



Salim & another v Shallo & 5 others (Environment and Land Case 17 of 2014) [2025] KEELC 6247 (KLR) (24 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6247 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE 17 OF 2014
FM NJOROGE, J
SEPTEMBER 24, 2025**

BETWEEN

ABDALLA MOHAMED SALIM 1ST PLAINTIFF

ALI MOHAMED SALIM 2ND PLAINTIFF

AND

OMAR MOHAMED SHALLO 1ST DEFENDANT

FAISAL HASSAN ALI 2ND DEFENDANT

THE COUNTY LAND REGISTRAR, KILIFI 3RD DEFENDANT

THE COUNTY LAND REGISTRAR, MOMBASA 4TH DEFENDANT

THE HON ATTORNEY GENERAL 5TH DEFENDANT

DIRECTOR OF SURVEYS 6TH DEFENDANT

RULING

1. The subject of this ruling is a Notice of Motion application dated 13/2/2025 wherein the Applicants implore this court to grant the following orders: -

1.Spent;

2.Spent;

3.Spent;

4. After the said inter-parties hearing of this application this court be pleased to grant a stay of execution of the orders/judgment rendered on 24/4/2023 be granted pending the hearing and determination of the 1st and 2nd Applicants’ appeal;



5. This honourable court do grant such further orders as it deems necessary and expedient in the circumstances;
 6. An appropriate order be made for costs of this application.
2. The application, which is supported by the affidavit of Omar Mohamed Shallo sworn on the same date, is premised on the grounds that this Court delivered a judgment on 24/4/2023 in favour of the Plaintiffs and against the Applicants. The Applicants have expressed their intention to appeal the said judgment and have already filed a Notice of Appeal on 27/4/2023. However, they contend that they are yet to be issued with a certified decree, which is necessary for the preparation and filing of the record of appeal. It is averred that their advocate has been making formal requests for the said decree since 4/12/2024, but the same has not been provided.
 3. The Applicants further aver that the Plaintiffs have commenced execution of the judgment and have entered the suit property, fenced it off, and subdivided it into several portions with the intention of disposing of the same by way of sale. They contend that they face real and imminent danger of suffering irreparable loss and damage should the Plaintiffs proceed to execute the judgment, including execution on costs. According to the Applicants, such execution would gravely prejudice their legal rights and render the intended appeal nugatory, futile, and academic.
 4. The Plaintiffs, in response to the application, hereby oppose the said application on the following grounds raised in the grounds of opposition dated 19/2/2025:
 1. The defendants/applicants are guilty of laches, and their application for an order of stay execution has not been filed and prosecuted with promptitude.
 2. The reasons set out in the application for the inordinate delay in moving the court are spurious and mala fides.
 3. The defendants refused or failed to approve the draft decree physically served on their advocates on 26.04.2023, and they now cannot use that as an excuse for the delay, or for failure to settle the decree having forfeited that opportunity by contumelious default.
 4. The proposed appeal and application for stay of execution are otherwise an afterthought, seeing that the applicants have without a good reason, waited for 23 months to move the court.
 5. The applicants' delay and sloppy conduct is equal to acquiescence with the judgement of court, and granting of the application would work grave prejudice to the plaintiffs.
 6. The plaintiffs who were the registered owners of the suit land have waited for too long, invested in sub-division process and a stay at this stage would escalate costs and needlessly delay them from enjoying the fruit of their judgement.
 7. The public and judicial documents exhibited with the application for stay of execution do not comply with sections 2 and 64, 68 (3) (c), and 79 of the Evidence Act.
 8. In so far as this application seeks to abridge or buy the applicants time, it is not made to the right court, or the right section of the law (i.e. Sec. 7 of Appellate Jurisdiction Act) and applicable rules of court, and is otherwise an abuse of the court process.
 9. There must be an end to litigation. And the applicants' advocates' conduct of these proceedings has not assisted the court to realise early resolution of this dispute, which in equity disentitles the applicants to any exercise of discretion.



5. In addition, the Plaintiffs filed a replying affidavit sworn by Ali Mohamed Salim on an even date. He avers that following the court's judgment, he sold his parcel of land, Kilifi/Takaye Musoloni/483, to raise funds for medical treatment for himself and his co-plaintiff, both of whom have been unwell. He states that the only remaining unsold property is Kilifi/Takaye Musoloni/666, and that the decree is not severable. Consequently, in his view, a stay of execution would serve no practical purpose since the property has already been transferred to a third party.
6. He further challenges the credibility of photographs annexed by the Applicants, stating they are unclear, uncertified, and improperly introduced in evidence. He confirms that the Applicants had refused to approve the draft decree, which was physically served on their former advocates on 26/4/2023. He maintains that the application for stay was brought too late and adopts the separately filed grounds of opposition in their entirety as part of his sworn response.
7. In a further affidavit sworn by the 1st Applicant on 26/5/2025, the deponent contends that the Plaintiffs were fully aware of the Applicants' intention to appeal, yet proceeded to sell the suit property to a third party on 9/5/2024, which he characterizes as malicious and done in bad faith. He further deposes that delays in obtaining the proceedings and certified decree have hindered the lodging of the appeal.
8. Mr. Shallo denies that a certified decree was served on their former advocates, arguing that there is no evidence of receipt such as a receiving letter. He questions the authenticity and legality of the Plaintiffs' reliance on what he terms a draft decree, and asserts that no signed or sealed decree has been shown to justify the Plaintiffs' sale and transfer of the suit property.
9. He concludes that if such service did occur, he was not informed by his former advocate, whom he had difficulties reaching at the material time, and therefore considers himself a stranger to the alleged service.
10. The application was canvassed by way of written submissions.

Applicants' Submissions

11. Through their counsel, the Applicants invoke the Court's discretion under Order 42 Rule 6 of the Civil Procedure Rules and submit that unless stay is granted, the appeal will be rendered nugatory. They assert that a Notice of Appeal was duly filed on 27/4/2023, but delays in obtaining certified proceedings and a decree were caused by the inaction of their previous advocates, Gicharu Kimani & Associates, who later abandoned the matter. The Applicants subsequently instructed K. Lughanje & Company Advocates, who pursued the file and secured the decree only on 12/5/2025, despite repeated requests.
12. The Applicants contend that the Plaintiffs were fully aware of the appeal but still proceeded to sell, fence, and subdivide the suit property (Plot No. Kilifi/Takaye/Musoloni/483). They submit that these actions were undertaken in bad faith, and that continuing with execution will irreparably affect the Applicants' rights and render the appeal academic. In support of this, the Applicants cite: Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR, defining a nugatory appeal as one that would be worthless or irreversibly prejudiced; RWW v EKW [2019] eKLR, affirming that stay is meant to preserve the subject matter pending appeal; Butt v Rent Restriction Tribunal [1979], setting out principles for exercising discretion in stay applications; Kerugoya HCC Civil Appeal No. 305 of 2013, and Rubo Kimnetich Arap Cheruiyot v Peter Kiprof Rotich [2006] eKLR, both emphasizing that judgment alone is not executable unless reduced into a signed and sealed decree, which the Applicants argue the Respondents failed to obtain prior to executing transfer.



13. Importantly, the Applicants rely on the principle set out in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, where the Court emphasized that: "Substantial loss is what has to be prevented by preserving the status quo, because such loss would render the appeal nugatory. The mere fact of execution or risk of execution does not constitute substantial loss unless the execution will irreparably affect or negate the very core of the applicant's rights in the appeal."
14. The Applicants argue that transfer and subdivision of the suit property constitutes such substantial loss, especially if the land is sold to multiple third parties, making reversal complex and expensive. They also submit that they are ready and willing to provide security for costs, as required; the Respondents have not demonstrated how they would reimburse the Applicants should the appeal succeed; and the appeal raises arguable grounds, as defined in *Stanley Kang'ethe*, being neither frivolous nor hopeless.
15. Finally, the Applicants urge the Court to disregard the Respondents' grounds of opposition, which are based on procedural technicalities, delay, and alleged acquiescence, and instead grant stay in the interest of justice, guided by Article 50 of the Constitution on the right to a fair hearing.
16. The respondents filed submissions on 26th June 2025. The respondent's counsel faulted the applicants for failing to clarify to the court what difficulties their advocates had encountered in obtaining a certified copy of the degree of the court. he also accused the applicants of entering onto the suit land and fencing it off. He faulted their photographic evidence as inadmissible. He maintained that one of the parcels has already been disposed of and only one of the suit properties is unsold. He argued that given the fact that the decree is a joint decree, then it is not severable. He referred the court to *inter alia* *Muthu Narayan Reddy Versus Balakrishna Reddy and Others* 1896 ILR 19, MAD, 306. He maintained that a stay of execution order would be in vain since one of the properties is already beyond reach. Relying on the 1897 reception clause he maintained that if there is a lacuna in our Civil Procedure Rules on the issue, there should be fall back to the pre-1924 Code of Civil Procedure of India. He referred to Order 22 Rule 11, stating that it envisages that where one of several joint decree holders may move the court in execution for the benefit of all, reserving the power of court to ensure that the absent joint decree holders are not prejudiced by their application for execution made by only some of the joint decree holders. Transfer by one of the joint decree holders was therefore proper. He stated that in any event, there is nothing in Kenyan law that bars a successful co-plaintiff from selling their property where judgment has been pronounced in their favor as long as there is no stay of execution.
17. He blamed the applicants for delay stating that Order 42 Rule 6 envisages promptitude in the making of an application for stay of execution or of proceedings and approve of substantial or a reparable loss which he has started the applicants are not established.
18. In the same breath, he maintained that the applicants cannot complain that the plaintiffs have executed the decree because there is no application for execution on record. He averred that the court upheld the plaintiffs RLA titles while declining to uphold the applicants' RTA titles. The register regarding the plaintiff's titles was left unaltered due to that fact; that in selling the land, the second plaintiff was only exercising his property rights post-judgment.

Analysis And Determination

19. I have carefully considered the application dated 13/2/2025, the affidavits for and against, the submissions by counsel, and the judicial precedents cited. The main issue for determination is whether the Applicants have met the threshold for grant of a stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules. That provision reads: -

“ 6. 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 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.
- (3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

20. The law on stay pending appeal is settled. In *Butt v Rent Restriction Tribunal* [1979], the Court of Appeal held that the power to grant stay is discretionary and ought to be exercised to prevent injustice. The applicant must demonstrate that they will suffer substantial loss unless the order is made; that the application has been made without unreasonable delay; and that they are willing to provide security for the due performance of the decree.

21. In the present matter, although the Applicants filed a Notice of Appeal on 27/4/2023, their conduct thereafter was marked by protracted delay and inaction. It is not in dispute that the application for stay



- of execution was filed nearly 23 months after the delivery of judgment, and only after the Plaintiffs had moved to implement the decree by subdividing and partially transferring the suit land.
22. The Applicants attribute the delay to their former advocates' alleged abandonment of the matter and difficulties in obtaining the certified decree. However, no credible evidence has been placed before this Court to show that they made prompt and diligent follow-up during the period in question. The excuse that the advocate became unreachable, while possible, is not sufficient to explain nearly two years of silence, particularly where the applicants knew of the judgment and had signaled their intent to appeal.
 23. The Respondents, on the other hand, have demonstrated that they physically served a draft decree on the Applicants' then advocates on 26/4/2023, who declined to approve or engage. The Court finds this to be an act of contumelious neglect by the Applicants, and they cannot now turn around and rely on the absence of a decree as a shield against their own inaction.
 24. On the issue of substantial loss, the Applicants contend that transfer and subdivision of the land could render the appeal nugatory. However, the Court notes that the suit property, at least in part, has already been transferred to a third party. The Plaintiffs aver that the decree was executed to raise funds for urgent medical needs, and that the remaining portion of land is still available. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [supra], the Court emphasized that execution in itself does not amount to substantial loss; a party must demonstrate an irreversible situation that undermines the very essence of the appeal. In this case, the Applicants have failed to do so.
 25. Moreover, there is no explanation why the Applicants failed to apply for stay immediately after filing their Notice of Appeal. Their conduct shows clear indolence, and equity does not aid the indolent. The assertion that the Plaintiffs acted in bad faith is unsupported. A party who obtains a judgment is entitled to enjoy its fruits unless validly stayed by the Court. It is also worth noting that the Plaintiffs have long subdivided and transferred part of the suit property to third parties. Granting stay at this stage would not only disrupt concluded transactions, but also introduce uncertainty and prejudice in a matter where litigation must come to an end.
 26. In the result, I find that the Applicants have not satisfied the requirements under Order 42 Rule 6. The delay is inordinate and unexplained, the risk of substantial loss is speculative, and the balance of convenience does not favour the grant of stay.
 27. In view of the foregoing, the application dated 13/2/2025 is hereby dismissed with costs to the Plaintiffs.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 24TH DAY OF SEPTEMBER, 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

