



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Changiwa v Omwera & 3 others (Environment and Land Appeal
E080 of 2025) [2025] KEELC 7440 (KLR) (29 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7440 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E080 OF 2025**

A NYUKURI, J

OCTOBER 29, 2025

BETWEEN

EDWARD GUDAHI CHANGIWA APPELLANT

AND

MOSES OMBUNDO OMWERA & 3 OTHERS RESPONDENT

RULING

Introduction

1. Before court is a Notice of motion dated 15th September 2025 filed by the appellant seeking stay of execution of the judgment and decree dated 14th August 2025 delivered in Kakamega MC ELC CASE No. E512 OF 2018 pending the hearing and determination of this appeal.
2. The application is anchored on the affidavit sworn by the appellant/applicant dated 15th September 2025. The applicant's case is that he had been sued in the lower court as a 4th defendant and that judgment was entered against him to pay the 1st respondent a sum of Kshs. 300, 000/= with interest at court rates. That having been aggrieved by the judgment he filed the appeal herein.
3. That his appeal raised arguable grounds on the basis inter alia that the suit against him was time barred, that the 1st respondent was estopped from claiming against him by dint of section 120 of the *Evidence Act* and that the 1st respondent waived his right when he made him his witness. Further, that he was apprehensive that the 1st respondent may proceed to execute against him That he stands to suffer substantial loss as the financial means of the 1st respondent are unknown and he may not be in a position to reimburse the amount if paid and if he wins the appeal. That he prays that the execution of the judgment to the extend that he pays the respondent the sum of Kshs. 300, 000/=, be stayed.
4. The application was opposed. He respondent filed grounds of opposition dated 29th September 2025. He stated that the application was improperly before court. That the applicant had not met the



threshold for grant of orders of stay pending appeal, that the appeal has no chances of success and that the applicant was guilty of latches.

5. The application was disposed by way of written submissions. On record are submissions filed by the applicant dated 23rd September 2025, which the court has duly considered.

Analysis and determination.

6. The court has carefully considered the application, grounds of opposition and the applicant's submissions. The single issue that arises for the court's determination is whether the applicant has met the threshold for grant of orders of stay of execution pending appeal.

7. Order 42 Rule 6 of the Civil Procedure Rules provides for the jurisdiction of the court to grant orders of stay of execution pending appeal as follows;

Stay in case of appeal [Order 42, rule 6]

- (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.
8. Essentially, for an applicant to succeed in an application for stay pending appeal, they ought to demonstrate that they stand to suffer substantial loss if stay is not granted; that they have sought stay without unreasonable delay and show willingness to provide security for the due performance of the decree that may issue against them.
9. In *Butt vs Rent Restriction Tribunal* [1979] KLR the Court of Appeal stated the principles to be considered in determining an application for stay of execution pending appeal, and stated as follows:

- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
- b. Secondly, 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 the appeal court reverse the judge's discretion.
- c. Thirdly, 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.



- d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse.

10. In the case of Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation) [2004] 2 EA 331 the court discussed the element of substantial loss as follows;

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”

11. In the instant matter, the applicant stated that he has an arguable appeal, due to among other grounds; that the 1st respondent was estopped from making a claim against him and that the claim being in respect of breach of contract, was time barred. That he was ordered to pay Kshs. 300, 000/= and is not sure of the 1st respondent’s ability to refund the same in the event he is successful in the appeal.
12. As the applicant’s concern is the ability of the 1st respondent to refund the sum of Kshs. 300, 000/=, and the 1st respondent having not disputed that allegation through a replying affidavit, the applicant’s apprehension can be addressed by an order of provision of security.
13. As the applicant was ordered by the trial court to pay the 1st respondent the sum of Kshs. 300, 000/=, I allow the prayer for stay of execution pending appeal, on condition that within 30 days of this ruling, the applicant deposits in court a sum of Kshs. 300, 000/= being security for the due performance of the decree that may ultimately be binding on him.
14. Ultimately, the application dated 15th September 2025 is hereby allowed in the following terms;
 - a. That this honourable court hereby issues an order staying execution of the decree issued in Kakamega MC ELC NO. 512 of 2018 dated 14th August 2025 to the extent that the trial court ordered the appellant to pay the 1st respondent a sum of Kshs. 300, 000/= with interest; pending the hearing and determination of this appeal.
 - b. The appellant shall, in 30 days of this ruling, deposit in court, a sum of Kshs. 300, 000/= being security for the due performance of the decree that may issue against him. In default, the orders of stay granted herein above shall stand vacated.

15. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 29TH DAY OF OCTOBER, 2025

A. NYUKURI

JUDGE

In the presence of;

Mr. Wambua the appellant/applicant

Ms. Cheronu holding brief for Mr. Nandwa for 1st respondent



No appearance for other respondents

Court Assistant: Delphine

