



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Anti-Corruption Commission v Salim & 2 others (Environment and Land Case 39 of 2009) [2025] KEELC 7335 (KLR) (29 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7335 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND CASE 39 OF 2009  
SM KIBUNJA, J  
OCTOBER 29, 2025**

**BETWEEN**

**KENYA ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**AGIL MAHAMOUD SALIM ..... 1<sup>ST</sup> DEFENDANT**

**ACADEMIC PROPERTIES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**WILSON GACANJA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The 2<sup>nd</sup> defendant moved the court through the notice of motion dated 28th July 2025 seeking for the following orders:

1. “Spent.
2. Spent.
3. That this Honourable Court be pleased to grant a temporary stay of execution of the judgment delivered on 23rd July, 2025 and all other consequential proceedings emanating from the said judgment pending the hearing and determination of this appeal.
4. That costs of this application abide the outcome of appeal.”

The application is based on the eight (8) grounds on its face and supported by the affidavit of Abdalla Salim Omar, Managing Director of the 2nd defendant, sworn on 28th July 2025, in which he inter alia deposed that the judgment was delivered in favour of the plaintiff on 23rd July 2025, and they were aggrieved; that the 2<sup>nd</sup> defendant has already filed a notice of appeal dated 25th July 2025; that they have been in possession of the suit property since 1992; that they have used the said yard for their tracking business, and had even charged the suit



property to a bank since 2018, and are reasonably apprehensive that they may be evicted; that if the register is rectified, it would render the appeal nugatory and an academic exercise; that the appeal before the Court of Appeal is meritorious and arguable; that the application has been brought without delay and in good faith.

2. The plaintiff opposed the application through the replying affidavit of Dedan Okwama, an investigator with the plaintiff, sworn on 26th August 2025, in which he inter alia deposed that the 2nd defendant has not met the threshold for an order of stay of execution of judgment to issue because it has not demonstrated what substantial loss it will suffer; that the 2<sup>nd</sup> defendant has not offered security for the due performance of the decree; that the plaintiff is yet to extract a decree and the 2nd defendant has not demonstrated what action the plaintiff has taken towards executing a decree; that no evidence of a bank loan has been presented and in any case, bank loans are always insured and secured through collateral; that no material evidence has been provided to show that the plaintiff would be unable to restore the 2nd defendant to the position prior to the execution; that granting stay would inconvenience members of the public as property will not be used for the purpose it was meant for; that granting stay orders is a balancing act between the rights of both parties.
3. The 3<sup>rd</sup> defendant informed the court through counsel during the mention of 19<sup>th</sup> September 2025 that he was not participating in the application, while no replies were filed by the 1<sup>st</sup> defendant.
4. The learned counsel for the 2<sup>nd</sup> defendant and plaintiff filed their submissions dated the 9<sup>th</sup> September 2025 and 15<sup>th</sup> September 2025 respectively, which the court has considered.
5. The following are the issues arising in the application for the court's determinations:
  - a. Whether the 2<sup>nd</sup> defendant has met the threshold for stay of execution of judgment pending hearing and determination of an appeal for the order to issue.
  - b. Who bears the costs?
6. The court has carefully considered the grounds on the application, affidavit evidence, submissions by the learned counsel, superior court decisions cited thereon and come to the following conclusions:
  - a. The application has invoked Order 42 (6) of the Civil Procedure Rules, among others, which the learned counsel have in their submissions cited. The provision sets out the two conditions under sub-rule 2 that are:
    - i. the court be 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
    - ii. 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.

Indeed, the applicant has a duty to establish before the court that substantial loss is likely to occur if the stay order is not issued; that the stay of execution application was filed without unreasonable delay and readiness to tender security for the due performance of the decree that may finally be found binding. The merit or otherwise of the applicant's appeal is a matter better left for the appellate court as can be seen in the decision in the case of *Housing Finance Company of Kenya versus Sharok Kher Mohamed Ali Hirji & Another* [2015] eKLR Civil Application No. 74 OF 2015 (UR 63 OF 2015) the Court of Appeal held as follows:

“These are issues which in our view would best be addressed on merit at the hearing of the intended appeal. We cannot over emphasize that at this stage



we are not required to go to the merits of the case as tempting as it may be or consider whether the issues will be successful in favour of the appellant, lest we embarrass the trial judge. We therefore find that the applicant has discharged this requirement on the balance of probabilities. We are further guided by this court's decision in *Carter & Sons Ltd. V. Deposit Protection Fund Board & Two Others* – Civil Appeal No. 291 of 1997, at Page 4 as follows:

“ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

Therefore, the fact that an appeal has arguable grounds is not a ground for this court's consideration, but for the appellate court.

- b. Furthermore, stay of execution orders is not a right to a litigant, but a relief, granted in exercise of the discretionary power of the court, as restated in the case of *Butt versus Rent Restriction Tribunal (1979) KECA 22 (KLR)*.
- c. The first condition of substantial loss was described in the case of *James Wangalwa & Another versus Agnes Naliaka Cheseto (2012) KEHC 1094 (KLR)* where the court held thus:

“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.”

The 2<sup>nd</sup> defendant has in their affidavit deposed that their trucking business, which they have been operating since 1992, would suffer if the stay order was not issued and execution proceeds. Further, that they had charged the suit property, and would be adversely affected by the actions to be taken by the bank if execution takes place. The plaintiff has countered the 2<sup>nd</sup> defendant arguments positing that they have not proved the existence of any steps taken by the plaintiff to suggest execution would commence, like extraction of a decree. That further, the stated bank loans facilities are always insured and 2<sup>nd</sup> defendant, as a borrower, must have provided collateral for the same.

- d. The court takes judicial notice that any business, which has been operating for a long time, such as that of the 2<sup>nd</sup> defendant, establishes goodwill. That while the 2<sup>nd</sup> defendant's long use of the suit property may have earned it goodwill, there is nothing presented to this court to show their trucking business would suffer substantial loss if it was relocated to some other appropriate facility of their choice, when execution occurs. Indeed, the certificate of official search marked “ASO2” shows that there is an existing charge registered against the suit property's title to I & M Bank that is dated 8th November 2018. The suit property has been found to have been unlawfully, illegally and fraudulently allocated and the title to the 1<sup>st</sup> and 2<sup>nd</sup> defendants has been successfully impugned. It still remains the responsibility of the 2<sup>nd</sup> defendant to come up with an arrangement acceptable to the bank on how the outstanding loan facilities will



henceforth be secured or settled, if execution takes place. The existence of the encumbrance to the title in the nature of a charge does not on its own amount to evidence of substantial loss.

- e. The record confirms that the judgement in this suit was delivered on 23<sup>rd</sup> July 2025, and the instant application was filed on 6<sup>th</sup> August 2025, about fourteen days later. There being no contestation from the plaintiff that there was unreasonable delay in its filing, I have no difficulty concluding that the application was timeously filed.
- f. On security for the due performance of the decree, it is important to note that the plaintiff's claim was not liquidated. I have perused the grounds on the application and the supporting affidavit and noted there is no offer to provide security or an express undertaking to abide by any terms to be set by the court on security for due performance of the decree. That being the case, and noting that the 2<sup>nd</sup> defendant did not present evidence of the steps the plaintiff has taken that could be construed to mean they were going to execute any time soon, I find the application to be without merit, even though it was filed without unreasonable delay.
- g. The 2<sup>nd</sup> defendant having failed in its application should in terms of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, that provides for costs to follow the events unless where for good cause otherwise ordered, pay the plaintiff's costs.
  1. From the foregoing conclusions on the application dated 28<sup>th</sup> July 2025, the court finds and orders as follows:
    - a. That the said application is without merit and is dismissed.
    - b. That the 2<sup>nd</sup> defendant to pay the plaintiff's costs.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 29TH DAY OF OCTOBER 2025.**

**S. M. Kibunja, J.**

**ELC MOMBASA.**

In The Presence Of:

Plaintiff : M/s Songole

Defendants : Mr Magolo for 1<sup>st</sup> Defendant

M/s Julu for 2<sup>nd</sup> Defendant

M/s Ngure for 3<sup>rd</sup> Defendant

Kalekye-court Assistant.

S. M. Kibunja, J.

Elc Mombasa.

