

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT ELDORET

ELC CASE No. 34 OF 2020 (OS)

JOSEPH KIPLETING LAGAT **1ST**
PLAINTIFF/RESPONDENT

SHADRACK KIPROTICH NGISIREI ... **2ND**
PLAINTIFF/RESPONDENT

VERSUS

BIRGEN ARAP MUREI
DEFENDANT/APPLICANT

RULING:

1. By a Notice of Motion Application dated 28th January, 2025, the Defendant/Applicant moved this court seeking for the following orders:-
 - (i) Spent
 - (ii) THAT the orders of stay execution pending appeal issued on 22nd February 2023 in favour of the Respondent be set aside and/or vacated and execution to issue as per the judgment of 6th July 2023.
 - (iii) THAT cost of this application be provided for.

2. The grounds of the application are stated on the face of the application, and supported by the Defendant/Applicant's affidavit of even date. He deponed that judgment was issued on 6th July, 2023. That on 18th July, 2023, the Plaintiffs/Respondents issued a Notice of Appeal that was endorsed by the Deputy

Registrar on the same day. He averred that the Plaintiffs/Respondents obtained stay of execution of the judgment vide a Ruling dated 22nd February, 2023.

3. The Applicant averred that the intended Appeal ought to have been lodged within 6 months from the day the Notice of Appeal was issued, but, since 22nd February, 2023, the Respondents have not preferred an appeal, thus denying him the fruits of his judgment. He deponed that it is in the best interest of justice that the Application be allowed as prayed.
4. In response to the said application, the Plaintiffs/Respondents filed a Replying Affidavit sworn by Joseph Kipleting Lagat, the 1st Plaintiff, on 18th February, 2025. They contended that the application lacks merit, is vexatious, frivolous and an abuse of the court process and should be dismissed *in limine*. The 1st Plaintiff admitted that they filed a Notice of Appeal and obtained a stay of execution of the judgment upon depositing KShs. 150,000/- as security as ordered by the court.
5. He deponed that they had done everything in their power to pursue the intended Appeal, but the delay has been occasioned by the delay in preparation of the proceedings by the court. He explained that they requested a certified copy of the court proceedings vide a letter dated 18th July, 2023 and made the requisite payments. That they made verbal inquiries and followed up through their letters dated 28th August, 2023 and again on 13th May, 2024 as well as 20th November, 2024 to which there has been no response to date.
6. The 1st Plaintiff deponed that the court proceedings are an integral component of the Record of Appeal, and they cannot

move without them, but the preparation thereof is not within their control. He stated that the Record of Appeal was ready and awaiting the court proceedings, and undertook to lodge the Appeal within 14 days of receipt of the Court Proceedings. He averred that in the circumstances of the said delay, they were exempt from the 6 month rule.

7. The 1st Plaintiff deponed that their appeal will be rendered nugatory if the stay is set aside, occasioning them a great injustice. He also alleged that the Defendant/Respondent has not demonstrated that he will suffer any harm if the order of stay is sustained, since the order preserves the status quo that has prevailed for the last 30 years.
8. The 1st Plaintiff/Respondent also swore and filed a Supplementary Affidavit dated 29th August, 2025 on his behalf and on behalf of the 2nd Plaintiff. He deponed that they had formally lodged the Appeal before the Court of Appeal being Eldoret COACA No. E066 of 2025, and are now awaiting directions on processing the Appeal from the Appellate Court.
9. He urged that the Appeal may be hindered by the fact that this court is yet to furnish them with a certified copy of its proceedings. He averred that they had done everything in their power to secure a copy of the certified proceedings, and that it is unjust and unfair to penalize them for a delay occasioned by the internal processes of the court.

Submissions:

Defendant's/Applicant's Submissions;

10. The Application was canvassed by way of written submissions. The Defendant/Applicant filed two sets of submissions, one dated 31st March, 2025 and another dated 13th June, 2025 in support of the Motion. In the Submissions dated 31st March, 2025, it was pointed out that the ruling granting the stay was erroneously dated 22nd February, 2023 instead of 22nd February, 2024.
11. Counsel submitted that the Plaintiffs are enjoying the stay of execution pending Appeal, which Appeal is yet to be lodged. Counsel submitted that a Notice of Appeal cannot act as a stay pending an intended appeal. It was contended that there being no appeal after lapse of the 6-month statutory period, then the interest of justice tilts in favour of the Defendant. Counsel urged the court to grant the prayers sought in the interests of justice.
12. In the Submissions dated 13th June, 2025, Counsel reiterated his earlier submissions, adding that the Defendant/Applicant has not enjoyed the fruits of his judgment, hence the instant Motion. Counsel submitted that the court is allowed under Order 45 of the Civil Procedure Rules to set aside the stay orders, which he claimed are evident and do not require elaborate explanation or argument. Counsel argued that the stay orders were temporary in nature and not meant to stay in force indefinitely.
13. Counsel argued that stay orders are granted so as to avoid the Appeal being rendered nugatory. He however pointed out that in this case, there is no Appeal. Counsel submitted that the

delay in filing the Appeal is unexplained. Further, that the Defendant/Applicant has suffered substantial loss from being denied access to the property which is now occupied by the Plaintiffs. Counsel prayed that the prayers sought be granted, and for orders that the KShs. 150,000/- paid as security for costs be released to the Defendant's Counsel.

Plaintiffs'/Respondents' Submissions;

14. The Plaintiffs/Respondents filed their submissions dated 1st September, 2025. Counsel for the Plaintiffs submitted that the Defendant has not met the threshold for setting aside or vacating the order of stay pending appeal.
15. Counsel for the Plaintiffs reiterated that they had done all they could to pursue the Appeal, but the delay was caused by the court in failing to supply the copy of Trial Court's Proceedings, without which the Appeal cannot be processed. Counsel cited the case of **Hassan Nyanje Charo vs Khatib Mwashetani and 3 Others (2014) eKLR** and **County Executive of Kisumu vs County Government of Kisumu & 8 Others (Civil Application 3 of 2016)(2017) KESC 16 (KLR)**.
16. Counsel added that no sufficient reason had been given to warrant setting aside the stay order, and further, that the Defendant has not demonstrated any harm or prejudice the he has suffered. He argued that his interests are protected by the security deposited as directed by the court, and cited the case of **Nduhiu Gitahi vs Warugongo (1988) KLR 621; 1 KAR 100; (1988-92)2 KAR 100**.

17. Counsel submitted that if the stay is removed, the Plaintiffs on the other hand, will be evicted from the only home they have known since childhood, impacting them and their families and will occasion them irreparable harm and render them destitute. Counsel relied on the case of **Maalim vs Mathobe & Another (Suing on Behalf of the Estate of Mathobe Maalim)(Civil Appeal E004 of 2024)(2024) KEHC 10182 (KLR)**.
18. Counsel for the Plaintiffs cited the doctrine of *lis pendens*, pressing on the importance of preserving the substratum of the suit (**Anne Njeri mwangi vs Cooperative Bank of Kenya limited (2013) eKLR**). Counsel also submitted that if the Plaintiffs are removed from the suit land, the substratum of the suit will have failed as they will have no effective remedy from the Appeal.
19. In support of his arguments, Counsel cited **Kennedy Kimutai Salat vs Kanuli Information Technology Solutions Limited & Another (2017) eKLR**. Counsel asserted that the Plaintiffs are keen on prosecuting their appeal. Counsel asked the court to find no merit in the application and dismiss it with costs.

Analysis and Determination:

20. I have considered the application, the responses filed thereto and the parties' rival submissions and find that the issues for determination are:-

- i. Whether the Defendant has met the threshold for the stay of execution order to be vacated/set aside;*
- ii. Who shall bear the costs of the application?*

(i) Whether the Defendant has met the threshold for the stay of execution order to be vacated/set aside;

21. From the court record, this court delivered a merit judgement on the 6th July, 2023 in favour of the Defendant dismissing the Plaintiffs suit. The Trial Judge directed that they be evicted from the suit property within 60 days and pay general damages of KShs. 1,000,000/-.
22. The Plaintiffs filed a Notice of Appeal dated 18th July, 2023. The Plaintiffs also filed an Application dated 28th August, 2023 for stay of execution pending appeal, which was heard and allowed vide a ruling dated 22nd February, 2023. I note that the ruling granting stay is dated 22nd February, 2023. However, from the proceedings, the Ruling was delivered on 22nd February, 2024.
23. The Defendant's main ground in this application is that the Plaintiffs obtained orders of stay of execution of the judgment pending the determination of their intended Appeal. However, as at the time of filing this application, aside from the Notice of Appeal, the formal Appeal was yet to be lodged. He contended that since there was no Appeal, the Plaintiffs were only using the order of stay to deny him the fruits of his judgment.

24. The Plaintiffs have opposed the application, claiming that they are very keen to prosecute the Appeal, and that they are not liable for the delay in doing so. The Plaintiffs main ground is that they are yet to get the typed proceedings despite having applied for them vide their letter dated 18th July, 2023. There is a copy of the said letter applying for the proceedings on the record in which they paid for the said proceedings vide receipt dated 18th July, 2023 Ref. No. E2HKT7MV.
25. The Plaintiffs claim that they have made inquiries at the Registry as well as reminders through several letters, one is dated 28th August, 2023 while another is dated 13th May, 2023. The Plaintiffs also referred to another letter dated 20th November, 2024 reminding the court of the undelivered typed court proceedings. They state that they have received no response to any of their letters, and neither have they received the typed court proceedings.
26. A ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. In this instance however, the issue of delay in obtaining typed proceedings cannot be attributed to the Plaintiffs, but to the court. In **Samson Emmanuel Kibet vs Chebaswony Chepkiyeny (2007) eKLR**, the court held that:-
- “To my mind, a party who is desirous to lodge an appeal should not just file an application for the proceedings giving rise to the judgment, ruling or order against which he wishes to appeal, and then sit***

back to wait for such proceedings. It would definitely be prudent to demonstrate the desire to get on with the intended appeal, by making a follow-up to the initial written application for the proceedings. However, I am alive to the fact that the need to send reminders is not a strict or absolute requirement.”

27. While also dealing with the issue of delayed court proceedings, the Supreme Court in **Charo vs Mwashetani & 3 others (Application 15 of 2014) (2014) KESC 47 (KLR) (4 July 2014) (Ruling)** stated:-

“27.Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail. We note that the last correspondence in the record before us was on 29th January, 2014 and that could cast doubt on the measure of assertion of diligence; but there is nothing to show that the applicant has not made other efforts to inquire about the proceedings, or to show that the proceedings are now ready but remain uncollected. As no respondent has called into question the assertion that the proceedings are not yet available, we would not impugn the applicant’s claim of diligence.

28. Would it be in the interests of justice then to turn away an applicant who has, prima facie, exercised all due diligence in pursuit of his cause, but is impeded by the slow-turning wheels of the Court’s administrative machinery? We think not. We find that though prejudice to the representation of the people of Lunga

Lunga Constituency will persist, it is due to no fault on the part of the applicant.”

28. The order of stay of execution was made by this Court on merit after hearing the parties herein. There can be no doubt that the Defendant stands to suffer prejudice by being denied the right to enjoy the fruit of his judgement. That prejudice cannot however be placed singularly at the Plaintiffs' door, since as they submitted, save for the reminders to the court to supply the proceedings, they had no control over whether the said proceedings were typed or not.
29. In addition, the Plaintiffs also have a right to pursue their appeal. The Plaintiffs have since lodged their appeal as shown in the receipt dated 29th August, 2025, referenced therein as COACA No. E066 of 2025. The receipt shows that the Plaintiffs filed the Notice of Appeal from this Court, the Memorandum of Appeal as well as Record of Appeal, albeit without the typed court proceedings. Admittedly the appeal is still pending directions before the Court of Appeal, but the same cannot proceed without the typed court proceedings.
30. Moreover, the stay of execution order was lawfully and properly granted to preserve the subject matter pending appeal. Since the Appeal does actually exist, the effect of vacating the orders of stay of execution would result in execution of the judgment, which requires the Plaintiffs to either vacate the suit premises or be evicted therefrom. I agree with the Plaintiffs that vacating

the stay orders at this point would in fact render the appeal nugatory.

31. In any event, since the Defendant seeks to set aside Stay Orders pending the hearing and determination of an appeal, then he ought to have filed the application before the Appellate Court for determination. The Defendant's Application herein thus offends the provisions of Order 42 Rule 6(1) which provides that:-

"... 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."

32. For this reason, the court finds the Defendant has failed to establish reasonable basis of vacating or setting aside the stay orders. It should continue remaining in force, to ensure the Appeal now lodged remains meaningful and not just an academic exercise.

(ii) Who shall bear the costs of this application?

33. The issue of costs is governed by section 27 of the Civil Procedure Act. In particular, Section 27(1) provides as follows:-

27. Costs

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge,

and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

34. The basic rule on attribution of costs therefore, is that costs follow the event. It is also trite that costs lie at the discretion of the court. This discretion was explained by the Court of Appeal in the case of **Farah Awad Gullet vs CMC Motors Group Limited (2018) KECA 158 (KLR)**, where it held that:-

“It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning. Secondly, that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.”

35. The rule that costs follow the event is thus not invariable, and the ultimate factor on award of costs is the discretion of the court. The court in exercising its discretion must bear in mind the special circumstances of the case, the motivation and

conduct of the parties, while also being guided by ends of justice.

36. There is no doubt that the application herein was necessitated by the failure to lodge the Appeal on time. However, the Plaintiffs' failure to lodge the appeal on time was due to the lack of the typed court proceedings, which cannot be blamed on the Plaintiffs. The Plaintiffs have successfully defended the Application.
37. I am well aware of the fact that the Defendant has not succeeded in his application herein, and going by the principle that costs follow the event, he should bear the costs of the present motion. However, owing to the circumstances outlined above, I will not condemn the Applicant to pay costs of the application. To do so, would be tantamount to penalizing him for his vigilance in seeking to enjoy the fruits of his judgment.

Orders:-

38. In the upshot, I make the following orders:-
- (a) The Defendant/Applicant's Notice of Motion Application dated 28th January, 2025 is dismissed.
 - (b) There shall be no orders as to costs.
39. Orders accordingly.

DATED, SIGNED and DELIVERED virtually at **ELDORET** on this **16TH** day of **OCTOBER, 2025** vide Microsoft Teams.

HON. C. K. YANO
ELC, JUDGE

In the virtual presence of;

Ms. Chelogi for the Plaintiffs/Respondents.

No appearance for Mr. Misoi for Defendant/Applicant.

Court Assistant - Laban.

ORIGINAL