



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndegwa v Kapaai (Environment and Land Appeal E028 of 2024)  
[2025] KEELC 7925 (KLR) (13 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 7925 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL E028 OF 2024  
LC KOMINGOI, J  
NOVEMBER 13, 2025**

**BETWEEN**

**GRACE WANJIKU NDEGWA ..... APPELLANT**

**AND**

**GEOFFREY NJOGU KAPAAI ..... RESPONDENT**

*(Being an appeal from the Judgement and Order of the Principal Magistrate  
Hon. P. Achieng' delivered on 13th June 2024 in Ngong MELC No. 24 of 2019)*

**RULING**

1. This Ruling is in respect to the Notice of Motion dated 9<sup>th</sup> August 2024.
2. It seeks orders that;
  - i. Spent
  - ii. Spent
  - iii. The Honourable court do issue interim stay orders and/or arrest further proceedings emanating from the Judgment delivered by the trial court on 13<sup>th</sup> June 2024 pending the inter-partes hearing and determination of the main Appeal.
  - iv. This Honourable Court do issue such further orders or directions that it may deem fit to grant in the interest of justice.
  - v. The costs of this application be in the cause.
3. The grounds are on the face of the application as set out in paragraphs 1 to 10. It is supported by the sworn Affidavit of Grace Wanjiku Ndegwa the Appellant/Applicant herein.



4. She avers that in the impugned judgement delivered on 13<sup>th</sup> June 2024, the Trial Court issued Sixty (60) days stay of execution of judgement and the Respondent has extracted a Decree emanating from the said judgment and would proceed to evict her from the suit property at the expiry of the stay period which is 13<sup>th</sup> August 2024. That if the orders sought are not granted, then the Appellant would suffer irreparable loss and damage and the Appeal would be rendered nugatory.
5. The Respondent in his Replying Affidavit contested the application on grounds that the Appellant had not placed any evidence before Court to warrant stay of execution of the judgement in the Lower Court. He further deponed that in ELC Case No. 553 of 2017, Justice Christine Ochieng' restrained the Appellant from dealing with the suit property. It is his case that the Judgement in the Lower Court is in his favour. That the Appellant has disobeyed the court orders and continues to trespass on the property without paying rent. As such, the Application ought to be dismissed
6. This application was canvassed by way of written submissions.

### **Submissions of the Appellant/Applicant**

7. On whether the Appellant was entitled to grant of stay of execution pending appeal, it was submitted that the Appellant had satisfied the requirements of Order 42 Rule 6(2) of the Civil Procedure Rules. That the Application had been filed timeously, and the Appellant would suffer substantial loss if evicted from the suit property which would render the Appeal nugatory citing Butt vs. Rent Restriction Tribunal and Tropical Commodity Suppliers Ltd where Ogola J. held that substantial loss did not represent any mathematical formula. And that since stay of execution was a discretionary relief, then the Court should be inclined to issue orders that would not disadvantage the Appellant as held in Absalom Dova vs. Tarbo Transporters [2013] eKLR.

### **Submissions of the Respondent**

8. Counsel for the Respondent submitted that he and the Applicant entered into a lease agreement in the year 2000 but by the year 2011 the applicant had stopped paying rent and was claiming ownership of the property. The Respondent moved the Court via Kajiado ELC No. 553 of 2017. Justice C. Ochieng' granted the Respondent a temporary injunction restraining the appellant from interfering with property LR No. 260 Residential Ongata Rongai and referred the matter to the Chief Magistrate Court in Ngong where it was heard and determined. During the hearing the court ordered for a surveyor's report wherein the surveyor called the appellant and the respondent to point out their respective properties and the Appellant did not have any property relating to LR No. 260 Residential Ongata Rongai. The court then found that the Appellant was a tenant and should pay rent arrears dating back to the year 2011.
9. It was submitted that the issue of jurisdiction raised in the Memorandum of Appeal was an issue that was never raised at the trial court and should not be raised on appeal arguing that at no time was the suit property adjudicated or associated with the *Land Adjudication Act* as claimed.
10. On whether the Applicant was entitled to the orders sought, it was submitted that as per Giella vs Cassman Brown the applicant had not produced evidence to show that she had a prima facie case with probability of success or that she would suffer any loss. As such, the balance of convenience tilted in favour of the Respondent who had suffered harm for over 14 years and the application should be dismissed.



## **Analysis and determination**

11. I have considered the Notice of Motion, the affidavit in support, the response thereto, the rival submissions, and the authorities cited by the parties. Upon perusal of the court record, it is evident that no Memorandum of Appeal has been filed. There is no copy of the judgment and decree sought to be appealed against.
12. The Memorandum of Appeal is not a matter of form but one of substance. It is the primary document that enables the Court to appreciate the factual and legal basis of an appeal. In its absence, the Court is left without the materials necessary to determine whether the appeal is arguable or whether the orders sought can properly issue.
13. While the Court is mindful of the provisions of Article 159(2)(d) of *the Constitution* which direct Courts to administer justice without undue regard to procedural technicalities, and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act*, it has been stated that Article 159 of *the Constitution* is not a panacea for all procedural defaults. It cannot be invoked to cure fundamental omissions that go to the very root of a matter.
14. The failure to file the Memorandum of Appeal and the copy judgment and decree is not a curable irregularity. It strikes at the jurisdiction of the Court to determine the matter, for without those documents, the Court cannot ascertain the substance of the decision appealed against or the orders sought to be stayed. This omission is therefore fatal to the Application.
15. Consequently, the Application is struck out for being incompetent and fatally defective. The Appellant shall bear costs of the Application.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 13<sup>TH</sup> DAY OF NOVEMBER 2025.**

**L. KOMINGOI**

**JUDGE.**

In The Presence Of:

Ms. Kibare for the Appellant.

N/A for the Respondent.

Court Assistant – Peter.

