



REPUBLIC OF KENYA



KENYA LAW
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**Makori v Njoroge & another (Environment and Land Appeal
E054 of 2023) [2025] KEELC 5773 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5773 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E054 OF 2023**

JM ONYANGO, J

JULY 31, 2025

BETWEEN

KENNETH NYAKUNDI MAKORI APPELLANT

AND

JOSEPH GIKONDI NJOROGE 1ST RESPONDENT

EVANGELINE WANDA MURIITHI 2ND RESPONDENT

(Being an appeal from the ruling delivered by Hon. C.K. Kisiangani (Principal Magistrate) on 11th May 2023 in Ruiru ELC Suit No. E112 of 2021)

JUDGMENT

1. Joseph Gikondi Njoroge and Evangeline Wanda Muriithi, the 1st and 2nd Respondents herein, were the 1st and 2nd Plaintiffs in Ruiru ELC Suit No. E112 of 2021, where they filed their suit against Kenneth Nyakundi Makori, the Appellant herein, who was the Defendant in the lower court, seeking the following reliefs:-
 - a. The Plaintiffs be declared the legal owners of all that piece of land known as Ruiru/Ruiru East Block 2/30924.
 - b. The Defendant herein vacate the suit property and surrender possession of the property vacant within 30 days from the date of the judgment herein failure to which the Plaintiffs shall proceed with forceful eviction of the Defendant from the suit property.
 - c. Mesne profits.
 - d. Damages resulting from the Defendant's act of trespass.
 - e. Interest.



- f. Costs of this suit.
2. The Appellant entered appearance and filed a Defence. Upon hearing the suit, the court entered Judgment in favour of the Respondents on 27th October 2022 by allowing prayers (a) and (b) of the Plaint. The trial court also ordered that each party bear their costs and issued a 30-day stay of execution.
3. Subsequently, the Appellant filed a Notice of Motion Application dated 23rd February 2023 seeking orders that:
 - a. Spent
 - b. Nelius Njuguna Advocate practising as such at the Kituo Cha Sheria be granted leave to represent the Applicant herein.
 - c. That there be a temporary stay of execution of the orders in the matter pending the hearing and determination of this application.
 - d. That there be a temporal stay of execution of the orders in the matter pending the hearing and determination of the intended appeal.
 - e. That the costs of the application be provided for.
4. The Respondents opposed the Application through a Replying Affidavit dated 13th March 2023. The Application was canvassed through written submissions, and a Ruling was delivered on 11th May 2023. The trial court expressed itself as follows:

“...this court finds that the Defendant has not established sufficient and reasonable cause for it to allow the application. Also, the defendant has not proven that he has filed any appeal against the Judgment of this court that was delivered on 27th October 2022. Accordingly, the Notice of Motion application dated 23rd February 2023, is hereby dismissed with no orders as to costs.”
5. Being dissatisfied with the Ruling of the trial court, the Appellant filed this appeal raising 4 grounds of appeal claiming that the trial magistrate erred in law and fact by:-
 - i. Failing to find that the Appellant would suffer substantial loss if the appeal was rendered nugatory.
 - ii. Failing to find that the Appellant would suffer substantial loss if evicted, since he had developed the suit property.
 - iii. Failing to find that there was no inordinate delay in bringing the application.
 - iv. Failing to appreciate that security for the performance of the decree is as the court orders, and the Appellant was willing to abide by any directions that the honourable court would have imposed.

Appellant's Submissions

6. The appeal was canvassed by way of written submissions. The Appellant, who was acting in person, filed written submissions dated 8th July, 2025.
7. The Appellant submitted that the primary issue for determination was whether the Court should grant a stay of execution and allow the appeal. He relied on Order 42 Rule 6(2) of the Civil Procedure Rules,



which provides that a stay of execution may only be granted where the applicant demonstrates that substantial loss may occur if the stay is not granted, that the application was filed without undue delay, and that adequate security is offered for the due performance of the decree.

8. He further argued that Sections 1A, 1B, and 3A of the *Civil Procedure Act* (Cap 21) empowered the Court to make orders that promote the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. The Appellant emphasized that these provisions should be read together with Article 48, Article 50(1), and Article 159 of *the Constitution*, which safeguard the right to access justice, the right to be heard, and the preference for substantive over procedural justice.
9. In support of his claim of substantial loss, the Appellant cited the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR, where it was held that the mere fact of execution does not amount to substantial loss because execution is a lawful process. He stated that substantial loss had to be prevented by preserving the status quo because such loss would render the appeal nugatory. He further stated that in his case, substantial loss would occur because he resides on the suit property, which he had significantly developed and that he had no alternative home. He contended that eviction would cause him irreparable harm and that monetary compensation would not be an adequate remedy.
10. The Appellant maintained that the appeal concerned Land Parcel Ruiru/Ruiru East Block 2/4118, a portion of which he claimed ownership, and from which Land Parcel Ruiru/Ruiru East Block 2/30924, the subject of the current dispute, was subdivided. He argued that if the stay was not granted, the appeal would be rendered nugatory due to the risk of eviction and potential loss of his home.
11. He referred the Court to the decision in *Port Florence Community Health Care vs Crown Health Care Ltd* [2022] eKLR, where it was held that whether an appeal would be rendered nugatory should depend on whether the appeal is arguable, not necessarily whether it would succeed. He also cited *Co-operative Bank of Kenya Ltd vs Banking Insurance & Finance Union* [2015] eKLR, which reiterated that an arguable appeal needs only to raise a bona fide issue worthy of judicial consideration.
12. According to the Appellant, the appeal raised genuine questions as to whether the trial court had properly exercised its discretion in failing to find that he was entitled to a portion (0.06689 Ha) of Land Parcel Ruiru/Ruiru East Block 2/4118. He submitted that the appeal was not frivolous and that he was willing to comply with any terms or conditions the Court might impose.
13. In conclusion, the Appellant submitted that it was in the interest of justice to grant the orders sought. He argued that failure to do so would prejudice him greatly, deny him a fair hearing, and amount to a violation of his constitutional rights. He reiterated that eviction would subject him to irreparable harm and that, unless the stay was granted, he would be unjustly deprived of the opportunity to have his appeal fairly adjudicated.
14. Accordingly, the Appellant prayed that the Court allow the appeal and issue the orders sought.

Respondents' Submissions

15. The Respondents filed written submissions dated 20th February 2025 through the firm of Ms DW Gichio & Company Advocates. Counsel submitted that the present appeal had been overtaken by events given that the Judgment issued at the trial court had already been fully executed and that the Respondents had already taken possession of the suit property and developed permanent structures on it. Counsel further submitted that granting stay orders would therefore amount to issuing orders in vain. Counsel added that no competent appeal existed for which stay orders could be issued given that the Appellant's attempt to file an appeal out of time was dismissed.



16. Counsel for the Respondents relied on the decision in the case of Stanley Kangethe Kinyanjui vs Tony Keter & 5 Others [2013] eKLR in submitting that for an applicant to be granted a stay order he/she must satisfy the court that the appeal is arguable and that it would be rendered nugatory if the stay order is not granted. On whether the appeal is arguable, counsel contended that the trial court's judgment was well-reasoned and was based on the following clear uncontroverted evidence:(i) The Respondents proved ownership of the suit property through a valid title deed, which the Appellant never challenged; (ii) The Appellant failed to provide any documentary evidence to support his alleged claim to the land; and (iii) The trial court correctly held that possession did not override legal ownership, and Appellant's continued occupation was unlawful. Counsel further contended that the Appellant had not raised any legitimate issue warranting an appeal. He added that the Appellant's appeal was not arguable because it was based on unfounded claims already dismissed in the lower court.
17. On whether the appeal would be rendered nugatory if the stay was denied, counsel relied on the decision in Sicpa Securities Sol Sa vs Okiya Omtatah Okoiti & 2 Others [2018]eKLR, where the court held that an appeal would not be rendered nugatory if the consequences of execution could be remedied through an award of damages.
18. Counsel asserted that the execution of the decree would not cause irreversible harm to the Appellant. He added that if the appeal were to succeed, any loss suffered could be compensated through damages. Counsel further asserted that Order 42 Rule 6 of the Civil Procedure Rules set out the following three mandatory conditions that an applicant ought to meet before a stay pending appeal could be granted: (i) The applicant ought to satisfy that substantial loss would result to the applicant unless the stay was not granted; (ii) The application ought to be made without unreasonable delay; and (iii) The applicant ought to provide security for the due performance of the decree.
19. On the first condition, counsel submitted that the Appellant failed to show how execution of the decree would irreparably harm him beyond normal execution consequences. Counsel contended that the loss alleged by the Appellant was eviction, which was a natural consequence of losing a land ownership case.
20. On the second condition, counsel submitted that the obligation to furnish security was not optional and that an applicant ought to propose reasonable security to demonstrate their good faith and willingness to comply with the outcome of the appeal. Counsel further submitted that the Appellant had neither provided any tangible security nor demonstrated his financial ability or commitment to comply with the decree if his appeal failed. Counsel relied on the decision in the cases of Jane Cherotich Tum vs Rose Chepkurgat Rono(E& L Appeal No. E012 of 2024) and Sicpa Securities Sol Sa vs Okiya Omtatah Okoiti & 2 Others [2018]eKLR in support of his submissions.
21. On whether there was unreasonable delay in filing the application for stay of execution, counsel explained that the trial court granted the Appellant a three-month stay period during which the Appellant failed to take any steps. Counsel further explained that the Appellant filed his application for extension of time one month after the stay period expired. Counsel added that since the Appellant did not provide any valid reason for his delay, the trial court was correct in dismissing his application. Counsel relied on the case of Jane Cherotich Tum vs Rose Chepkurgat Rono, where the court rejected an application for extension of time when the applicant had failed to justify the three-month delay in filing the application. In conclusion, counsel urged this court to dismiss the appeal and award the costs to the Respondent.

Analysis and Determination

22. Having considered, the Grounds of Appeal, the Record of Appeal and the parties' submissions the main issue for determination is whether the trial magistrate erred in dismissing the Appellant's



application seeking stay of execution of the Judgment dated 27th October 2022. An order for stay of execution is discretionary. Principles for setting aside a discretionary order on appeal are well settled. The appellate court will not ordinarily interfere with the exercise of discretion of the trial court unless the Appellant demonstrates that the trial court misdirected itself or considered irrelevant matters or failed to consider relevant matters, leading to a wrong conclusion.

23. In the case of *Shah v Mbogo* [1968] EA , the Court of Appeal held as follows;

“I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that it’s decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

24. Stay of Execution is provided under Order 42 Rule 6 of the Civil Procedure Rules 2010 as follows;

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.”

25. The conditions to be fulfilled before a stay of execution order is granted was summarized as follows in the case of *Antoine Ndiaye vs African Virtual University* [2015] eKLR:

a. That substantial loss may result to the applicant unless the order is made.

b. That the application has been made without unreasonable delay.

c. That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

26. The Court of Appeal in the case of *Butt -vs- Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how a court should exercise the said discretion and held that:

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.”
27. In its impugned ruling dated 11th May 2023, the trial allowed the prayer (2) of the Application dated 23rd February 2023 seeking leave to have Nelius Njuguna Advocate, to represent the Appellant post-judgment. The trial court then considered the conditions set out under Order 42 Rule 6 and in the case of Antoine Ndiaye vs African Virtual University supra in determining whether to grant the order for stay of execution.
 28. On whether the Appellant would suffer substantial loss, the trial court faulted the Appellant for failing to specifically plead that the Plaintiffs' means were unknown, therefore they would not be capable of returning the suit property to him if he were to succeed in the Appeal. The trial court further found that the Appellant's supporting Affidavit was silent on the issue of substantial loss; hence, the Appellant had not met the said requirement.
 29. It was the trial court's finding that there was delay in filing the application seeking stay of execution given that it was filed a month after the temporary stay orders granted by the court had expired. On the issue of security for costs, the trial court faulted the Appellant for failing to undertake to provide security for the due performance of the decree. The trial court further found that the Appellant had not established that he had filed an appeal against the Judgment dated 27th October 2022.
 30. I am in agreement with the trial court that the Appellant did not meet the requirements under Order 42 Rule of the Civil Procedure Rules, 2010. A perusal of the Record of Appeal and the lower court file does not show any evidence of an appeal against the Judgment dated 27th October 2022 having been filed by the Appellant. The Notice of Appeal and the draft memorandum of appeal annexed to the Application dated 23rd February 2023 were in respect to the Judgment in ELC 162 of 2019, in which the Respondents herein were not included as parties. The trial court record shows that the Appellant filed a Notice of Motion Application dated 18th July 2023 seeking an extension of time to file an appeal against the Judgment dated 27th October 2022. This goes to show that an appeal had not been filed as at 23rd February 2023. Therefore, there was no basis to grant the stay of execution orders.
 31. The upshot is that the appeal lacks merit and it is hereby dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 31ST DAY OF JULY 2025.

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J. M ONYANGO

JUDGE

In the presence of :



1. Kenneth Nyakundi Makori, Appellant
 2. Miss Kiema for Miss Gichio for the 1st Respondent
- Court Assistant: Hinga

