



**Ethics and Anti-Corruption Commission v Tum (Administrator of the Estate of Nathaniel Kipkorir Tum) & another; Board of Management Kitale School Primary & another (Interested Parties) (Environment and Land Case E020 of 2023) [2025] KEELC 7193 (KLR) (15 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7193 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND LAND CASE E020 OF 2023**

**CK NZILI, J**

**OCTOBER 15, 2025**

**BETWEEN**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**EDWIN KIPCHIRCHIR TUM (ADMINISTRATOR OF THE ESTATE OF NATHANIEL KIPKORIR TUM) ..... 1<sup>ST</sup> DEFENDANT**

**WILSON GACHANJA ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**BOARD OF MANAGEMENT KITALE SCHOOL PRIMARY .... INTERESTED PARTY**

**HON ATTORNEY GENERAL ..... INTERESTED PARTY**

**RULING**

1. The court is faced with an application dated 10/7/2025 brought under the inherent powers of the court. The 1<sup>st</sup> defendant seeks a stay of execution or implementation of a ruling or order of this court issued on 9/7/2025, pending hearing and determination of the intended appeal.
2. The grounds are on the face of the application, the supporting affidavit of Edwin K. Tum, sworn on 10/7/2025. He says that, being aggrieved by the ruling, a notice of appeal has been preferred at the Court of Appeal. The notice and letter requesting typed proceedings have been attached as annexure marked EKT-3. The applicant avers that the order could be executed at any time, the receiver will dissipate and mismanage the suit premises, causing damage that will be great and incapable of being compensated by way of damages.



3. The applicant avers that his family's reputation will be ruined completely, and the heavy investment made there for 31 years will go down the drain. Again, the applicant avers that the property currently has several rental units, a petrol station, a car wash, go-downs, a hotel, a borehole that serves the entire residential and rental units, and a supermarket.
4. The applicant deposes that his family stand to suffer great prejudice and loss unless the application is allowed as prayed as the representatives of the estate of his late father will be deprived of their constitutional right to enjoy the property despite having a good appeal which is yet to be considered by the appellate court, otherwise, the respondent will suffer no prejudice if the stay order is given since there already exists orders barring him from disposing of the suit land.
5. The applicant deposes that allowing the application will comply with the tenets of the principles of natural justice, guaranteeing him the right of appeal. The applicant relies on written submissions dated 26/7/2025.
6. Through oral submissions on 17/7/2025, learned counsel Mr. Owiti said that the application was filed less than two days after the ruling and that in paragraph 6 of the supporting affidavit, the potential loss likely to be suffered has been demonstrated. Learned counsel submitted that the loss will be irreparable.
7. As to the written submissions by the respondent, that the application is fatal for not citing the law under which it is brought, the applicant submitted that the cited extract is by the minority of the bench. Learned counsel urged the court to be guided by Abraham Mukhola Asitsa -vs- Silver Style Investment Company Ltd [2020] KEHC 965 (KLR) and to determine the matter on merits.
8. Learned counsel submitted that his client was ready and willing to move to the Court of Appeal. Further, learned counsel urged the court to find that the leases referred to in the supporting affidavit were on record by virtue of a supplementary affidavit sworn on 19/1/2024.
9. The application is opposed by the respondent through written submissions dated 16/7/2025. Learned counsel Miss Githinji submitted that the application is brought under the inherent power of the court, making it fatal.
10. Again, learned counsel submitted that contrary to the submissions by the applicant, no evidence has been tendered to show substantial loss; otherwise, he who avers must prove. Learned counsel submitted that the alleged irreparable loss has not been substantiated and that the substantial loss, based on baseless apprehension, imagination, and speculation, should not suffice.
11. Learned counsel submitted that the receiver appointed will be bound by the provisions of Order 41 of the Civil Procedure Rules, with the primary duty being to preserve the subject property and not to dissipate or mismanage it.
12. Learned counsel submitted that there is no evidence of the alleged misconduct on the part of the plaintiff so far. Learned counsel submitted that the plaintiff has no intention to flout the law.
13. Further, learned counsel submitted that the apprehension that the receiver will be under the direction of the plaintiff and not the court is baseless; otherwise, he will have to abide by the court's directions.
14. On the rent, learned counsel submitted that it will be collected and deposited in a joint account held by both the plaintiff and the 1<sup>st</sup> defendant, hence there will be no advantage to either party to the account or suffering or loss.
15. Learned counsel submitted that the real damage or loss will be to the plaintiff if the orders are stayed, when the court has not been told if the suit property has been excluded from the estate of the deceased



- in the succession cause is greater. The learned counsel submitted that the plaintiff made an application in the succession cause since the property had been included, hence the applicant has come to court with unclean hands, and lifting the orders could mean that the property will not be safeguarded.
16. Learned counsel submitted that the earlier orders issued were limited in terms of the activities that could be conducted on the suit property; otherwise, the applicant is the one who has been in full control of the same.
  17. As to the doctrine of *lis pendens*, learned counsel submitted that the same is not automatic and only comes into effect upon commencement of the prosecution of the case.
  18. The learned counsel submitted that fair administration of justice requires that all parties be heard, and in this case, the orders granted by the court were most relevant and ideal in the circumstances.
  19. Learned counsel submitted that the applicant has not mentioned the issue of security, and given the claim by the plaintiff in the suit on mesne profits and damages on trespass, the issue cannot be overlooked.
  20. Further, learned counsel submitted that the intended appeal raises no arguable points, is frivolous in that the issue of *res judicata* was considered, and the court made a finding that the previous suits were not on similar issues as in the current suit.
  21. As to the court being unfair, learned counsel submitted that the orders were judicial in nature. As to substantial loss, learned counsel submitted that the court should not be referred to previous supporting affidavits; otherwise, if the applicant intended to rely on such a supplementary affidavit, it should have stated so in the supporting affidavit; otherwise, it could amount to trial by ambush to refer the documents to the application before the court. The learned counsel urged the court to find the application falling short of the threshold for a stay of execution.
  22. In a rejoinder, Mr. Owiti, learned counsel for the applicant, submitted that the *Evidence Act* allows a court to rely on previous court records, and in this case, the leases are contained in the application before this court.
  23. Learned counsel submitted that the plaintiff has not filed any replying affidavit or grounds of opposition or a preliminary objection, as per Order 51 Rule (4) of the Civil Procedure Rules, hence the submissions made from the bar should not be considered.
  24. The learned counsel submitted that the failure to cite the law is not fatal as held in the cited Supreme Court decisions.
  25. Learned counsel, on substantial loss and security in a monetary decree, submits that the latter is an irrelevant condition; otherwise, if needed, his client was willing to prove the same.
  26. A party seeking a stay of execution pending appeal from the court in which the order appealed against has to comply with the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules. Sufficient cause, filing the application on time, demonstrating substantial loss, and offering security for the due realization of the decree should the appeal not succeed, are the conditions that an applicant has to surmount.
  27. In *Samvir Trustee Ltd -vs- Guardian Bank Ltd*, Nairobi Milimani HCCC No. 795 of 1997, the court held that every aggrieved party with a decision of the high court has a natural and undoubted right to seek the intervention of the Court of Appeal. The court, in considering whether to grant or refuse an application for stay, is empowered to see whether there exists any special circumstances that can sway the discretion of the court in a particular manner.



28. The court held that the yardstick is to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory, while at the same time ensuring that a successful party, whose rights have been defined, enjoys the fruits of his judgment. The court further held that an applicant must satisfy the court that substantial loss would result if no stay is granted, and must guide the court through adequate and proper evidence of substantial loss.
29. In *Kenya Shell Ltd -vs- Kibiru* (1986) KLR 410, the court said that Order 42 Rule 3 of the Civil Procedure Rules has to be substantiated with evidence of substantial loss, since it is the cornerstone of stay.
30. In *James Wangalwa & Another -vs- Agnes Naliaka Cheseto* (2012) eKLR, the court said that execution by itself doesn't amount to substantial loss, and an applicant must show other factors that will negate the very essential core of the substratum of the appeal and affect the appellant as the successful party in the appeal.
31. In *National Industrial Credit Bank Ltd -vs- Aquinas Francis Wasike & another* [2006] KECA 333 (KLR), the court said that the legal duty is on the applicant to prove the allegation that an appeal could be rendered nugatory.
32. As to security, the court in *Focin Motorcycle Co. Ltd -vs- Ann Wambui Wangui & Another* [2018] eKLR, the court said that it is a mark of good faith and that an applicant must state if he is ready to provide security or propose the kind of security.
33. The applicant applied for stay almost three days after the impugned ruling.
34. As to substantial loss, other than alleging substantial loss, damage, loss of family reputation, mismanagement or dissipation of the suit property at the hands of the receiver, loss of the heavy investment on the suit property, loss of rental income and livelihood by the beneficiaries, in paragraph 6 of the supporting affidavit, there is no empirical and documentary evidence to substantiate the same.
35. The purpose of stay, as held in *RWW -vs- EKW* [2019] eKLR, is to preserve the subject matter in dispute so that the two rights can be safeguarded. The court weighs the two rights to ensure no party is put at a disadvantage or prejudice that cannot be compensated by way of damages.
36. In this application, the applicant has not demonstrated any special circumstances and unique requirements to demonstrate that the appeal shall be rendered nugatory if a stay is not granted. See *Butt -vs- Rent Restrictions Tribunal* 1982 [KLR] 417.
37. As to security, it is not an irrelevant consideration as submitted by the applicant. The supporting affidavit is silent on the same. An applicant has a show of good faith, has to offer security, undertaking, or commitments on security as held in *Thugi River Estates Limited & another -vs- National Bank of Kenya Limited & 2 others* [2008] eKLR
38. It is not for the court to suggest to a party that the three requirements under Order 42 of the Civil Procedure Rules have to go hand in hand and the failure to prove one dislodges the others.
39. Sufficient cause must be shown why a court which has made an order should stay it. In *Kenya Shell Ltd -vs- Kibiru* (supra), the court held that without this evidence, it would be difficult to see why the respondent should be kept out of enjoying the fruits of their judgment. The damages to be suffered must be shown to justify why the status quo before the ruling should remain.
40. In *Machira t/a Machira & Co. Advocates -vs- E.A. Standard* [2002] KEHC 1167 [KLR], the court held that it had to be proportionate and strive to give effect to the overriding objective to do justice



and fairness to the parties. The court held that any subsequent decision of the court tending to impede the normal flow of justice, by suspending the enjoyment of the consequential benefits of one's success, can only be rendered in exceptional circumstances, after an exercise of great caution and finding that suspension is necessary in the interest of justice and fairness.

41. Proper evidential material that substantial loss will result to the applicant out of proportion in relation to the interest of justice and fairness is what the applicant ought to have addressed before me.
42. Mere words, assertions, allegations, insinuations, presuppositions, and allegations will not suffice. Details, particulars, and specifics by way of valuation reports, financial records on income, tax returns, licenses, and permits for the residential and commercial properties are what the applicant should have attached to substantiate substantial loss.
43. A court of law may not order a stay of execution on mere vague speculation. There must be the clearest grounds necessary on disclosed evidence. At the very least, the court would have expected the applicant to offer the original title to the suit land to the court as security as a sign of good faith. Unfortunately, the applicant submits that security is an irrelevant consideration, since this is not a money decree.
44. As to the allegation that the receiver would mismanage and dissipate the suit property once he moves in, again, the basis for that averment has not been laid. Such an allegation does not amount to substantial loss. Sufficient cause, as held in *Antoine Ndiaye -vs- African Virtual University* [2015] eKLR, has to be shown.
45. In my considered view, the applicant has not met the conditions of stay. The application is dismissed with costs.
46. Orders accordingly.

**RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 15<sup>TH</sup> DAY OF OCTOBER 2025.**

**HON. C.K. NZILI**

**JUDGE, ELC KITALE.**

In the presence of:

Court Assistant - Dennis

No appearance.

1<sup>st</sup> defendant present

Mwangangi for 1<sup>st</sup> - 5<sup>th</sup> respondents

Githinji for the plaintiff present

Mwaniki Muriuki for 2<sup>nd</sup> defendant absent

Chilaka for Interested parties absent

Kiarie for 1<sup>st</sup> defendant present

