Mwilaria v Mungachiu & 3 others (Environment and Land Case E001 of 2023) [2025] KEELC 6866 (KLR) (7 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6866 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND CASE E001 OF 2023

JO MBOYA, J

OCTOBER 7, 2025

BETWEEN

DENNIS GITARI MWILARIA .... PLAINTIFF

AND

PAUL KIRIMI MUNGACHIU .... 1ST DEFENDANT

TIMOTHY MUNGATHIA .... 2ND DEFENDANT

DISTRICT LAND ADJUDICATION SETTLEMENT OFFICER TIGANIA WEST .... 3RD DEFENDANT

ATTORNEY GENERAL .... 4TH DEFENDANT

RULING

1. What is before me is the Notice of Motion Application dated 8th September 2025; brought pursuant to the provisions of Sections 1A, 1B, 3A & 63 (e) of the *Civil Procedure Act*, Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* 2010; and wherein the Applicant seeks the following reliefs;

   i. That this application be certified urgent and service thereof be dispensed within the first instance.

   ii. That the taxation proceedings by the 1st and 2nd defendant against the plaintiff be stayed pending the hearing and determination of the appeal before the court of appeal in Nyeri.

   iii. That this Honourable court be pleased to make such further or other orders as it may deem fit in the interest of justice.

   iv That the costs of this Application be provided for.

2. The instant application is premised on the various grounds which have been enumerated in the body thereof. In particular, the applicant has contended that same has since filed/lodged an appeal before

the court of appeal, namely; Nyeri Court of Appeal Civil Appeal No. E133 of 2024; and wherein same seeks to impugn the judgment rendered by this court [differently constituted]. In addition, it has been contended that the appeal that has since been lodged has overwhelming chances of success and hence the scheduled taxation proceedings shall defeat the appeal.

3. The subject application is supported by the affidavit of Dennis Gitari Mwilaria [the applicant herein], sworn on even date and to which the applicant has annexed assorted annexures, including a copy of the record of appeal and a copy of the memorandum of appeal.

4. The 1st & 2nd respondents have filed a replying affidavit sworn on 23rd September 2025; and wherein same have opposed the application. In particular, the 1st and 2nd respondents have averred that the decree that was issued by this honourable court was a negative decree and in so far as the decree is a negative one, the prayer for stay of execution, or of proceedings, cannot issue and or be granted. Moreover, it has been contended that the applicant herein has neither established nor demonstrated that substantial loss is likely to accrue unless the orders sought are granted.

5. The subject application came up for hearing today, 7th October 2025; whereupon the advocate[s] for the parties agreed to canvass and dispose of the application by way of oral submissions. To this end, the court issued directions and in particular, directed that the application does proceed on the basis of oral submissions.

6. The applicant adopted the grounds contained in the body of the application and reiterated the averments at the foot of the supporting affidavit. Furthermore, the applicant also reiterated the contents of the annexures attached to the supporting affidavit.

7. Additionally, learned counsel for the applicant proceeded to and highlighted three [3] key issues for consideration by the court. Firstly, learned counsel for the applicant has submitted that the applicant has since filed/lodged an appeal before the Court of Appeal at Nyeri. To this end, learned counsel referenced the copy of the memorandum of appeal and the record of appeal in respect of Nyeri Court of Appeal Civil Appeal E133 of 2024.

8. Moreover, learned counsel for the applicant has submitted that the said appeal has overwhelming chances of success and hence this court ought to ensure that the success of the said appeal is not negated by the current proceedings. In this regard, learned counsel has submitted that the scheduled taxation proceedings and the consequential execution shall render the appeal nugatory.

9. Secondly, learned counsel for the applicant has submitted that the applicant shall be disposed to suffer substantial loss unless the orders sought are granted. In this regard, it has been submitted that the amount of money sought at the foot of the party and party bill of costs is colossal and thus same shall occasion substantial harm to the applicant. Furthermore, it has been submitted that such costs are excessive and therefore ought to be stayed pending the appeal.

10. Thirdly, learned counsel for the applicant has submitted that the application beforehand is one that seeks the exercise of the court's discretion. In this respect, it has been submitted that the court ought to take into account the obtaining circumstances and to find that the appellant ought to be afforded the latitude to pursue his appeal without fear of same being rendered nugatory. Moreover, Learned Counsel submitted that there is no overwhelming hindrance to granting the Orders sought.

11. Finally, learned counsel for the applicant has submitted that the applicant has been in a serious financial crisis. To this end, it has been submitted that because of the financial crisis, the applicant was not able to file the subject application timeously and with due promptitude. Nevertheless, it has been submitted that the delay in filing the subject application is neither inordinate nor unreasonable.

12. The respondents adopted the contents of the replying affidavit sworn on 23rd September 2025; and thereafter highlighted five [5] key issues. Firstly, learned counsel for the respondents has submitted that the current application is incompetent and incapable of being granted in so far as the proceedings in respect of the instant matter have since terminated. For good measure, counsel posited that the applicant's suit was dismissed and a subsequent application seeking to set aside the dismissal was equally dismissed. In this regard, it has been contended that there are no more proceedings capable of being stayed.

13. Secondly, learned counsel for the respondent has submitted that what the applicant is seeking to stay is actually the recovery of costs. Nevertheless, it has been submitted that costs follow the event and the same cannot be the subject of a stay of execution or a stay of proceedings in the manner sought. To this end, Learned Counsel has cited and referenced the provisions of Section 27 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.

14. Thirdly, learned counsel for the respondents has submitted that the applicant herein has also failed to establish and demonstrate the requisite conditions underpinning the grant of an order of stay of execution. In particular, it has been submitted that the applicant has neither established nor demonstrated that a substantial loss is likely to accrue if the orders sought are not granted. In any event, it has been submitted that the costs which are sought to be stayed cannot occasion substantial loss in so far as same can be recovered subject to the outcome of the appeal.

15. Moreover, learned counsel for the respondents has also submitted that the subject application has been made with unreasonable and inordinate delay. In addition, it has been contended that the delay attendant to the subject application has neither been accounted for nor explained to the satisfaction of the Court. Absent explanation for the delay, learned counsel has posited that the application is defeated by the doctrine of laches.

16. Finally, learned counsel for the respondents has submitted that the applicant has failed to offer security for the due performance of the decree that may ultimately ensue. To the extent that the applicant has failed to offer/provide security, it has been contended that the subject application is devoid of bona-fides [good faith].

17. On the other hand, learned counsel for the respondents has also submitted that to the extent that the decree issued by the court was a negative decree [dismissal of suit] it has been submitted that the orders of stay sought cannot issue. In particular, it has been submitted that a negative decree/order cannot be the subject of stay of execution or stay of proceedings.

18. Having reviewed the Notice of Motion Application; the response thereto and upon consideration of the oral submissions canvassed on behalf of the respective parties, I come to the conclusion that the determination of the subject application turns on three [3] key issues, namely; whether the court has jurisdiction to grant an order of stay of execution or stay of proceedings in a matter where the decree is in the negative; whether the applicant has established/proven substantial loss; and whether the subject application has been made with unreasonable and inordinate delay or otherwise.

19. Regarding the first issue, it is important to recall and reiterate that the applicant herein filed the instant suit but same failed to prosecute the suit. To this extent, the suit was subsequently dismissed for want of prosecution. Further, and in addition, the applicant reverted to court with an application seeking to set aside the orders of 6th February 2024, which essentially dismissed the suit. Nevertheless, the application under reference was equally dismissed.

20. It is common ground that the dismissal of the suit and the subsequent application constitutes negative decree. In so far as the orders issued by the court were in the negative, it is old learning that such orders

cannot be the subject of a stay of execution or at all. Suffice it to state that a negative order cannot lend itself to stay. [See the dicta in *Western College of Applied Science & Arts v Oranga* (1976) eKLR; *Charles Barongo Nyakeri v The County Government of Kisii* (2020) eKLR; *Oliver Collins Wanyama v Engineering Regulatory Board* (2019) eKLR and *The Registered Trustees of Kenya Railways staff pension Scheme v Milimo Muthomi & Co. Advocates* (2022) KECA].

21. Taking into account the foregoing position, there is no gainsaying that this court is not seized of the requisite jurisdiction to grant any order of stay of execution or otherwise. Furthermore, it is not lost on me that though the applicant has crafted the application in such a manner as to stay the taxation proceedings, however, the bottom line is that the applicant is seeking to procure an order of stay pertaining to and concerning the recovery of the costs.

22. To my mind, the applicant herein is merely being ingenious so as to defeat the established position of the law. In any event, there is no gainsaying that taxation of costs and the recovery thereof cannot be the subject of stay of execution pending Appeal in so far as costs follow the event. For good measure, the event in respect of this matter is to the effect that the applicant's suit was dismissed. [see Section 27 of the *Civil Procedure Act*].

23. Turning to the 2nd issue, namely; whether the applicant shall be disposed to suffer substantial loss, it is important to underscore that substantial loss is the cornerstone to granting an order of stay of execution pending appeal. To this end, it is incumbent upon every applicant, the current applicant not excepted to place before the court, evidence to demonstrate that substantial loss will accrue. Absent proof of substantial loss, no order of stay can issue. [See *Kenya Shell Ltd v Benjamin Karuga Kibiru & another* (1986) eKLR].

24. Has the applicant established substantial loss? The position taken by the applicant is to the effect that the 1st and 2nd respondents have lodged a party and party bill of costs and that the taxation [intended taxation] shall subject the applicant to undue prejudice and thus substantial loss. Admittedly, the party and party bill of costs is yet to be taxed.

25. The question that does arise is how does the taxation of the party and party bill of costs pose substantial loss. To my mind, the arguments by the applicant are not well-grounded. In any event, there is no gainsaying that the costs upon taxation are computed in monetary terms. In this regard, there is no gainsaying that if the applicant were to succeed in the appeal, then same would be at liberty to recover the costs.

26. Furthermore, it is not lost on me that such costs subject to appeal will be refunded to the applicant; and in default the Applicant can also commence recovery proceeding[s] in the usual manner. At any rate, I have not heard the Applicant to say that the Respondents would not be able to repay/ refund the costs. To this end, I am afraid that the applicant has neither established nor demonstrated the existence of substantial loss, which is a key ingredient in the consideration as to whether or not to grant an Order of stay of execution.

27. In the case of *James Wangalwa v Agnes Naliaka Cheseto* (2012) eKLR, the Court considered the role [place] of substantial loss in an application for stay of execution pending appeal.

28. For coherence, the court stated thus;

    11. 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma v Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the *Court of Appeal Rules*, respectively, emphasized the centrality of substantial loss thus:

> ...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."

29. Next is the issue of whether the application has been mounted with unreasonable and inordinate delay; and if so, whether the delay has been accounted for. To start with, it is common ground that the applicant's suit was dismissed on 6th February 2024. Thereafter, the applicant filed an application seeking to set aside the dismissal of the suit. For coherence, the application for setting aside was heard and disposed of vide ruling rendered on 29th May 2024.

30. The subject application, which is seeking stay as pertains to the taxation and recovery of costs, was not filed until 8th September 2025. The duration between the dismissal of the application for setting aside of the Orders dismissing the Suit; and the current application amounts to more than 16 months. The 16-month[s] delay is ex facie unreasonable and inordinate. In this regard, one would have expected the applicant to account for the delay.

31. Has the applicant accounted for the delay? The reason that has been proffered by the applicant is to the effect that same has been suffering from serious financial crisis and hardship. It is the said financial crisis which is being deployed to account for inordinate delay. However, it is not lost on me that the assertion of financial crisis/hardship has not been verified. There is no document whatsoever to underpin the said assertion. Moreover, the applicant seems to be invoking financial difficulties as an excuse; scape-goat.

32. I say that the averments that the applicant was prevented from filing the subject application because of financial crisis is an excuse because the applicant was able to retain, engage and instruct counsel to file an appeal before the Court of Appeal. For good measure, the appeal before the court of appeal was timeously filed. It is common ground that an appeal to the Court of Appeal attracts filing fees. Moreover, the instruction to counsel also involves payment of professional fees. The question that does arise is how the purported financial crisis did not affect/inflict the filing of the appeal before the Court of Appeal, but only came into play as pertains to the subject application.

33. Quite clearly, the applicant is not being bona-fide [candid] with the court. Suffice it to underscore that the equitable discretion of the court cannot be invoked and applied in favour of a person who is less than candid with the court. Instructively, candour is imperative and hence it behooved the applicant to be honest with the court. However, that is not the case.

34. Simply put, there is no plausible; cogent or concrete explanation as to why the applicant took more than 16 months before approaching the court for an order of stay. Suffice it to state that whosoever seeks to partake of and benefit from the equitable discretion of the court must approach the court timeously and with due promptitude; and where there is delay the applicant must offer an explanation that is bona-fide; genuine; truthful; and reasonable [See *Njoroge v Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling).

35. Furthermore, it is trite learning that equity does not aid the indolent. In this regard, I beg to adopt and deploy the said equitable principle in respect of the instant matter.

36. Before concluding on this issue, it is also important to highlight the doctrine of laches. Where the duration of delay is unreasonable and inordinate, such delay lends itself to the invocation and deployment of the doctrine of Laches. Moreover, dilatory filing disentitles the applicant of equitable discretion.

37. In the case of *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018] KECA 27 (KLR) the Court of Appeal expounded on the import and tenor of the doctrine of Laches.

38. Same stated thus;

> 55. Laches means the failure or neglect, for an unreasonable length of time, to do that which by exercising due diligence could or should have been done earlier; it is negligence or omission to assert a right within a reasonable time, warranting a presumption that the party entitled to assert it either has abandoned it or declined to assert it. This equitable defense is based upon grounds of public policy, which requires the discouragement of stale claims for the peace of society. (See *Republic of Philippines v Court of Appeals*, G.R. No. 116111, January 21, 1999, 301 SCRA 366, 378-379).

Final Disposition

39. For the reasons which have been highlighted in the body of the ruling, it must have become apparent that the subject application is not only premature and misconceived, but same is equally untenable in the eyes of the law. Furthermore, there is no gainsaying that dilatory filings disentitle[s] an applicant from partaking of equitable discretion.

40. In the upshot, the final orders of the court are as hereunder;

    i. The Application dated 8th September 2025; be and is hereby Dismissed.

    ii. Costs of the application be and are hereby awarded to the 1st and 2nd respondents only.

    iii. Furthermore, the costs in terms of clause (ii) are hereby assessed and certified in the sum of Kshs.20,000/= only.

41. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF OCTOBER 2025.

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE

In the presence of:

Hussein – Court Assistant

Miss Wambui for the Applicant

Mr. Carl Peters Mbaabu for the 1st & 2nd Respondents

No appearance for the 3rd & 4th respondents