

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ELC APPEAL NO E046 OF 2023

SIMON KIMANI.....1ST APPELLANT
DAVID MWANGI NJAMA.....2ND APPELLANT
KIREMBA FARMERS CO-OPERATIVE SOCIETY LTD.....3RD
APPELLANT

VERSUS

AKUISI FARMERS COMPANY LIMITED.....1ST RESPONDENT
KIFCO FARMERS CO-OPERATIVE SOCIETY LTD.....2ND RESPONDENT

RULING

1. This ruling is in respect of the 3rd Appellant/Applicant's Notice of Motion Application dated 19th June, 2025, which seeks the following orders:

a) Spent

b) Spent

c) THAT there be a stay of execution of the aforesaid Judgment/Decree pending the hearing and determination of the Appeal preferred therefrom against the court's judgment/Decree dated 17th June, 2025.

d) THAT the costs of this Application be provided for.

2. The application is supported by the annexed affidavit of Ruth Wambui, the 3rd Appellant/Applicant's counsel, who deponed that judgment was delivered on 17th June, 2025, without orders on stay of execution in favour of the Applicant who has filed a Notice of Appeal.

3. It was counsel's submission that the 1st Respondent will not suffer any prejudice if the application is allowed as the Applicant has furnished security costs by depositing Ksh 300,000/= in a joint interest-earning account. She deponed that the Applicant has moved the court timeously without undue delay.
4. Stanley Mburu Njoroge, the Secretary of the 1st Respondent, filed a Replying affidavit sworn on 5th July, 2025, and deponed that the application is meant to deny the Respondents, the successful parties the enjoyment of the fruits of judgment and quiet possession of the suit property.
5. It was his evidence that the Appellants have not furnished any security of costs as alleged; the same was deposited pending hearing and determination of the current appeal, which is now spent. Further, that the money, deposited pending the hearing of the Appeal, which was dismissed, should be withdrawn to cater for the costs awarded to the Respondents by the court.
6. According to the 1st Respondent's Secretary, the Respondents will be prejudiced if the orders sought are granted and urged the court to dismiss the application with costs.

3RD APPELLANT/APPLICANT'S SUBMISSIONS

7. Ms. Wambui, counsel for the 3rd Appellant filed submissions dated 9th July, 2025, and identified the issues for determination as:

- a) *Whether the Appellant has met the threshold for the grant of stay of execution pending appeal as required under Order 42 Rule 6 (2) of the Civil Procedure Rules?*
- b) *Whether the execution of the judgment before the appeal is heard and determined would cause substantial loss to the Appellants?*
- c) *Whether the security for costs already deposited by the Appellants is sufficient and whether further security should be ordered by the court?*
- d) *Whether the allegations made by the Respondents concerning unlawful use and leasing of the suit property are substantiated and relevant to the determination of the stay application?*
- e) *Whether the balance of convenience tilts in favour of granting a stay to preserve the subject matter of the intended appeal?*
- f) *Whether the application for stay is an abuse of court process or a legitimate invocation of the appellate rights?*

8. Counsel submitted that the judgment being appealed was delivered recently and the application for stay was filed immediately thereafter, and if stay of execution is not granted, the suit property may be irreversibly altered thereby rendering the appeal nugatory.

9. It was counsel's submission that the Appellant has already deposited a sum as directed by the trial court and no evidence has been presented by the Respondents to show that the amount is insufficient. Counsel submitted that the allegations in the Replying Affidavit are unsubstantiated and the balance of convenience favours preservation of the property.

10. Counsel submitted that the application is a legitimate step taken by aggrieved parties seeking justice through the appellate process and relied on the cases of **Halai & Another vs Thornton & Turpin (1963) Ltd [1990] KLR 365**, **Butt vs Rent Restriction Tribunal [1982] KLR 417**, **Kenya Shell Ltd vs Benjamin Karuga Kibiru & Another [1986] eKLR**, **Equity Bank Ltd vs West Link MBO Ltd [2013] eKLR**, **Trust Bank Limited vs Amin Company Ltd & Another [2000] eKLR**, **RWW vs EKW [2019] eKLR** and **Board of Governors, Moi High School Kabarak & Another vs Malcom Bell [2013] eKLR**, and urged the court to allow the application as prayed.

RESPONDENTS' SUBMISSIONS

11. Mr. Mburu, counsel for the Respondents filed submissions dated 19th July 2025, and submitted that the Applicant has not demonstrated that it will suffer substantial loss if the orders sought are not granted. However, counsel submitted that if the court is inclined to grant stay of execution pending appeal, the Applicants should provide additional security by depositing in a joint interest earning account a sum of not less than Ksh 2,000,000/= within fourteen days.

12. Counsel relied on provisions of Order 42 Rule 6 1(2) of the Civil Procedure Rules and the cases of **Butt vs Rent Restriction Tribunal (1982) KLR**, **Samvir Trustee Limited vs Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997**, **Telposta Pension Scheme Registered Trustees vs Intercountries Importers & Exporters Ltd & 3 others KEELC 1182 (KLR)** and **Charles Kariuki Njuri vs Francis Kimaru Rwara (Suing as Administrator of Estate of Rwara Kimaru alias Benson Rwara Kimaru (Deceased) [2020] eKLR**, and urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

13. The issue for determination is whether the 3rd Appellant/Applicant has met the threshold for the grant of a stay of execution order of this court's judgment delivered on 17th June, 2025. The Applicant has attached a Notice of Appeal dated 18th June 2025, in the affidavit in support of the Notice of Motion application dated 19th June, 2025, showing an intention to appeal to the Court of Appeal.
14. This is the second application for stay of execution by the Appellant. The first one was filed upon lodging this Appeal, which was heard and determined. The Appellant was dissatisfied with the judgment delivered by this court on 17th June 2025, whereby the Appellant's appeal was dismissed, which has necessitated the filing of this application.
15. Order 42 rule 6(2) of the Civil Procedure Rules provides:

“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.”*

16. The power to grant or refuse an application for a stay of execution is discretionary as was stated by the Court of Appeal in the case of **Butt – vs- Rent Restriction Tribunal (1982) KLR 417** as follows:

“The power of the court to grant or refuse an application for 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 in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

17. However, the discretionary power to grant or refuse an application for a stay of execution must be exercised judiciously taking into account the rights of both parties. An Applicant must satisfy the ingredients for grant of stay of execution as provided for under Order 42 Rule 6(2) of the Civil Procedure Rules before the court can grant such orders.

18. In the case of **Absalom Dora vs. Turbo Transporters 2013 eKLR** the Court held as follows:

“The discretionary relief of stay of execution pending Appeal is designed on the basis that no one would be worse off by virtue of an order of the Court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his Appeal, which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree, which includes full benefits under the decree. The Court in balancing the two competing right focuses on their reconciliation which is not a question of discrimination.”

19. The Applicant must also demonstrate that he/she will suffer substantial loss if the order of stay is not granted. This is a very important segment of the limbs required to be demonstrated before an order for stay can be granted.

20. In the case of **James Wangalwa & Anor Vs Agnes Naliaka Cheseto(2012) eKLR**, the court held as follows:

“ no doubt in law the act 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 because execution is a lawful process. The Applicant must establish other factors which show the execution will create a state of the affairs that will irreparably affect or negate the very core of the Applicant as the successful party in the appeal”.

21. It is not enough for an Applicant to claim that he/she will suffer substantial loss without going a step further to demonstrate the substantial loss. The Applicant stated that it would suffer substantial loss if an order for stay is not granted, but does not demonstrate how.
22. In the case of **KENYA COMMERCIAL BANK LIMITED Vs SUN CITY PROPERTIES LIMITED & 5 OTHERS [2012] eKLR**, the Court stated as follows:

“.....in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced. ... In a bid to balance the two competing interests, the Courts usually make an Order for

suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal”.

23. The court must balance the competing interests of the parties in the fair administration of justice.
24. On the requirement of security of costs, order 42 (6) (2) (b) states that it is the Court that orders the nature of security the Applicant should give as may ultimately be binding on the Applicant. This is to ensure that the discretion bestowed on the Court is not fettered.
25. The Applicant submitted that in the earlier application for a stay, the court had ordered that the Applicant deposit Kshs. 300,000/ in a joint interest-earning account of the Advocates on record which they did. Counsel for the Applicant submitted that the same can act as security, however, counsel for the Respondent submitted, that should the court be inclined to grant the order, then it should order that the Applicant deposit, not less than Kshs.2 million as security for the due performance of the decree within fourteen days.
26. Consequently, I make the following orders in the interest of justice.

a) Application for stay of execution is hereby allowed on condition that the Applicant deposit, Kshs. One Million, Five Hundred Thousand (1,500,000/) only in a joint

interest earning account of the Advocates on record within 30 days failure to which the order lapses.

b) Costs of the Application to abide by the outcome of the Appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 14TH DAY OF OCTOBER 2025.

**M. A. ODENY
JUDGE**