



**Suter v Kipsait (Sued as the Legal Representative of James Cheboi Chesir (Deceased))  
(Environment and Land Case 77 of 2012) [2025] KEELC 7214 (KLR) (22 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7214 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND LAND CASE 77 OF 2012**

**CK NZILI, J  
OCTOBER 22, 2025**

**BETWEEN**

**PHILIP KIPLALAK SUTER ..... PLAINTIFF**

**AND**

**JANE KIPSAIT ..... DEFENDANT**

**SUED AS THE LEGAL REPRESENTATIVE OF JAMES CHEBOI CHESIR  
(DECEASED)**

**RULING**

1. Stay of execution of a decree by the court to which an appeal is preferred is governed by Order 42 Rule 6[1] of the Civil Procedure Rules. Over and above the ordinary considerations, sufficient cause must be shown by the aggrieved party why the court, after delivering the decision, should postpone its execution, pending the intended appeal.
2. The main purpose of interim orders of stay pending appeal is to ensure that the appeal, if successful, is not rendered nugatory. At the same time, the court is called upon to balance the rights of the successful party against those of the aggrieved litigant seeking to exercise an unlimited right of appeal. See *Butt v Rent Restriction Tribunal* [1982] KLR 417.
3. Stay of execution also seeks to preserve the substratum of the dispute. Substantial loss had been described as the cornerstone for the grant of a stay pending appeal. See *Kenya Shell Ltd v Benjamin Karuga Kibiru* [1986] eKLR. An applicant has to provide credible evidence of the loss beyond merely the lawful enforcement of a final judgment; otherwise, execution is a legal process. See *James Wangalwa v Agnes Naliaka Cheseto* [2012] eKLR.
4. A party seeking a stay of execution must, therefore, show sufficient cause why the execution in favour of the successful party should be postponed, yet he is equally entitled to the fruits of its judgment.



5. The question before the court is whether the judgment debtor/applicant herein, through an application dated 12/8/2025, deserves a stay of execution pending hearing and determination of the intended appeal to the Court of Appeal. The reasons are contained on the face of the application and in the supporting affidavit of Jane Kipsaita Chebet, sworn on 6/7/2025.
6. After giving the history of the suit, the applicant says that she has filed a notice of appeal, attaches a draft memorandum of Appeal, which she says has raised substantial points of law, among them questions of whether fraud or forgery was pleaded and subjected to evidence, or was introduced without an opportunity to be heard by the court.
7. The applicant says that without stay, the estate will suffer substantial loss and hardship, in that, the total acreage is 20 acres and if 7 acres are transferred, it will mean over a lot to the estate, the land is their home and source of livelihood, for third parties who bought from her late father, land is emotive, unique and if transferred the loss may not be compensable; the execution is imminent and the decree holder may dispose of to third parties; reversion of these actions later would be exceedingly difficult if not impossible especially to reclaim the land from third parties which is cumbersome or uncertain, otherwise the original status quo may not be restored.
8. Further, the applicant deposes that the prospect of an eviction or interference is imminent, it creates uncertainty and potential conflicts, which may stoke tensions or even provoke breach of peace on the ground, events which would be averted by preserving peace through issuance of stay orders.
9. The applicant deposes that he applied for the orders within 5 days of the judgment; that she is ready to furnish security by depositing the original title deed to the court or any other security that the court may require to safeguard the pending outcome of the appeal.
10. The applicant deposes that she has acted in good faith, hence the security proposed to be deposited as a sign of willingness to abide by any condition set by the court, for a stay which shall serve the ends of justice by maintaining the status quo, so that her rights are not prejudiced, while also the decree holder is protected by the security.
11. The applicant deposes that she stands to suffer irreparable harm in the absence of a stay, unlike the respondent, who may not unduly be prejudiced as he waits for the appeal to be heard, and if the appeal does not succeed, the land will eventually be transferred to him.
12. The applicant deposes that at the moment, the respondent is not in possession of the 7 acres, he has waited since 1964, when the alleged trust arrangement arose and that a further wait to allow the appeal to be heard will not cause him material injury especially if conditions are Imposed to protect his interest, compared to the contrast if the execution proceeds, which will alter the substratum of the appeal.
13. The applicant undertakes to diligently prosecute the appeal without delay, and that it is not her wish to use the stay of execution to oppose the judgment creditor, but to ensure justice is served and to secure her rights pending the appeal.
14. The application is opposed through a replying affidavit of the plaintiff/respondent, sworn on 26/9/2025. He avers that the application as filed is bad in law, an abuse of due process, misconceived, vexatious, frivolous, and made in bad faith, since the applicant has neither demonstrated nor given security for the due performance of the decree or order that may ultimately be binding on her.
15. The respondent further avers that the applicant has also failed to demonstrate what substantial loss she is likely to suffer if the orders for stay are not granted, since her family does not reside on the suit land, since they sold the entire portion to third parties who are in occupation. Equally, the respondent avers



- that he wants to enjoy the fruits of his judgment, which he has been deprived of by the applicant's family.
16. The applicant relies on written submissions dated 22/9/2025 to say that she has met the conditions set out in Order 42 Rule 6[1] of the Civil Procedure Rules, Section 1A and 1B, and 3 and 3A of the *Civil Procedure Act*. Reliance is placed on *Butt v Rent Restriction Tribunal* [supra] and *RWW v EKW* [2019] eKLR.
  17. The applicant submits that the application was filed timeously as per Order 42 Rule 6[a] of the *Civil Procedure Act*. As to substantial loss, the applicant, guided by *Kenya Shell Ltd v Benjamin Kibiru Karuga* [supra] and *Mukuma v Abuoga* [1988] KLR 645, has been demonstrated, given that no monetary damages can truly compensate for the loss of one's land or homestead, which are unique assets, amount to irreparable loss, substantial harm, being the essential core of the appeal.
  18. The applicant submits that the court is called to make a proportionate and fair order that causes the least prejudice to all parties, and in this case, the balance tilts heavily in favour of maintaining the status quo pending the appeal. It is submitted that a stay of execution will only temporarily keep out the respondent from enjoying the fruits of his judgment, which can be catered by way of costs and through an expedited hearing of the appeal, but if not granted, the applicant will suffer the immediate and potentially irreversible loss of the land.
  19. Stay of execution is a discretionary remedy. An applicant must file the application expeditiously, demonstrate substantial loss, show sufficient cause, and lastly, offer security for the due realization of the decree should the appeal not succeed.
  20. A party coming to court for a discretionary order must make full material disclosure and act in good faith. In the affidavit in support, at paragraphs 8 and 14, the deponent blames the court for determining unpleaded issues on fraud and forgery, being the arguable points in the intended appeal. Looking at the draft memorandum of appeal, such issues have not been raised. The judgment of the court did not refer to any fraud or forgery or the like.
  21. Swearing falsely or making a false affirmation or declaration is criminal perjury under Section 108 [1] [a] of the Penal Code. See *Simon Mugo Rutere v Republic* [2021] KEHC 2612 [KLR]. It undermines the credibility of the deponent. It leaves the court to doubt whether the deponent is a truthful person whose other averments should be believed.
  22. The basis of the application is that if execution were to proceed, the consequences would be dire, irreversible, and would render the appeal nugatory.
  23. Starting with the term nugatory, it was defined in *Stanley Kinyanjui v Tony Keter & Others* [2013] eKLR, as worthless, futile, invalid, or trifling. The court held that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible, and if it is not reversible, whether damages will reasonably compensate the aggrieved party.
  24. In *FWK v JGK Civil Application E042 of 2024* [2025] KECA 592 KLR [14<sup>th</sup> March 2025] [Ruling], the court observed that each case must depend on its own facts and peculiar circumstances on whether or not to stay execution. The court declined to stay the execution, since the applicant could be compensated monetarily if the land was to be disposed of or transferred.
  25. Regarding substantial loss at paragraph 18 of the supporting affidavit, other than indicating that there will be execution, the applicant does not demonstrate the status of the suit land. Entries into the register of title cannot be termed as permanent in nature or irreversible. They can be reversed on appeal if the applicant were to succeed in the intended appeal. As held in *James Wangalwa v Cheseto* [2012] eKLR,



execution per se does not amount to substantial loss. A party must demonstrate other factors that will negate the very essential core of the substratum of the appeal.

26. Evidence of substantial loss must be tangible and cogent.
27. In *Vishram Ravji Halai v Thornton & Turpin* [1990] KLR 365, the court held that the discretion under Order 42 Rule 6[1] of the Civil Procedure Rules is fettered by three conditions, namely: establishment of sufficient cause, substantial loss, and the furnishing of security. In *Jason Ngumba Kagu [Suing As The Personal Representative Of Nancy Nyawira Ngumba [Deceased] & 2 others v Intra Africa Assurance Co. Limited* [2014] KEHC 5979, the court said that while exercising the power, it is really not a question of measuring the prospects of the appeal itself but rather whether by asking the applicant to comply with what the judgment requires, he will become a pious explorer in the judicial process.
28. Further, in *Samvir Trustee Ltd v Guardian Bank Ltd*, Nairobi Milimani HCC 798 of 1997, the court said exceptional circumstances to sway the discretion of the court on whether to refuse or grant a stay must be presented, as it weighs the scales of justice one way or the other. The court said that mere assertions of substantial loss without empirical or documentary evidence to support them are not enough.
29. The applicant has not availed documentary evidence to show the status of her developments on the land, the value of the same, who are the persons occupying it, evidence of the alleged property being matrimonial home, and source of livelihood, the so called third parties on the suit land and the quantification of the source of income likely to be denied of if there will be no stay.
30. On security, a copy of the title deed and an up-to-date official search certificate showing its status have not been availed. Whereas the court has to be guided by proportionality acts in the best interest of the parties, balance all the parameters and undertake the balancing act of whether or not to stay the execution of the decree, the same must be on judicial and sound reasons.
31. Written submissions are not evidence and cannot replace pleadings. The applicant has labored to submit on the implications of the execution in the written submissions dated 22/9/2025. Unfortunately, paragraphs 18-29 of the supporting affidavit are mere assertions that are not supported by any empirical or documentary evidence as per the *Samvir Trustee Ltd v Guardian Bank Ltd* [supra].
32. The applicant in paragraph 18 [8] and [9] of the supporting affidavit, while trying to demonstrate substantial loss, states that in the absence of a stay, there would be chaos, anarchy, animosity, and or disturbance of law, peace, and order. The said averments on oath are unfortunate and depict an applicant who does not value the rule of law.
33. *The constitution* requires courts to act without fear or favour, or sympathy, as it discharges its mandate. Fear of the consequences of the court's decisions is what the applicant is selling to this court. That cannot amount to sufficient cause why the respondent should be driven out of the seat of justice. The application is dismissed with costs.
34. Orders accordingly.

**RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 22<sup>ND</sup> DAY OF OCTOBER 2025.**

**HON. C.K. NZILI**

**JUDGE, ELC KITALE.**

In the presence of:



Court Assistant - Dennis

Wanyama for the defendant/applicant present

Lichuma for respondent present

