



REPUBLIC OF KENYA



KENYA LAW
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**Ndungu v Mungai (Environment and Land Appeal E044 of 2024)
[2025] KEELC 6805 (KLR) (8 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6805 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E044 OF 2024
MAO ODENY, J
OCTOBER 8, 2025**

BETWEEN

JOHN NDUNGU APPELLANT

AND

GEORGE GIKANGA MUNGAI RESPONDENT

RULING

1. This ruling is in respect of the Appellant/Applicant's Notice of Motion Application dated 18th October 2024 seeking the following orders:
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this appeal this Honorable Court be pleased to stay the execution of the judgment and/or decree in Nakuru Mcelc No E126 Of 2023 issued on 8th, August, 2024 and all other consequential orders arising therefrom.
 - d. That costs be in the cause.
2. The application is supported by the annexed affidavit of John Ndungu, the Appellant/Applicant, sworn on 18th October, 2024, where he deponed that the trial court delivered a judgment on 8th August, 2024, and dismissed his counterclaim. He deponed that the court ordered him to demolish the structures on the suit property and vacate within sixty days from the date of the judgment. It was his deposition that he has filed a Memorandum of Appeal dated 27th August, 2024 and has requested for certified proceedings in order to file a Record of Appeal.
3. The Appellant/Applicant further stated that the execution of the decree shall cause him irreparable harm as he currently resides on the suit property with his family and shall be rendered destitute. He averred that the application has been brought without undue delay and he has an arguable appeal. The



Appellant further deponed that he is willing to abide by any reasonable conditions set by the court and urged the court to allow the application as prayed.

4. George Gikanga Mungai, the Respondent, filed a Replying Affidavit sworn on 14th July, 2025, and deponed that the Appellant/Applicant filed an application for stay of execution in the lower court dated 4th September, 2024, which was dismissed with costs. He further deponed that the Applicant has neither shown that he will suffer substantial loss if the orders sought are not granted, nor offered any security for due performance of the decree.
5. The Respondent deponed that he stands to suffer greater prejudice if the orders sought are granted as he has been deprived of his property for nearly two decades and has incurred substantial legal costs to assert his rightful ownership. He asked the court to dismiss the application with costs.

Appellant/applicant's Submissions

6. Mr. Karanja, counsel for the Appellant, filed submissions dated 15th March 2025, and relied on Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010, and the cases of: Runda Water Limited & another vs Timothy John Nicklin & another [2017] eKLR and RWW vs EKW [2019] eKLR.
7. On the issue of substantial loss, counsel submitted that if execution is not stayed, the Applicant faces the imminent and irreparable harm of destitution as the Respondent has already moved to enforce the judgment by filing an application for eviction. Counsel relied on the case of James Wangalwa & another vs Agnes Naliaka Cheseto [2012] eKLR.
8. On the issue of offering security, Mr. Karanja submitted that the Applicant has through affidavit evidence, unequivocally demonstrated a willingness to comply with any reasonable conditions that this Honourable Court may impose as a prerequisite for granting the orders sought.
9. Counsel relied on the cases of Absalom Dova vs Tarbo Transporters [2013] eKLR, Mwaura Karuga t/a Limit Enterprises vs Kenya Bus Services Ltd & 4 others [2015] eKLR, Gianfranco Manenthi & Another vs Africa Merchant Assurance Company Ltd [2019] eKLR and Focin Motorcycle Co Limited vs Ann Wambui Wangui & Another [2018] eKLR.
10. Counsel submitted that the judgment was delivered on 8th August 2024 and there was no unreasonable delay in filing the application, and relied on the case of Nduhiu Gitai & Another vs Anna Wambui Warugongo [1988] 2KAR and urged the court to allow the application as prayed with costs.

Respondent's Submissions

11. Mr. Ayisi, counsel for the Respondent filed submissions dated 22nd July, 2025, and relied on the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules. On the issue of substantial loss, counsel submitted that the Applicant has not provided sufficient evidence to prove that he will suffer substantial loss if the orders sought are not granted.
12. Counsel submitted that the inconvenience of being evicted from land that one has no legal title, is not sufficient to prove substantial loss, and relied on the case of Kenya Shell Limited vs Benjamin Karuga Kibiru & another [1986] KECA 94 (KLR).
13. Counsel submitted that the application was made on 18th October, 2024 which is seventy-one days after judgment was passed and no satisfactory explanation has been provided for the delay. Counsel submitted that the Appellant/Applicant exceeded the sixty days compliance period and relied on the cases of Agip (Kenya) Limited vs Highlands Tyres Ltd [2001] eKLR and Ivita vs Kyumbu [1975] eKLR.



14. On the issue of security for due performance of the decree, Mr. Ayisi submitted that the Appellant/Applicant has neither offered nor proposed any form of security for the due performance of the decree as required under Order 42 Rule 6 (2) (b) of the Civil Procedure Rules. Counsel relied on the case of Antoine Ndiaye vs African Virtual University [2015] KEHC 6783 (KLR) and urged the court to dismiss the application with costs.

Analysis And Determination

15. The issue for determination is whether the Appellant has met the threshold for the grant of stay of execution as provided for under Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

“(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.”

16. An applicant must file an application for stay of execution without unreasonable delay, must demonstrate that he/she will suffer substantial loss if the orders sought are not granted and that he/she is willing to offer security for the due performance of the decree.

17. On whether the application was filed without unreasonable delay, this application was filed on 18th October, 2024, while subject judgment under appeal was rendered on 8th August, 2024. The stay application was therefore filed seventy-one days after the judgment. Why did the Applicant wait until the sixty days granted by the court to lapse before filing the application for stay of execution.

18. In the case of Jaber Mohsen Ali & another v Priscillah Boit & another [2014] the court held as follows:

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.”

19. On the issue of substantial loss, the Appellant contends that if execution is not stayed, he faces the imminent and irreparable harm of destitution as the Respondent has already moved to enforce the judgment by filing an application for eviction.

20. In the case of Karungu v Masira & another (Environment & Land Case 540 of 2016) [2024] KEELC 5683 (KLR) (25 July 2024) (Ruling); this court held that:

“It should also be noted that where there is an order of eviction, it is not enough to say that a party shall be evicted, as that is a decree that was issued after the parties have been heard and a case is determined. A mere mention of imminent eviction is not proof of substantial loss.”

21. Similarly on the issue of substantial loss is, it was observed in the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, that:

“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.”

22. On the issue of security, the Appellant informed the court that he is willing to comply with any reasonable conditions that this Honourable Court may impose as a prerequisite for granting the orders sought.

23. In the case of Exclusive Mines Limited & another vs Ministry of Mining & 2 others [2015] eKLR, the court stated as follows:

“...On the issue of furnishing security, my understanding is that an applicant seeking an order of stay pending appeal should, as a sign of good faith, offer or propose any such security for the performance of the decree which the appeal has been preferred. I have looked at the Interested party’s affidavit in support of his Notice of Motion and nowhere in his seventeen (17) paragraph affidavit does he make any offer of any security nor bind himself to meet any such orders that the Court may impose. While the law leaves it to the Court’s discretion to make such orders as to security as it may deem fit, it is a good practice for an applicant seeking such an order to intimate to the Court his preparation to meet such orders as the Court may impose as this assists the Court while exercising its discretion in that respect.”

24. I have considered the application, the submissions by counsel and find that the Applicant has not met the threshold for the grant of orders of stay of execution, but in the interest of justice, I will order the Applicant to deposit Kshs 200,000/ in a Joint interest earning account of the Advocates on record within 30 days, failure to which the stay order lapses. Applicant to fast track the processing of the record of Appeal within 45 days. Costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 8TH DAY OF OCTOBER 2025.

M. A. ODENY

JUDGE

