



**Republic v Deputy County Commissioner, Makueni & 3 others; Maithya & another (Interested Parties); Matolo (Ex parte Applicant) (Environment and Land Judicial Review Case E021 of 2022) [2025] KEELC 7709 (KLR) (6 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 7709 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**  
**ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E021 OF 2022**  
**EO OBAGA, J**  
**NOVEMBER 6, 2025**  
**IN THE MATTER OF SECTIONS 8 AND 9 OF THE**  
**LAW REFORM ACT CAP 26 LAWS OF KENYA**

**-AND-**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**-AND-**

**RULING**

**IN THE MATTER OF A DECISION OF AN APPEAL TO THE MINISTER CASE NO. 87/1995 DELIVERED BY THE DEPUTY COUNTY COMMISSIONER – MAKUENI ON 5TH SEPTEMBER, 2022 OVER LAND PARCEL NO. 1000**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DEPUTY COUNTY COMMISSIONER, MAKUENI ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT, MAKUENI ..... 2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR, MAKUENI ..... 3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**PETER NZESYA MAITHYA ..... INTERESTED PARTY**

**ROBERT MUTHIANI VULI ..... INTERESTED PARTY**



AND

**ROBERT MULI MATOLO ..... EX PARTE APPLICANT**

**RULING**

1. Before this court for determination is the Notice of Motion dated 5<sup>th</sup> December, 2024 in which the Ex-parte Applicant seeks issuance of the following orders: -
  1. [spent]
  2. [spent]
  3. That this Honourable Court be pleased to grant an order of stay of the execution of the ruling delivered on 15/10/2024 and the certificate of taxation issued on 19/11/2024 and all other consequential orders emanating therein pending the hearing and determination of the intended appeal.
  4. That the costs of the application be in the cause.
2. The application is premised on the grounds appearing on its face in addition to the supporting affidavit sworn by Robert Muli Matolo on even date. The Ex-parte Applicant averred that vide the ruling dated 15<sup>th</sup> October, 2024, the Taxing Officer awarded Kshs.308,325/= to the Interested Parties following the taxation of their party and party bill of costs dated 25/4/2024. He added that there is an imminent threat of execution of the said certificate of taxation issued on 19/11/2024.
3. The Ex-parte Applicant contended that being aggrieved with the earlier judgment of this court that was delivered on 6/3/2024, he has preferred an application to file an appeal out of time being Nairobi Court of Appeal Application No. E484 of 2024 and the intended appeal stands to be rendered nugatory if the orders sought are not granted. Again, he contended that it is not possible to file the present application before the Court of Appeal since an appeal has not been lodged. He averred that there was no inordinate delay in filing the present application and that the Respondents will not suffer any prejudice if the orders sought are granted.
4. Opposing the application, Peter Nzesya Maithya swore and filed a replying affidavit on 3<sup>rd</sup> March, 2025. He averred that the issue of costs cannot be dealt with at this stage unless one applies to the taxing officer to set aside the taxed bill of costs. He added that there is nothing to stay since the court dismissed the Ex-parte Applicant's application. It was further contended that there had been an inordinate delay in the filing of the application after the ruling was delivered and that the Ex-parte Applicant had not provided reasons for the delay. That the Ex-parte Applicant had not provided security for costs.
5. In a further affidavit sworn by the Ex-parte Applicant on 3<sup>rd</sup> April, 2025, he averred that the certificate of taxation that was issued on 19<sup>th</sup> November, 2024 by the taxing officer was still in force and therefore capable of being enforced against him. He added that he is not challenging the ruling of the taxing officer awarding costs, but rather the whole judgment delivered on 6<sup>th</sup> March, 2024.
6. The Ex-parte Applicant contended that the reasons for the delay in filing the present application is because his advocates never communicated to him about the judgment in time and that a copy of the same was yet to be uploaded on the CTS. He stated that the intended appeal is arguable and that he is willing to abide by whatever conditions that may be imposed by this court on the present application.
7. The application was canvassed by way of written submissions.



8. In the Ex-parte Applicant's submissions dated 3<sup>rd</sup> April, 2025, Counsel submitted that the application is properly grounded on the provisions of Order 42 Rule 6 1(1) and (2) of the Civil Procedure Rules. Counsel further submitted that the grant of an order for stay of execution is a discretionary power bestowed upon the court.
9. In support of the contention that the Ex-parte Applicant risks substantial loss, Counsel asserted that Kshs.308,325/= being the costs that were awarded to the Interested parties is a huge amount of money which the Ex-parte Applicant may not be able to recover should the intended appeal succeed. It was further contended that the Interested Parties had not provided evidence that they are financially capable of refunding the assessed costs.
10. Submitting on whether the application has been made without inordinate delay, Counsel stated that the present application was filed on 5/12/2024 after the certificate of costs was issued on 19/11/2024 and thus the application was made timeously.
11. On security, Counsel submitted that the Ex-parte Applicant was willing to comply with the conditions that this Court may impose and with that, Counsel concluded that the threshold for an order of stay of execution had been met.
12. In the Interested Parties' submissions dated 19<sup>th</sup> May, 2024, Counsel opined that this court dismissed the Ex-parte Applicant's case vide the judgment delivered on 6/3/2024 and being a negative order, there is nothing to stay. Counsel contended that the requirements of Order 42 Rule 6 of the Civil Procedure Rules, 2010 had not been met and hence the application should be dismissed with costs.
13. The sole issue for determination is whether the Ex-parte Applicant has demonstrated merit in their application for the issuance of an order for stay of execution.
14. The governing law in an application for stay of execution pending appeal is Order 42 Rule 6 (1) and (2) 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 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 subrule (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.
15. In the case of Kenya Shell Ltd v Kibiru [1986] KLR 416 Platt Ag. J.A. (as he then was) held as follows: -

“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 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 a stay. That is what has to be prevented.”

16. Upon perusal of this court’s judgment delivered on 6<sup>th</sup> March, 2024, the learned judge dismissed the Ex-parte Applicant’s judicial review proceedings with costs. It is not in dispute that the costs of the suit were assessed by the taxing officer and a certificate of taxation issued on 19<sup>th</sup> November, 2024 for a total sum of Kshs.308,325/=. It is also not in dispute that the Ex-parte Applicant has filed Nairobi Court of Appeal Civil Application No. E484 of 2024 seeking enlargement of time to file an intended appeal against this court’s judgment.
17. The Interested Parties contend that a negative order ensued from the dismissal of the Ex-parte Applicant’s suit. It is manifestly clear that the only enforceable part of the judgment in favour of the Interested Parties was on the aspect of costs which the Ex-parte Applicant was condemned to pay.
18. The legal position on the issue of negative orders has been settled over the years by several court decisions. For instance, the Court of Appeal in *Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah* [2008] eKLR aptly held as follows: -

“The 2<sup>nd</sup> prayer in the application is for stay (of execution) of the order of the superior court made on 18<sup>th</sup> December, 2006. The order of 18<sup>th</sup> December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences vs. Oranga & Others* [1976] KLR 63 at page 66 paragraph C).”
19. Similarly, in *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR the Court of Appeal eruditely observed as follows: -

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”
20. The Applicant is not appealing against the taxed costs. He is appealing against the dismissal of the judicial review case he had filed. Even if execution was to proceed on costs, this will not render his appeal nugatory or will not amount to substantial loss.
21. There is no evidence that should the Applicant pay costs to the Interested Parties, they will not refund the same. This being the case, I find that the Applicant’s application lacks merit. The same is dismissed with costs to the Interested Parties.

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 6<sup>TH</sup> DAY OF NOVEMBER, 2025.**

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**HON. E. O. OBAGA**

**JUDGE**



In The Presence Of:

Ms. Kyalo for Applicant.

Mr. Masika for Interested Parties.

Court assistant – Deodata.

