



**Gatugi v Mwai & another (Environment and Land Appeal
E013 of 2023) [2025] KEELC 7013 (KLR) (16 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7013 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E013 OF 2023
JO OLOLA, J
OCTOBER 16, 2025**

BETWEEN

CATHERINE NYAGUTHII GATUGI APPELLANT

AND

JAMES NDIRANGU MWAI 1ST RESPONDENT

HARUN GITHENYA MURAGE 2ND RESPONDENT

RULING

1. By a Notice of Motion dated 6th October 2023, Catherine Nyaguthii Gatugi (the Appellant/Applicant) prays for an order of stay of execution of the decree issued on 5th June 2023 in Nyeri Chief Magistrates Court Environment and Land Case No. E003 of 2023 pending the hearing and determination of this Appeal.
2. The application is supported by two Affidavits sworn by the Appellant and is premised on the grounds that:
 - a. On 27th September 2023, the court delivered a Ruling dismissing the Appellant's Application dated 14th June 2023, wherein the Appellant was seeking orders to set aside the interlocutory judgment entered on 4th April, 2023;
 - b. Prior to that the Learned Trial Magistrate had issued a decree on 5th June 2023 ordering the eviction of the Appellant from the parcel of land known as No. Mweiga/Thungare Block 1/Kamiru/983;
 - c. The Appellant currently lives on the suit land and faces imminent deprivation of property and being rendered homeless if the eviction orders are effected;
 - d. The Appellant has filed an arguable Appeal that has high probability of success and will suffer substantial loss if the decree is executed before the Appeal is heard and determined;



- e. The instant application had been filed without unreasonable delay and the Applicant is willing to comply with any conditions that the court may impose; and
 - f. The Respondents shall not suffer any prejudice if the application is allowed.
3. James Ndirangu Mwai (the 1st Respondent) is opposed to the application. In his Replying Affidavit sworn on 7th November 2023, the 1st Respondent avers that the application is misconceived, bad in law and ought to be dismissed. The 1st Respondent avers that he is the registered proprietor of the suitland and further that the Appellant does not stay on the suitland and hence will not suffer any prejudice or irreparable loss.
 4. I have carefully perused and considered the Appellant’s application as well as the response thereto by the Respondent. I have similarly perused and considered the submissions placed before the court by the Learned Advocates representing the parties.
 5. By her application before the court, the Appellant prays for an order of stay of execution of the decree issued on 5th June 2023 in Nyeri CMELC. Case No. E003 of 2023. It is the Appellant’s case that the said matter proceeded ex-parte and that judgment was entered against herself without her being served with Summons to Enter Appearance.
 6. The Appellant further avers that when she learnt about the decree issued in the said matter, she did file an application dated 14th June 2023 seeking to set aside the ex-parte judgment. Her application was however dismissed by the trial court on 27th September 2023 and the Appellant moved to this court on 6th October 2023 and lodged a Memorandum of Appeal. By her application before the court, the Appellant asserts that she is now apprehensive that she stands to be evicted from the suit property and hence her plea for stay of execution pending the hearing and determination of the Appeal.
 7. In respect of an order of stay of execution, Order 42 Rule 6 of the Civil Procedure Rules, 2010 provides as follows:
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.”



8. In the case of Butt –vs- Rent Restriction Tribunal (1982) KLR 417, the Court of Appeal gave guidance on how the courts should exercise discretion in an application such as this and held as follows:

- i. 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.
- ii. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
- iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- iv. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
- v. The court in exercising its powers under order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

9. From the material placed before the court, it was apparent that following the entry of the default judgment in the trial court, the Appellant had instituted an application dated 14th June 2023 seeking to stay the same and to have it set aside. As it turned out, that application was dismissed by the trial court on 27th September 2023. Some nine (9) days later the Appellant lodged the Memorandum of Appeal herein dated 6th October 2023. Another 5 days later, the Appellant lodged the application herein seeking orders of stay of execution. In the circumstances, I had no doubt that the application had been instituted as required without unreasonable delay.

10. As to whether the Appellant stands to suffer substantial loss, this court is alive to the determination in the case of James Wangalwa & Another –vs- Agnes Naliaka Cheseto (2012) eKLR where the court observed as follows:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

11. In the matter before me, the Appellant has asserted that she presently resides on the suit land and faces imminent deprivation of property and being rendered homeless if the eviction orders are effected. At



paragraph 7 and 8 of the Replying Affidavit of the 1st Respondent, he denies the assertion made by the Appellant and avers as follows:

- “(2) 7. That the applicant is misleading this court by claiming that she resides on the suit land which is not the case; and
- (2) 8. That the applicant will not suffer any prejudice as she does not reside on the suit land and it is only mete and just that I be allowed to enjoy my property without any interference from the applicant.”

12. Those averments by the 1st Respondent were certainly devoid of truth and meant to mislead the court. The fact that the Appellant was in occupation of the suit property was the very reason the 1st Respondent had sued Harun Githenya Murage and the Appellant herein in the Lower Court. At page 1 of her judgment rendered on 24th May 2023, the Honourable M.M. Gituma SRM, captures the 1st Respondent’s claim as follows:

“Judgement

1. The Plaintiff states that he is the registered owner of land parcel no. Mweiga/Thungare Block I/Kamiru/983 (hereinafter to be referred to as the suit land). He alleges that he agreed with the 1st Defendant for the sale of the suit land. However, the said agreement was later revoked by both parties on 23rd September 2022;
2. Plaintiff states that the 1st Defendant, without any capacity to sell, sold the suit land to the 2nd Defendant who is currently in possession and occupation of the suit land;
3. It is the Plaintiff’s case that the 2nd Defendant’s occupation of the suit land violates his proprietary rights. Therefore, Plaintiff seeks the following orders:
 - a. An order of eviction against the Defendants from Mweiga/Thungare Block I/Kamiru/983.
 - b. An order of permanent injunction restraining the Defendants, their agents, servants, or otherwise from entering and/or remaining or conducting any act whatsoever on the Plaintiff’s land Mweiga/Thungare Block I/Kamiru/983.
 - c. General damages for trespass.
 - d.”

13. Arising from his own pleadings pursuant to which he had obtained the impugned judgment, the 1st Respondent cannot be allowed to come here and plead in the opposite direction. It was clear from his own pleadings that the Appellant was the one in occupation of the suit property and that the 1st Respondent is desirous of executing the order of eviction against the Appellant.

14. As was held by the Court in the case of RWW –vs- EKW (2019) eKLR.

“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.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay, however, must balance the interests of the Appellant with those of the Respondent.”

15. In the matter before me, the judgment which is the subject of the Appeal was entered in default as the Appellant claims she was not served with the summons and pleadings. Pending an inquiry as to whether or not she was served as stated by the 1st Respondent it is only fair that this court holds the scales of justice even. Balancing the rights of the Appellant who admittedly resides on the suit property and those of the 1st Respondent who has obtained a judgment in default, I find and hold that it is in the interest of justice that this court stops the imminent eviction of the Appellant from the suit premises pending the hearing and determination of the Appeal.
16. It follows that I am persuaded that there is merit in the Motion dated 6th October, 2023. I hereby allow the same in terms of prayer No. 3 thereof.
17. The costs of the application shall be in the Appeal.
18. It is so ordered.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 16TH DAY OF OCTOBER, 2025

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J.O. OLOLA

JUDGE

In the presence of:

- a. Ms. Firdaus Court Assistant.
- b. Mr. Kamande Advocate for the Appellant/Applicant
- c. Mr. Gichuki Advocate for the 1st Respondent

