



REPUBLIC OF KENYA



**KENYA LAW**

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Mshabwa v Mwanjala (Environment and Land Appeal E005 of 2025)  
[2025] KEELC 4395 (KLR) (Environment and Land) (12 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4395 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VOI  
ENVIRONMENT AND LAND  
ENVIRONMENT AND LAND APPEAL E005 OF 2025**

**EK WABWOTO, J**

**JUNE 12, 2025**

**BETWEEN**

**CECILIAH NYONYI MSHABWA ..... APPELLANT**

**AND**

**SIMON MWACHA OO MWANJALA ..... RESPONDENT**

**RULING**

1. The Appellant being dissatisfied with the judgment delivered on 11<sup>th</sup> March 2025 in respect to Voi CMC ELC Case No. 18 of 2022 *Simon Mwachoo Mwanjala v Cecilia Mshabwa Nyonyi & Another* preferred the instant appeal from the said judgment. Contemporaneous to filing the instant appeal, the Appellant moved this court vide a Notice of Motion dated 25<sup>th</sup> April 2025 seeking inter alia for stay of execution pending the hearing and determining of this appeal.
2. The application was premised on the grounds that the trial court had declared the Appellant a trespasser and ordered her eviction within 90 days from the 11<sup>th</sup> March 2025, the Appellant has appealed against the said judgment, and the 90 days lapse on 11<sup>th</sup> June 2025, the appeal raises triable issues and that should she be evicted from the suit parcel then this appeal shall be rendered nugatory. The Appellant also filed a supporting affidavit sworn on 25<sup>th</sup> April 2025 in support of the said application.
3. The application was opposed by the Respondent vide a Replying Affidavit sworn on 30<sup>th</sup> April 2025. It was deponed that the application is premature and an abuse of the court process since the execution process has not commenced and there is no current threat to the said eviction.
4. The application was canvassed by way of written submissions pursuant to the directions issued by the court. The Appellant filed written submissions dated 9<sup>th</sup> May 2025 while the Respondent filed written submissions dated 8<sup>th</sup> May 2025 which the court has duly considered.



5. Having carefully considered the application, read through the rival affidavits and written submissions on record, the main issue for determination is whether the application is merited to warrant the reliefs sought.

6. The relevant law governing applications for stay of execution pending appeal is Order 42 Rule 6 1(2) of the [Civil Procedure Rules](#). The Rule states as follows:-

- “(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.”

7. Courts have often discussed substantially the issue of stay of execution. As such there is phelathora of decisions which guide this Court. One such decision is the case of [Halal & Another -vs- Thornton & Turpin \[1963\] Ltd](#) [1990] eKLR the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag. JA) held that:

“...thus the superior court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course, be made without unreasonable delay.”

8. In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of [Hassan Guyo Wakalo -vs- Straman EA Ltd](#) (2013) eKLR as follows:

“In addition the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory. These two principles go hand in hand and failure to prove one dislodges the other.”

9. As held in the authority cited, the grant of an order of stay of execution is a discretionary one. However, in exercising it, the Court must act judiciously, within the confines of the law and not capriciously. On that point I am guided by the Court of Appeal decision in [COI & Arnother v Chief Magistrate Ukunda Law Courts & 4 Others](#) [2018] eKLR. To act judicious means that the Court considers all facts and the law and then makes a reasoned judgment. In Brian A. Garner (2019). [Black’s Law Dictionary](#), 11th Edition, Thompson Reuters, MN, the term “judiciously” is defined to mean “to use sound judgment.” What it means is that the Court has to apply its mind to the circumstances of the case and the law as any reasonable (learned) person would and demonstrate or show it in its determination that it did so.

10. The purpose of an order for stay of execution pending appeal is to preserve the subject matter of the appeal. If the subject is not maintained before the determination of the appeal, then it would render the appeal nugatory or an academic exercise. I agree with the decision of the court in [RWW vs EKW](#) (2019) eKLR where it was held:

“.....the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted



right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

11. It therefore means that the court should endeavor to balance the interests of both the successful party in litigation so as not to unnecessarily bar him from enjoying the fruits of judgment and that of the Appellant whose appeal may succeed and be rendered nugatory if stay of execution is not granted.
12. In the instant application, judgment was delivered on 11<sup>th</sup> March 2025, the Appellant filed a Memorandum of Appeal and the consent application promptly on 27<sup>th</sup> March 2025 and 25<sup>th</sup> April 2025 respectively. The Applicant came to court within the time allowed to file the appeal. The court has perused the Memorandum of Appeal and it is my considered view that it raises arguable issues. However, that does not guarantee the issuance of the orders of stay of execution by this court without considering the merits of the application. In any event the law in Order 42 Rule 6(1) of the Civil Procedure Rules, provides that an appeal is not an automatic stay of execution of the decree of a Court.
13. On the issue of substantial loss, it is evident that the judgment of the lower court directed that the Applicant be evicted within 90 days even though the eviction process has yet to commence and in essence the appeal may be rendered nugatory on that point.
14. Having considered the aforementioned issue, it is in the court’s opinion that considering the grounds raised in the appeal and with a view of balancing the interest of both parties to this appeal and further considering that there is no specific threat to eviction at the moment, the appropriate relief to grant at this stage is for the parties to maintain order in the suit property pending the hearing and determination of the appeal and thus an order of maintenance of status quo would suffice.
15. In the circumstances, this court directs that the status quo pertaining to the suit property as at the time of delivery of the judgment of the trial court on 11<sup>th</sup> March 2025 be maintained pending the hearing and determination of the appeal.
16. In view of the foregoing, the court finds that the orders that command themselves to the court in respect to the application dated 25<sup>th</sup> April 2025 are as follows:-
  - a. An order be and is hereby issued that the status quo currently pertaining to the suit premises be maintained pending the hearing and determination of the appeal herein.
  - b. Costs of the application to abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 12<sup>TH</sup> DAY OF JUNE 2025.**

**E. K. WABWOTO**

**JUDGE**

In the presence of:-

Mr. Motuka for the Appellant.

Mr. Mwzighe for the Respondent.

Court Assistant: Mary Ngoira.

