Murakaru v Kirera & 2 others (Environment and Land Case Civil Suit 265 of 2012) [2025] KEELC 7701 (KLR) (6 November 2025) (Ruling)

Neutral citation: [2025] KEELC 7701 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 265 OF 2012

OA ANGOTE, J

NOVEMBER 6, 2025

BETWEEN

HAMPTON IRERI MURAKARU ..... PLAINTIFF

AND

MERCY W KIRERA ..... 1ST DEFENDANT

CITY COUNCIL OF NAIROBI ..... 2ND DEFENDANT

DANIEL WAITITU MAINA ..... 3RD DEFENDANT

RULING

Background

1. Before this court for determination is the 1st and 3rd Defendants'/ Applicants' Notice of Motion application dated 11th February, 2025 brought pursuant to the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*, and Order 42 Rule 6(1) of the Civil Procedure Rules. They seek the following reliefs:

    i. That upon hearing this application inter-partes, this Honourable Court be pleased to grant a stay of execution of its judgment and orders made on 30th January, 2025 pending the hearing and determination of the appeal preferred therefrom.

    ii. That costs of this Application be provided for.

2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Mercy W Mwangi, the 1st Defendant/Applicant herein on her own behalf and on behalf of the 3rd Defendant/2nd Applicant. She deponed that on 30th January, 2025, the court delivered a judgment which if executed would effectively dispossess them of the subject matter herein, and that being dissatisfied and aggrieved by the said judgment, they have since preferred an appeal therefrom which

has overwhelming chances of success and whose outcome would be rendered completely nugatory should the prayers sought be declined.

3. According to Ms. Mwangi, it is not in dispute that the 2nd Applicant has been and continues to be in possession of the suit land since the issuance of an allotment letter in respect thereof almost fifteen years ago, and that the investment thereon is huge, as was exhibited in the relevant list and bundle of documents.

4. In view of the above, it was deposed, it follows that any attempt to destabilize the status quo would visit untold suffering, loss and damage upon the Applicants such as is posed by the impending eviction should the stay not be granted. She urged that the Respondent stands to suffer no prejudice at all other than the attendant delay which can otherwise be compensated by way of damages and/or costs.

5. She noted that the Motion has not only been made timeously, but is founded on the sacred dictates of natural justice, equity and statute law with regard to conservatory and stay of execution orders in the pendency of an appeal, and that it is not frivolous but raises serious points of law. It is the Applicants' case that they are ready, willing and able to make good any term that this court may order with regards to security save to add that there is security in the subject matter itself. She urged that justice dictates that the Motion is granted.

6. In response to the Motion, the Plaintiff/Respondent filed a Replying Affidavit on 24th February 2025, in which he deponed that the Motion is frivolous, vexatious, and an abuse of the court process, designed solely to frustrate and delay him from enjoying the fruits of a valid and lawfully obtained judgment.

7. He averred that the Applicants seek to continue benefitting from the suit property at his expense, despite failing to demonstrate that they were ever in lawful occupation or that the structures erected thereon were legally constructed. He urged that the Applicants should not be permitted to profit from what is clearly an illegal act.

8. Mr. Murakaru further deponed that, contrary to the 1st Applicant's assertions, it has been established that she is not an innocent purchaser for value. He contended that her conduct reveals a deliberate and sustained effort to dispossess him of his land, consistent with a broader pattern of fraudulent dealings.

9. He maintained that granting the orders sought would subject him to further and unnecessary suffering, as the Applicants are undisputed trespassers on his property. He emphasized that the mere filing of an appeal does not automatically warrant the grant of a stay of execution, and that the grounds advanced in support of the Motion are flimsy and do not justify the exercise of the court's discretion in favour of the Defendants.

10. The Respondent averred that he stands to suffer great prejudice and injustice should the stay orders be granted, as he would once again be deprived of the use and enjoyment of his lawfully owned property, land he has been denied access to for over sixteen years.

11. The Plaintiff further contended that the Applicants cannot rely on the purported security over the suit property to justify extension or delay, especially given the contents of the decree and the procedural timelines for filing and determining appeals before the Court of Appeal. He urged the court to allow the appellate process to take its natural course without granting interim protection to parties found to have acted unlawfully.

12. Finally, he reiterated that litigation must come to an end. He averred that all parties should stand on an equal footing and that granting the orders sought would unduly tilt the balance of justice in favour of the Applicants. The parties filed submissions and authorities which I have considered.

Analysis and Determination

13. Having considered the Motion, Affidavits and submissions, the sole issue that arises for determination is whether the Applicants have satisfactorily demonstrated the conditions warranting the grant of stay of execution pending Appeal?

14. The law with respect to stay of execution pending appeal is found under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, which provides as follows:

> " (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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—
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> (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."

15. In Vishram Ravji Halai vs Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal, discussing the High Court's [read ELC's] jurisdiction under this Order stated:

> " The Superior Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, 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. The application must of course be made without unreasonable delay."

16. What arises from the foregoing is that the grant of orders of stay of execution is subject to the court's discretion, the court in this respect being guided by the provisions of Order 42 Rule 6 of the Civil Procedure Rules. The question of how the court should exercise this discretion was extensively discussed by the Court of Appeal in Butt vs Rent Restriction Tribunal [1982] KLR 417 as follows:

> " 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.

5. 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."

17. Further to the above, this court is now enjoined to give effect to the overriding objectives in the exercise of its powers as expressed in Section 3 of the *Environment and Land Court Act* and Section 1A of the *Civil Procedure Act*, to wit, the just, expeditious, proportionate and affordable resolution of disputes.

18. The court is so guided.

19. By way of brief background, the Respondent as Plaintiff instituted this suit seeking, inter alia, a declaration that he is the lawful and rightful owner of Plot No. 297, Kariobangi River Bank(suit property). He further sought an order directing the cancellation of any title documents that may have been unlawfully issued to the 1st Applicant/Defendant or to any person claiming through her, and a declaration that any purported sale or transfer of the property was null and void. In addition, he sought general damages for trespass, together with costs of the suit and interest at court rates until payment in full.

20. The Respondent's case was that he is the lawful owner of Plot No. 297 Kariobangi River Bank, having been allotted the same by the Nairobi City County on 24th February 1992 and having dutifully paid all requisite rates up to December 2009. Despite this, in July 2011, he discovered a stranger developing permanent structures on the land and later learned that the County had unlawfully reallocated the property to its employee, the 1st Applicant who fraudulently sold it to the 2nd Applicant.

21. The matter proceeded for hearing and vide the Judgment entered on the 30th January, 2025, this court found merit in the Respondent's case and consequently issued several orders. The court declared the Respondent as the rightful owner of the suit property, and found that the sale of the property was illegal, null, and void. It also issued permanent injunctive orders. In addition, the Respondent was awarded general damages of Kshs. 1,000,000 for trespass, to be borne jointly by the Applicants. The Respondent was also awarded costs of the suit.

22. Aggrieved by this decision, the Applicants intend to appeal to the Court of Appeal. They have asked this court to stay the execution of the Judgment of 30th January, 2025 and the decree arising therefrom pending determination of the appeal.

23. At the onset, the court notes that the parties have argued the arguability of the Appeal. The court wishes to reiterate that its jurisdiction to grant a stay of execution pending appeal is derived from Order

42 Rule 6 of the Civil Procedure Rules. This provision does not contemplate or require the court to assess the arguability of the pending appeal as a condition for granting a stay.

24. This position is well-founded. It would be both procedurally improper and logically untenable for this court to assess the arguability of an appeal arising from its own decision. The court will disregard any arguments under this head.

25. Moving to the pre-requisites under Order 42 Rule 6(2), the court will begin with the aspect of sufficient cause. What constitutes the same was explicitly discussed by the court in Antoine Ndiaye vs African Virtual University [2015] eKLR, which persuasively stated as follows:

> " The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:
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> a) The application is brought without undue delay;
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> b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and
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> c) 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."

26. The question of what constitutes unreasonable delay was discussed in the case of Jaber Mohsen Ali & another vs Priscillah Boit & another [2014] eKLR where Munyao J stated as follows:

> " The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land."

27. The Judgment sought to be appealed against herein was delivered on the 30th January, 2025 and the Notice of Appeal filed the same date. This Motion was filed approximately 12 days later. The court does not consider that there has been reasonable delay in this regard.

28. In Rhoda Mukuma vs John Abuoga [1988] eKLR, the court proffered the following definition of substantial loss:

> " Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss

is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory…"

29. Similarly, the court in Century Oil Trading Company Ltd vs Kenya Shell Limited as cited in Muri Mwaniki & Wamiti Advocates Vs Wings Engineering Services Limited [2020] eKLR, held as follows:

> " The word 'substantial' cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words 'substantial loss' must mean something in addition to all different from that."

30. The courts' have also held that substantive loss must be demonstrated. This position was articulated by the Court of Appeal in Kenya Shell Limited vs Benjamin Karuga Kibiru & another [1986] eKLR thus:

> " It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an Appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay."

31. The court in James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR similarly opined that the process of execution alone does not amount to substantial loss. It stated as follows:

> " 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. This is what substantial loss would entail…"

32. The court is also alive to its duty to balance the interests of an Applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory, and the interests of a Respondent who is seeking to enjoy the fruits of his judgment. As expressed by Kuloba, J in Machira T/A Machira & Co Advocates vs East African Standard [2002] eKLR:

> " To be obsessed with the protection of an Appellant or intending Appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way Applications for stay of further proceedings or execution, pending Appeal are handled. In the Application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court."

33. The Applicants contend that they will suffer substantial loss if the stay is not granted. It is asserted that the 2nd Applicant has been in occupation of the property for over 15 years, during which time substantial investments and developments have been made on the property. It is argued that without the stay, not only is eviction eminent, but these investments will be lost. This constitutes irreparable damage incapable of being adequately compensated through monetary damages.

34. On its part, the Respondent asserts that he stands to suffer untold prejudice and injustice if the stay orders sought are granted as he will not be able to enjoy the fruits of his validly obtained judgment given that he will not be in a position to access and/or put into any productive use the suit land having been unjustly deprived of the same for over 16 years.

35. As stated earlier, a plea of substantial loss must be demonstrated. In this case, it is not in dispute that the 2nd Applicant has had possession of the suit property for approximately 16 years. Indeed, this court was informed that the suit property is developed, and the photos of the developments formed part of the evidence of the 3rd Defendant during trial.

36. In view of the above, it follows that any attempt to destabilize the status quo would visit untold suffering, loss and damage upon the Applicants such as is posed by the impending eviction should the stay not be granted. On the other hand, the Respondent stands to suffer no prejudice at all other than the attendant delay which can otherwise be compensated by way of costs.

37. Moving to the last issue regarding provision of security, for purposes of completion, its purpose was discussed by the court in Arun C Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others [2014] eKLR, thus:

> " 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 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."

38. While in Focin Motorcycle C. Ltd vs Ann Wambui Wangui [2018] eKLR, it was stated that:

> " Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground of stay."

39. From the above persuasive decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same. It is alleged by the Respondent that the Applicants have not given any concrete proposal with respect to provision of costs. This is indeed so. They have however indicated willingness to abide by the decision of the court in this regard, which suffices.

40. Considering that the suit property will be available after the appeal has been heard, the only order for security that this court should grant is in respect to the Kshs. 1,000,000 that was granted to the Plaintiff as damages.

41. For those reasons, the application dated 11th February, 2025 is allowed as follows:

    a. An order of stay of execution of the judgment and orders of this court made on 30th January, 2025 is hereby granted pending the hearing and determination of the appeal.

    b. The above order is granted on condition that the Defendants deposit Kshs 1,000,000 in an interest earning joint account of the Plaintiff's and the 1st and 3rd Defendants' advocates within 30 days from the date of this Ruling.

    c. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 6TH DAY OF NOVEMBER, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Njugi for Applicant

No appearance for Respondent

Court Assistant: Tracy