



**Musau & 2 others v Kiamba (Environment and Land Appeal  
E014 of 2024) [2025] KEELC 6565 (KLR) (2 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6565 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT AND LAND APPEAL E014 OF 2024**

**EO OBAGA, J**

**OCTOBER 2, 2025**

**BETWEEN**

**CHARLES MUTHAMA MUSAU ..... 1<sup>ST</sup> APPELLANT**

**KIVUVA NGOMO ..... 2<sup>ND</sup> APPELLANT**

**ALOISE MUTIE KATHIME ..... 3<sup>RD</sup> APPELLANT**

**AND**

**DANIEL MBITHI KIAMBA ..... RESPONDENT**

**RULING**

1. Before this court for determination is the Notice of Motion dated 25<sup>th</sup> September, 2024 in which the Appellants/Applicants seek issuance of the following orders:-
  1. [SPENT]
  2. [SPENT]
  3. That this Honourable Court be pleased to stay the execution of the decree in Tawa ELC NO. E002 of 2023 together with all consequential orders and proceedings pending the hearing and determination of the Appeal lodged herein.
  4. That the costs of this application be provided for.
2. The application is premised on the grounds appearing on its face in addition to the supporting affidavit sworn by Aloise Mutie Kathime on even date on his behalf and that of his Co-applicants. He averred that on 29<sup>th</sup> August, 2024, the lower court delivered a judgment in the Respondent's favour in which orders were granted for the eviction of the Applicants from the suit property. The Applicant added that the Respondent is now in the process of extracting the decree with the intention of executing it.



3. The Applicant contended that they have filed a Memorandum of appeal against the judgment and the same deserves to be given a hearing hence the need for stay orders. He further contended that the Applicants are apprehensive that the Respondent will evict them from the suit property before the appeal has been determined and that as a result, they would suffer irreparable loss and damage. The Applicant averred that the Respondent will not suffer any prejudice if the orders sought are allowed.
4. The Respondent swore a replying affidavit on 30<sup>th</sup> September, 2024 wherein he averred that the 1<sup>st</sup> Appellant, Charles Muthama Musau is deceased and that he did not give instructions for the filing of the appeal. He contended that both the application and appeal herein are misplaced and an abuse of court process and hence ought to be dismissed. He added that the Applicants have not established that they would suffer substantial loss and hence the court ought to dismiss the application with costs.
5. The Respondent filed a further affidavit sworn by himself on 10<sup>th</sup> October, 2024. He averred that both the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants did not tender any evidence in the lower court and hence they have nothing to appeal against. That as a result, the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants cannot purport to have an arguable appeal when they did not participate in the lower court proceedings. He urged the court to dismiss the application with costs.
6. The Applicants filed a supplementary affidavit sworn by Cecilia K. Mwangangi Advocate on 24<sup>th</sup> October, 2025. In a ruling delivered by this court on 5<sup>th</sup> May, 2024, the averments contained in paragraphs 7 to 15 of the supplementary affidavit were expunged from the record.
7. From the remaining averments at paragraphs 3 to 6, the deponent contended that on 4<sup>th</sup> September, 2024, she was instructed by all the three Appellants to file the present appeal together with the application herein. That it was subsequent to the filing of the present application that the deponent learnt about the death of the 1<sup>st</sup> Appellant. She further contended that it is not a legal requirement that every Defendant should testify.
8. At the hearing of the application, the Counsel for the Applicants elected to rely on the sworn averments in support of the application.
9. On behalf of the Respondent, Counsel filed written submissions dated 20<sup>th</sup> May, 2025. Two issues for determination were identified by Counsel: -
  - a. Whether the Appellants/Applicants have met the threshold for the stay orders sought.
  - b. Whether the Appellants/Applicants have locus standi.
10. Submitting on the first issue, Counsel pointed out that the necessary conditions for an order of stay of execution are stipulated under Order 42 Rule 6 (2) of the Civil Procedure Rules. Counsel contended that the Applicants had not made an attempt to demonstrate substantial loss which they are likely to suffer making the present application frivolous. Counsel further submitted that the Applicants had not indicated their readiness to give security for the due performance of the decree neither had they expressed their willingness to abide by any conditions imposed by the court.
11. Submitting on the second issue, Counsel contended that the 3<sup>rd</sup> Appellant allegedly purchased the property of a deceased person from a third party who was not an administrator of the estate. Counsel insisted that both the vendor and the 3<sup>rd</sup> Appellant had no locus standi and hence they have no legitimate cause of action rendering the application herein and the appeal fatally defective. Counsel urged the court to dismiss the application with costs.
12. The sole issue for determination is whether the Applicants have demonstrated the threshold for issuance of the orders sought.



13. The governing law in an application for stay of execution pending appeal is Order 42 Rule 6 (1) and (2) which provides as follows: -

1. No appeal or second appeal shall operate as a stay of execution or proceedings 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.

14. This Court’s discretion to grant an order for stay of execution pending the determination of an appeal is guided by the decision of the Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 where it held as follows: -

- “ 1. 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.
2. 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.
3. 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.
4. 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.
5. 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.”

15. Platt Ag. J.A. (as he then was) held as follows in *Kenya Shell Ltd v Kibiru* [1986] KLR 416: -

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in



its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented.”

16. Whereas the Applicants have an undoubted right of appeal against the decree of the trial court delivered on 29<sup>th</sup> August, 2024 in TAWA MCELC CASE NO. E002/2023, the Respondent has an equally undoubted right to enjoy the fruits of his judgment. It is clear from the pleadings that an eviction order was issued pursuant to the said decree and that the Respondent intends to commence lawful execution thereof. Nonetheless, it is not in contention that the Applicants are apprehensive of such eviction from the suit property which they state will cause them irreparable loss as expressed in paragraph 5 of the supporting affidavit. The Respondent did not contest the Applicants’ occupation of the suit properties.
17. The Applicants annexed a copy of the memorandum of appeal as Exhibit “AMK2” in their supporting affidavit. Among the grounds of appeal is their contention that the Respondent wrongfully sued them in the lower court as they were not parties to the sale agreement.
18. In the case of James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR the court observed as follows: -

“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 Vs. Chesoni [2002] 1KLR 867, and also in the case of Mukuma Vs. 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.”

19. It is manifestly clear that if the eviction order is executed, then the Applicants risk being put in hardship. They have indeed demonstrated that that they would suffer substantial loss and that they have an arguable appeal which would be rendered nugatory if stay of execution is not granted.
20. The Applicants have demonstrably shown that there was no delay in the filing of the present application which was filed barely a month after judgment was delivered by the lower court on 29<sup>th</sup> August, 2024.
21. In Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates, Nishit Raikundalia & Sapphire Trading & Marketing Ltd [2014] KEHC 2430 (KLR) the Court held as follows: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment-debtor... This is a civil suit where the Applicants are judgment-debtors... Civil process is quite different because, in a civil process, the judgment is like a debt hence the Applicants become and are judgment-debtors in relation to the Respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the Applicants. I presume, the security must be one which can serve that purpose.”



22. In the circumstances of the case, it is in the interest of justice that the application should be allowed in terms of prayer number three (3) with a condition that the Applicants do deposit Kshs.100,000/= in court within 30 days as security for any decree which may ultimately be binding upon them.

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 2<sup>ND</sup> DAY OF OCTOBER, 2025.**

.....

**HON. E. O. OBAGA**

**JUDGE**

IN THE PRESENCE OF:

Ms. Nyaata for Appellant.

Mr. Njuguna for Respondent

Court assistant – Steve Musyoki

