGO.....2ND

DEFENDANT

LUCY WANGARI NJENGA.....3RD

DEFENDANT

LAND REGISTRAR KAJIADO.....4TH

DEFENDANT

SIDIAN BANK.....INTERESTED

PARTY

RULING

(In respect of the Notice of Motion application dated 9th April 2025 seeking a stay of execution of the judgement of this court pending appeal to the court of appeal)

Background

1. This ruling is in respect of the Notice of Motion application dated 9th April 2025 in which the Applicants seek the following orders: -
 - a) That there be a stay of execution of the Judgment of this Honourable Court delivered on 4th March 2025 pending the hearing and determination of the intended appeal to the Court of Appeal.
 - b) That in the alternative, there be a stay of cancellation or revocation of the Applicants' titles to **L.R. No. Kajiado/Kitengela/89956-89976** until such time as the Plaintiff shall have refunded the sum of **Kenya Shillings Thirteen Million Two Hundred and Forty-Nine Thousand Nine Hundred and Ninety-Nine and Thirty Cents (KShs. 13,249,999.30)**, being the consideration paid to the Plaintiff by the 1st Defendant.
 - c) That this Honourable Court be pleased to grant such further or other orders as it may deem fit and just in the circumstances.
 - d) That costs of this Application be provided for.

2. On 4th March 2025, this Court delivered judgment in favour of the Plaintiff as against the 1st and 2nd Defendants. In the said decision, the Court declared that the suit property, comprising **L.R. No. Kajiado/Kitengela/89956-89976**, belonged to the Plaintiff as the absolute proprietor; ordered the cancellation and revocation of all titles issued to the 1st Defendant and restoration of the register as at 22nd February 2016; issued a permanent injunction restraining the Defendants and the Interested Party from interfering with the Plaintiff's ownership and possession; directed the 1st and 3rd Defendants to execute transfer instruments in favour of the Plaintiff failing which the Deputy Registrar to do so; and finally awarded the Plaintiff costs and interest. The Court too ordered that the consideration paid by the 1st Defendant to the Plaintiff be refunded.

3. Aggrieved by the said Judgment, the Applicants have expressed their intention to appeal to the Court of Appeal and have filed a Notice of Appeal dated 10th March 2025. They have also sought typed proceedings to facilitate the filing of the Record of Appeal. Pending the hearing and determination of the intended appeal, the Applicants have moved this Court seeking inter alia, stay of

execution of the Judgment and Decree. In the alternative, they pray that the cancellation or revocation of their titles be stayed until the Plaintiff refunds them the sum of Kenya Shillings Thirteen Million Two Hundred and Forty-Nine Thousand Nine Hundred and Ninety-Nine and Thirty Cents (KShs. 13,249,999.30), which the Court confirmed had been paid to him as the purchase price.

4. The Application is premised on the grounds that unless stay is granted, the Applicants will suffer substantial loss as the Plaintiff, being a foreigner who has since relocated to Japan, may be beyond their reach should they wish to pursue a refund of the sums already paid to her. They contend that their intended appeal is arguable, that this application has been filed timeously, and that the balance of convenience tilts in favour of preserving the substratum of the appeal.

5. The application is opposed. The Plaintiff/Respondent filed Grounds of Opposition dated 11th June 2025 contending, inter alia, that the application is fatally defective having been brought more than one month after delivery of the judgment without any reasonable explanation, which delay demonstrates that the application is an

afterthought intended to obstruct execution and deny her the fruits of her judgment. The Respondent further avers that this Court already made a clear finding of fraud against the Applicants, and therefore, their assertion that the intended appeal has overwhelming chances of success is untenable. It is argued that the Applicants have failed to demonstrate with specificity how they intend to dislodge that finding of fraud on appeal, rendering their prospects speculative and unsubstantial.

6. The Respondent also maintains that granting a stay would occasion grave prejudice, as it would allow the Applicants to perpetuate the fraudulent transfer while continuing to deprive her of her constitutional right to property protected under Article 40 of the Constitution. It is also pointed out that the Applicants had not completed paying the purchase price, and therefore, a stay would result in unjust enrichment at her expense. The Respondent further submits that the Applicants have not demonstrated any irreparable harm incapable of compensation by damages, and that the Applicants' fears that recovery from the Plaintiff would be impossible are unfounded, since she owns property in Kenya against which execution can issue, and the law

provides adequate mechanisms for execution against parties residing abroad.

7. Finally, the Respondent contends that the discretion to grant stay of execution must be exercised only where special circumstances exist, which the Applicants have not demonstrated. In her view, no such circumstances have been established, and it is in the interest of justice that the application dated 9th April 2025 be dismissed with costs.

Directions

8. The court directed that the application be canvassed by way of written submissions. I have read the parties' submissions and considered them in the writing of this ruling.

Analysis and Determination

9. The singular issue for determination is whether the Applicants have satisfied the legal requirements for grant of stay of execution pending appeal.

10. The governing provision is **Order 42 Rule 6(2) of the Civil Procedure Rules, 2010**, which provides as follows: -

“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.”

11. The Court of Appeal in **Butt v Rent Restriction Tribunal [1979] eKLR**, emphasized the discretionary nature of stay orders, stating: -

“The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle is that a successful litigant is entitled to the fruits of his judgment... the court in exercising its discretion should see

that the appeal is not rendered nugatory should it succeed.”

12. In addition, the Court of Appeal in **Kenya Shell Ltd v Benjamin Karuga Kigibu & Ruth Wairimu Karuga [1982-1988] 1 KAR 1018**, too held that: -

“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 cornerstone of both jurisdictions for granting a stay. That is what has to be prevented.”

13. On the first limb, the Applicants argue that unless stay is granted, they will suffer substantial loss because the Respondent permanently resides in Japan and may not be within reach should they seek a refund of the **KShs. 13,249,999.30** paid as consideration. The Respondent disputes this assertion, contending that she owns immovable property in Kenya, including the suit property, and that the law provides mechanisms for execution against a person residing outside the jurisdiction.

14. In *Kenya Shell Ltd v Benjamin Karuga (supra)*, the Court underscored that substantial loss is more than ordinary loss—it must be real, irreparable, or disproportionate.
15. The Applicants have not demonstrated, beyond bare assertions, that they would be unable to recover their monies in the event their appeal succeeds. The Respondent has shown that she has attachable property in Kenya and further pointed to the statutory safeguards for execution against persons abroad. I am therefore not persuaded that the Applicants have established the kind of substantial loss envisaged under the law.
16. On the second limb, judgment was delivered on 4th March 2025, and the present application was filed on 9th April 2025, just over one month later. While the Applicants argue that they moved without delay, the Respondent contends that the delay is unreasonable. In my view, the delay of slightly over one month, in the circumstances of this case, cannot be termed inordinate, especially given that the Applicants filed a Notice of Appeal within the statutory period. This limb is satisfied.

17. On the third limb, the Applicants have not made any proposal regarding security for the due performance of the decree. In **Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR**, the Court held that:

“The purpose of the security under Order 42 Rule 6 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the applicant....”

18. In the absence of any express willingness or proposal to provide security, the Applicants have failed to comply with this requirement.

19. Additionally, I note that this Court, in its judgment made a finding of fraud against the Applicants, a finding reached after applying the heightened evidentiary standard required in such cases. As was stated in **Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others [1996] eKLR**, fraud vitiates everything. The Applicants have not demonstrated how their intended appeal would surmount that factual finding.

20. Finally, I am guided by the principle that the Court must balance the competing rights of the parties. The Respondent is entitled to enjoy the fruits of her judgment, while the Applicants are entitled to pursue their appeal without it being rendered nugatory. However, in the circumstances of this case, the Applicants have not shown the existence of special circumstances that would justify depriving the Respondent of the benefit of her judgment by demonstrating that they would suffer substantial loss unless the order of stay is granted.
21. Having carefully weighed the law, the facts of this case, and the judicial authorities cited above, I find that the Applicants have failed to satisfy the threshold under **Order 42 Rule 6(2)** of the Civil Procedure Rules. In particular, they have not demonstrated substantial loss which is the cornerstone for granting a stay.
22. Accordingly, the Notice of Motion dated 9th April 2025 is hereby dismissed with costs to the Plaintiff/Respondent.

Dated Signed and Delivered at Kajiado Virtually this 30th Day of September 2025.

M.D. MWANGI
JUDGE

In the virtual presence of:

Ms. Chepkoyo h/b for Mr. Dalila for the Plaintiff/Respondent

Ms. Mumbi h/b for Mr. Omiti for the 1st and 2nd
Defendants/Applicants

Court Assistant: Mpoye

M.D. MWANGI
JUDGE