



**Mwadzina & 2 others v Mwakutseka (Environment and Land Appeal E001 of 2024) [2025] KEELC 7663 (KLR) (8 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7663 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT AND LAND APPEAL E001 OF 2024  
LL NAIKUNI, J  
OCTOBER 8, 2025**

**BETWEEN**

**CHIDISA SULEIMAN MWADZINA ..... 1<sup>ST</sup> APPLICANT**

**SALIM SULEIMAN MWADZINA ..... 2<sup>ND</sup> APPLICANT**

**HAMISI SULEIMAN MWADZINA ..... 3<sup>RD</sup> APPLICANT**

**AND**

**KASSIM BAKARI MWAKUTSEKA ..... RESPONDENT**

**RULING**

**I. Introduction**

1. This Honourable Court was called upon to make a determination to the Notice of Motion application dated 27<sup>th</sup> March 2025. It was brought by the Plaintiff/Applicant seeking for stay of execution and extension of time to file an appeal out of time on being aggrieved from the Judgement of Principal Magistrate L. T. Lewa delivered on 29<sup>th</sup> November 2023.
2. The application was under the dint of the provisions of Sections 1A, 1B, 3A, 3B & 79G of the *Civil Procedure Act*, Cap. 21, Order 42 Rule 6, Order 21 Rule 22 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.
3. While opposing the application, the Respondent on being served filed a Replying Affidavit dated 13<sup>th</sup> June 2025 sworn by Kassim Bakari Mwakutseka.

**II. The Plaintiff/Applicant's Case**

4. The Plaintiff/Applicant sought for the following orders:-
  - a. Spent.



- b. That the Honourable Court be pleased to stay execution of the Judgement dated 29<sup>th</sup> November 2023.
  - c. That time be extended to file appeal.
  - d. That costs of this application be provided for.
5. The application was premised upon the grounds, testimonials facts and an eight [8] Paragraphed affidavit sworn by Salim Suleiman Mwadzina the 2<sup>nd</sup> Plaintiff/Applicant herein but, with no annexures annexed thereto. He averred in summary as follows that:-
- a. He was the 2<sup>nd</sup> Plaintiff/Applicant herein with the authority of the rest of the Applicants.
  - b. The Trial Honourable Court - Hon. L. T. Lewa heard and delivered its the Judgement dated 29<sup>th</sup> November 2023 in the civil case of:- “Kassim Bakari Mwakutseka - Versus - Chidisa Suleiman Mwadzina and 2 others MCELC Case No 89 of 2019”.
  - c. Being aggrieved by the said decision, they immediately instructed their Advocate to institute an Appeal against the Judgement by the trial Court.
  - d. They were informed by their Advocates that they were yet to receive court proceedings.
  - e. Since the subject matter of the appeal was very emotive, and so they prayed for the courts indulgence
  - f. The delay was regretted but the same was not inordinate.
  - g. The application was extremely urgent as was demonstrated in the grounds above.

### **III. The responses by the Respondent.**

6. In opposing the application, the Respondent filed a 15 Paragraphed Affidavit sworn by Kassim Bakari Mwakutseka. He averred as follows:-
- a. He was the Respondent in this mater and hence authorised and competent to swear the Affidavit on his own behalf.
  - b. The application arose from the Judgement delivered on 29<sup>th</sup> November 2023 in the afore stated Civil case.
  - c. The Applicants were seeking stay of execution of the Judgement and leave to file appeal out of time and that the conditions for such an application share an inextricable bond such that absence of one would affect the exercise of the discretion of the court in granting stay of execution
  - d. In as much as the Applicants had filed the Draft Memorandum of Appeal against the Judgement of the trial court, it was not guaranteed that the court ought to Issue the orders sought.
  - e. The Applicants need to demonstrate they had an arguable appeal and which they had failed to do on several grounds.
  - f. A perusal of the Draft Memorandum of Appeal revealed that the first ground of appeal was that the trial court failed to consider the submissions on record.



- g. On this the Respondent stated that it was trite law that allegations of fraud ought to be specifically pleaded and which the Applicants failed to do.
- h. It was averred that the second ground of appeal was on the excessive award in damages and which the Respondent states was a preserve of the court having applied its mind and facts of the case.
- i. The third ground of appeal was that the Learned Magistrate erred in law and fact by not considering the evidence adduced before court that the land in question had been a subject of contention whereby the National Land Commission was handling the matter and that the same had been recommended for a resurvey. It was averred that the court applied its mind in finding the recommendations were just.
- j. On the last ground of appeal, the Respondent stated that the court had not reached a wrong finding as it had applied itself on what had been presented before it and thus upheld the Respondents claim.
- k. The Respondent averred that the appeal was a mere academic exercise and as such had no chances of success. That the court in granting orders in the nature of what had been sought ought to balance the rights of all parties so as not to deprive one party from enjoying the fruits of its Judgement.
- l. At Paragraph 7 of the affidavit, it was stated that the Respondent instituted the suit before the Magistrate's court in the year 2019 and had successfully prosecuted the same for the last 5 years.
- m. He had been deprived off use of the same by the Appellants who had constantly used the same and thus the award of general damages of a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000/-) was justified.
- n. The court ought not to exercise its discretion under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 only on the chances of success of appeal but must establish other factors and which include the state of affairs and which the Appellants had failed to demonstrate.
- o. The application ought to be made without unreasonable delay.
- p. Despite of the allegation that the Applicants sought for typed proceedings from the court, the said request was not annexed or produced before court to substantiate this claim.
- q. The Applicants were guilty of inordinate and protracted delay in bringing the application. Initially it was filed on 14<sup>th</sup> March 2024 and was struck out for non - attendance on the part of the Appellants. The application had yet again been filed before Court.
- r. The Appellants had not offered any security for costs for due performance of the decree of the lower court and neither had they shown that they were willing to commit giving security.
- s. The Court was urged to dismiss the application with costs.

#### **IV. Submissions**

- 7. On 17<sup>th</sup> June 2025 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 27<sup>th</sup> March 2025 be disposed of by way of written submissions. It was further ordered that the suit property be preserved through interim orders staying the execution until 8<sup>th</sup> October 2025.



8. For some reason or the other, by the time of penning down this Ruling, the Honourable Court had not been able to access any of the filed submissions by the parties herein from neither the Judiciary CTS Portal nor the ELC Registry. Thus, it proceeded to make the determination based on its merit. A ruling date was reserved for 8<sup>th</sup> October 2025 accordingly.

## V. Analysis & Determination

9. I have carefully read and considered the pleadings herein by the parties herein, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
10. In order to arrive at an informed, just, equitable and reasonable decision, the Honourable Court has framed four (4) framed Issues for its determination. These are: -
- a. Whether the Notice of Motion application dated 27<sup>th</sup> March 2025 seeking to stay execution of the Judgment made by Hon LT Lewa delivered on 29<sup>th</sup> November 2023 pending the hearing and determination of the Appeal is merited?
  - b. Whether the court should exercise its discretion to grant the Applicants leave to file their appeal out of time;
  - c. Whether the Applicants herein are entitled to the reliefs sought.
  - d. Who will bear the Costs of Notice of Motion application dated 27<sup>th</sup> March 2025.

### **Issue No. a). Whether the Notice of Motion application dated 27<sup>th</sup> March 2025 seeking to stay execution of the Judgment made by Hon L. T Lewa delivered on 29<sup>th</sup> November 2023 pending the hearing and determination of the Appeal is merited?**

11. Under this sub heading, the Honourable Court shall endeavor to examine the main substratum of this application being the granting of stay of execution and the enlargement to file an appeal out of time whatsoever. The law concerning stay of execution pending Appeal is found in the provision of Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, 2010 which stipulates as follows:

“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 sub rule (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.



12. The principles guiding the Court in granting stay was well articulated at the very initial stages of building jurisprudence on this subject matter in “the locus classicus” case of: “Butt – Versus - Rent Restriction Tribunal (1982) KLR 417” where the Court of Appeal 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.
6. 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.”

13. Additionally, these principles were summarised in the case of:- “RWW – Versus - EKW [2019] eKLR”, where the Court considered the purpose of a stay of execution order pending appeal, in the following words:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her Judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

14. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in the provision of Sections 1A and 1B of the *Civil Procedure Act*, Cap. 21 the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act*, Cap. 21 or in the interpretation of any of its provisions.



15. The provision of Section 1A (2) of the *Civil Procedure Act*, Cap. 21 provides that:-
- “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under the provision of Section 1B some of the aims of the said objectives are:-
- “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
16. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 to which:
- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
  - ii. The application is brought without undue delay and iii. 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.
17. The purpose of stay of execution is to preserve the substratum of the case. In the case of: “Consolidated Marine – Versus - Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)”, the Court held that: -
- “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the Appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
18. As such, for an Applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the Applicant has given security or is ready to give security for due performance of the decree.
19. On the aspect of substantial loss, the same was explained in the case of:- “James Wangalwa & Another – Versus - 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.”
20. Similarly, in the case of: “Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga [1982-1988] KAR 1018” the Court of Appeal pronounced itself to the effect that:
- “It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would



be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

21. Further, in the Court of Appeal case of:- “Mukuma - Versus - Abuoga [1988] KLR 645” where their Lordships further stated that:-

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.” It is trite that the Applicant has a burden to show the substantial loss they are likely to suffer if no stay is ordered. In the instant case, the Applicant has failed to demonstrate this aspect of law.

**Issue No. b). Whether the court should exercise its discretion to grant the Applicants leave to file their appeal out of time.**

22. Under this Sub – heading, the Honourable Court will deliberate on the extension of time to prefer an appeal. The laws governing the enlargement of time are founded under the provision of Section 79G of the *Civil Procedure Act*, Cap. 21 and Order 50 Rules, 6 and 7 of the Civil Procedure Rules, 2010. Section 79G states:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

23. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicants must satisfy the court that that they have good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of:- “Diplack Kenya Limited – Versus - William Muthama Kitonyi [2018] eKLR” an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.

24. Further, the Supreme Court in the case of: “Nicholas Kiptoo Korir arap Salat – Versus - IEBC and 7 Others [2014] eKLR” enunciated the principles applicable in an application for leave to appeal out of time. The court stated “inter alia” that: -“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
  - i. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  - ii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
  - iii. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
  - iv. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
  - v. Whether the application has been brought without undue delay”.



25. Having robustly extrapolated the law on the Issue of the granting of stay of execution and enlargement of time to prefer an appeal, the Honourable Court now will proceed to apply the said legal principles to the instant case.

**Issue No. c). Whether the Applicants herein are entitled to the reliefs sought**

26. Under this sub heading, the Honourable Court now wishes to apply the above legal principles to the instant case. From the proceedings, the Applicant herein filed the instant application seeking to stay the lower court Judgment rendered on 29<sup>th</sup> November 2023. According to the Applicants, the said Judgment by the lower court disposed them of their land and which they had been in occupation of for a very long time.
27. That the matter had previously been before the National Land Commission and a verdict was rendered stating that the suit property was eligible for re – surveying exercise. The Applicants were further aggrieved by the award of damages granted to the Respondent and stated that the same was excessive. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under the provision of Order 42 Rule 6 of the Rules, 2010. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicants unless stay of execution is granted; and thirdly such security as the court orders for the due performance of such decree or order as may ultimately be binding on them has been given by the Applicant.
28. I have taken into consideration the grounds as stated in the appeal though not with a view of determining the said application thereof. The aspect of substantial loss has in my opinion not been demonstrated in any way. I am not able to tell whether the Applicants are in occupation of the suit property or have been in use of the same and are apprehensive of an eviction. I am strongly persuaded that indeed, the Applicants have failed to prove that they will suffer substantially if the orders for stay of the execution are not granted as prayed. For that reason, the application should not succeed.
29. On the second Issue to determine is where the application for stay of execution was made without inordinate delay. From the record, the judgment being appealed against was delivered on 29<sup>th</sup> November 2023 and the application herein was filed on 27<sup>th</sup> March 2023, the Notice of appeal on 5<sup>th</sup> February 2024. This application was filed after about 1 year 5 months after the Judgment. Clearly, in this Honourable Court’s assessment, the application was not filed expeditiously and the delay is inordinate.
30. On the last condition as to provision of security. Critically speaking, I find that the provision of Order 42 Rule 6 (2) (b) of the Civil Procedure Rules, 2010 stipulates in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. The purpose of security was explained in the case of: “Arun C. Sharma – Versus - Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR” the court stated: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the Judgment Debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose. I note that the applicants have made no provisions for security in their application”.



31. As already demonstrated in the case of:- “James Wangalwa & Another – Versus - Agnes Naliaka Cheseto (Supra)” the three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. Bearing this in mind, it is this court’s finding that the application dated 27<sup>th</sup> March 2025 is not merited, the Applicants have failed to proof grant of orders of stay pending appeal to the required standard.
32. On whether the Applicants should be allowed to file the appeal out of time, the applicants intimated to court that they were unable to file the appeal within the stipulated time because of delay in being availed with the typed proceedings from the lower court. I must admit that the Issue in delay of typed proceedings from courts is not out of the ordinary and has been addressed by the courts in several instances. The Supreme Court expounded the matter in the case of: “County Executive of Kisumu – Versus - County Government of Kisumu & 8 Others [2017] eKLR” and held:-
 

“However, we hasten to add that a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the court”.
33. The Applicants stated that letters and notices were Issued to the court requesting for typed proceedings. I have however noted that the said notices were never availed to court as the supporting affidavit to the application had not annexures. No certificate of delay has been availed to confirm the allegations as stated by the Applicants. Therefore, it is my considered view that the delay of 1 year 5 months is not only inordinate, unreasonable but also inexcusable. Furthermore, the Applicants have not given any plausible explanation on the reasons for the inordinate delay.

**Issue No. d). Who will bear the Costs of Notice of Motion application dated 27<sup>th</sup> March 2025.**

34. It is now well established that the Issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court:- “Jasbir Rai Singh – Versus - Tarchalan Singh (2014) eKLR” and Cecilia Karuru Ngayo – Versus - Barclays Bank of Kenya Limited, [2014] eKLR”.
35. In the case of:- “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR”, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
36. In this case, this Honourable Court holds that the Respondents are entitled to costs accordingly.

**VI. Conclusion & Disposition**

37. In the long analysis, the Honourable Court having caused an indepth analysis to the farmed Issues herein, it has arrived to the following specific orders:-
  - a. That the Notice of Motion application dated 27<sup>th</sup> March, 2025 be and is hereby found to lack any merit and thus it is dismissed.
  - b. That the prayers for admitting the appeal out of time and for stay of execution of the lower court’s Judgment and decree automatically fails for the reason that there is no existing appeal.



- c. That costs to be awarded to the Respondents to be borne by the Appellant/Applicants herein.
  - d. That this appeal file to be and is hereby closed having been opened erroneously.
- It is ordered accordingly.

**RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 8<sup>TH</sup> DAY OF OCTOBER 2025**

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**HON. MR. JUSTICE L.L NAIKUNI,  
ENVIRONMENT & LAND COURT  
AT  
KWALE.**

Ruling delivered in the presence of: -

Mr. Daniel Disii, the Court Assistant.

.Mr. Birir Advocate for the Applicant.

M/s. Kimaita Advocate holding brief for the Respondents.

