

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC CASE NO. 933 OF 2002

AUGUSTINE KIMENTERIA NTHIGA
PLAINTIFF

VERSUS

DAVID NDUBI STOWER
DEFENDANT

RULING

1. Before this Court for determination is a Notice of Motion dated 17th September 2025, brought pursuant to **Articles 10, 27, 48 and 159 of the Constitution, Section 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules**. Through the said Motion, the Defendant seeks the following orders:

- a. That there be stay of further proceedings in the present case pending the tracing by this Honourable Court of the original court file and court proceedings of trial to enable the applicant to exercise his Constitutional and statutory right of appeal.*
- b. That alternatively, there be stay of execution of the decree pending the hearing and*

determination of the intended appeal against the ruling and order of 18th July 2024.

c. That the costs of this application be provided for.

2. The application is premised on the grounds set out therein and supported by the affidavit sworn by the Defendant. It is the Defendant's case that following the delivery of judgment against him, he exercised his statutory right of appeal and filed a Notice of Appeal and that he thereafter applied for certified copies of proceedings and judgment to enable him file the appeal. However, the original court file went missing and, to date, has not been traced.
3. The Defendant deponed that in its ruling of 18th July 2024, this Court noted that after judgment was entered in 2013, and during the process of transferring the matter to the Environment and Land Court, the court file was misplaced and only reconstructed in February 2023. He averred that the reconstructed file lacks the original proceedings recorded during trial, rendering it impossible to file a meaningful appeal.
4. It was further deponed that in view of the missing proceedings, the Defendant filed an application dated 21st June 2023 seeking review of the judgment as the only viable avenue available to him. In its ruling delivered on 18th July 2024, this Court dismissed the application on grounds that the alleged error did not amount to an error apparent on the

face of the record. The Defendant now contends that this decision was erroneous and has since filed a Notice of Appeal against the ruling.

5. The Defendant deponed that despite a formal request made through a letter dated 30th June 2024, the court has not supplied the requested documents, thereby preventing him from lodging his appeal. He contends that notwithstanding these circumstances, the Plaintiff has moved to execute the decree by issuing a Notice to Show Cause against him.
6. The Defendant maintains that the delay in lodging the appeal is occasioned solely by the absence of the court proceedings, a situation that has been perpetuated by the Court's inability to provide them. It was contended that denying him an opportunity to appeal on account of circumstances beyond his control would amount to discrimination, unfairness, and a denial of justice contrary to **Articles 27 and 48** of the **Constitution**.
7. The application is opposed. In a Replying Affidavit sworn by Leo Masore Nyang'au, Counsel for the Plaintiff, it was deponed that the application is misconceived, frivolous, and an abuse of the process of the Court. It was asserted that the Defendant has been guilty of inordinate delay of over one year and two months, which delay has not been explained and is inexcusable.

- 8.** Counsel deponed that there can be no stay of proceedings or execution pending the tracing of a lost or misplaced file when the same has already been reconstructed. It was explained that reconstruction is only undertaken after the Court has conducted a thorough and unsuccessful search for the original file.
- 9.** He averred that before applying for reconstruction, he made several written and physical follow-ups with the Deputy Registrars of both the Civil and Environment and Land Divisions and was informed that exhaustive efforts to trace the file had been made without success. It was upon this advice that he moved the Court for reconstruction, which was duly ordered.
- 10.** It was further deponed that the Defendant's Counsel did not oppose the reconstruction process nor seek that it be suspended pending further tracing. Since reconstruction, it was deposed, various proceedings have been undertaken on the reconstructed file, including the Defendant's application dated 13th June 2023 for review and setting aside of the judgment delivered on 5th September 2013, and the taxation of the Plaintiff's party-and-party bill of costs.
- 11.** Counsel contended that by filing the present application, the Defendant seeks to reopen settled issues and to litigate in instalments, an approach amounting to an abuse of the process of the Court.

- 12.** It was further deponed that following the dismissal of the Defendant's application for review, the Plaintiff issued a Notice to Show Cause why execution should not issue and that the Defendant's Counsel then proposed to liquidate the decretal sum by monthly instalments of Kshs. 50,000, two of which payments were made, as shown by copies of the Defendant's Counsel's cheques.
- 13.** Counsel asserted that the Defendant thereafter defaulted in making further payments, prompting the Plaintiff to proceed with the Notice to Show Cause and that it was only at that stage, Counsel averred, that the Defendant brought the present application in an attempt to frustrate execution.
- 14.** It was submitted that the absence of the trial judge's handwritten notes does not bar the Defendant from pursuing an appeal, since under **Rule 84** of the **Court of Appeal Rules, 2022**, an appellant may move the Court of Appeal to admit additional evidence to cure such gaps.
- 15.** Counsel contended that, in any event, the Defendant must first surmount the provisions of **Rule 84(2)** of the said Rules, as no appeal was filed within sixty days of the ruling, and the letter bespeaking proceedings was never copied to or served upon him as required.
- 16.** In response, the Defendant's Counsel, Mr. Desterio Oyatsi, swore a Further Affidavit denying the allegations made by the Plaintiff's Advocate. He deponed that there had been

deliberate non-disclosure of material facts by the said deponent, and specifically denied that the Defendant ever proposed to pay the decretal sum by instalments.

17. Counsel clarified that the two payments of Kshs. 50,000 each were made without prejudice, pursuant to private discussions between Counsel regarding Advocates' fees, and not as part of any settlement or satisfaction of the decree. He maintained that the Plaintiff's Counsel was fully aware of this arrangement. A copy of a letter from his firm confirming this position was annexed to the affidavit.

Submissions

18. In his submissions, Counsel for the Defendant argued that the law on reliance on without prejudice communications is well settled. He referred to the Further Affidavit sworn on 20th September 2025 clarifying that the said payments were made purely on a without-prejudice basis between Advocates. It was submitted that these facts have not been controverted by the Plaintiff through any supplementary or further affidavit and cannot therefore be challenged by way of submissions.
19. Counsel submitted that in the absence of a formal application to file a supplementary affidavit, the Plaintiff's attempt to dispute the contents of the said affidavit through submissions is procedurally untenable. Reliance was placed on **Millicent Wambui vs Nairobi Botanica Gardening Ltd [2012]**

eKLR, Oceanbulk Shipping & Trading SA vs TMT Asia Ltd & Others [2010] UKSC 44, and Geoloy Investments Ltd vs Behal t/a Krishan Behal & Sons [2002] eKLR 447, for the principle that without prejudice communications are privileged and inadmissible as evidence of admission.

20. On the issue of the missing file, Counsel submitted that the loss of the original record is not in dispute and was occasioned by the Court itself. Reliance was placed on the case of **Nakumatt Holdings Ltd vs Commissioner of Value Added Tax, Civil Appeal No. 200 of 2003**. It was submitted that this decision is binding on this court.
21. Counsel submitted that the Defendant is an innocent victim of circumstances created by the Court, which has effectively denied him the right to pursue his appeal, and that to punish him for this would amount to injustice.
22. It was further submitted that it would be oppressive and contrary to the dictates of fairness and common sense for the Court, having itself occasioned the loss of the record, to now turn around and insist that the Defendant suffers the consequences. Counsel urged the Court to grant the orders sought in the interests of justice and to preserve the Defendant's constitutional right of appeal.

Analysis and Determination

23. Upon careful consideration of the Notice of Motion dated 17th September 2025, the affidavits filed in support and opposition, the submissions of learned Counsel, and the authorities relied upon, the following issues arise for determination:

- a) *Whether the Defendant has made out a case for stay of proceedings or execution pending tracing of the original file or intended appeal;*
- b) *Whether to alternatively issue stay of execution orders pending the hearing and determination of the intended appeal against the ruling of 18th July 2024.*
- c) *Whether the orders sought are merited in the circumstances of this case.*

24. The Defendant seeks, in the first instance, an order for stay of proceedings pending the tracing of the original court file and the intended appeal, and in the alternative, a stay of execution of the decree pending the hearing and determination of the intended appeal against this Court's ruling delivered on 18th July 2024. The application is anchored on the admitted loss of the original court record and the Defendant's contention that, in its absence, it is impossible to lodge and prosecute a meaningful appeal.

25. Judgment in this matter was entered for the Plaintiff on 5th September 2013, granting a permanent injunction, general damages of Kshs 500,000 for trespass, special damages of

Kshs 250,000, and taxed costs of Kshs 292,707, bringing the total decretal sum to Kshs 2,380,316 as per the Notice to Show Cause dated 7th February 2025.

26. The general principles guiding the court when invited to stay proceedings are well captured in **Halsbury's Law of England, 4th Edition, Vol 37 at pages 330 and 332** as follows:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.”

27. This was affirmed in **Ferdinand Ndung'u Waititu vs Independent Electoral & Boundaries Commission (IEBC) & 8 others [2013] eKLR** as follows:

“A stay of proceedings involves arresting or stopping proceedings. It is a tool used to suspend proceedings to await the action of one of the parties in regard to some step or some act (see Black's Law Dictionary). This implies that the rationale for stay is the pendency of an act or step either required by the court or sought by a party.

It may be grounded on a statutory provision or on the need of a party and based on a plea for the plenary exercise of the court's discretion."

28. The power of this Court to grant an order for stay of proceedings pending appeal, and its attendant jurisdiction in that regard, is anchored in **Order 42 Rule 6** of the **Civil Procedure Rules** and reinforced by the inherent jurisdiction of the Court preserved under **Section 3A** of the **Civil Procedure Act. Order 42 Rule 6(1)** of the **Civil Procedure Rules** 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."

29. In **Global Tours & Travels Limited, Nairobi HC Winding Up Cause No. 43 of 2000**, the Court set out the guiding principles to be considered in determining whether or not to grant an order for stay of proceedings in the following terms:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”

30. Similarly, in **Christopher Ndolo Mutuku & another vs CFC Stanbic Bank Ltd [2015] eKLR**, the Court reiterated the applicable principles in the following terms:

“What matters in an application for stay of proceedings pending appeal is the overall impression the court makes out of the total sum of the circumstances of each which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice.”

- 31.** Guided by the foregoing authorities, this Court turns to the circumstances of the present case. It is not in dispute that the original court file in this matter was misplaced/lost following the transfer of the file from the High Court to the Environment and Land Court. By an order of the court, the same was reconstructed in February 2023 after an exhaustive search.
- 32.** Although there are no statutory provisions on reconstruction of lost files, it is settled that the process is administrative. As held in **Kiarie & another (Administrators of the Estate of Kiarie Ng'ang'a - Deceased) vs Aboli & another (Administrators of the Estate of Rev Madar Evans Okanga Dondo - Deceased) [2025] KEELC 5761 (KLR)**, reconstruction is to be undertaken under the supervision of the Deputy Registrar, guided by registry protocols.
- 33.** The High Court Registry Operation Manual (2nd Ed., pp. 33-34) outlines the administrative steps where a file is missing. In such event, the Registry will take the following steps:-

- a. The Registry Supervisor checks the file movement register to identify the person in whose possession the file was last recorded. The Supervisor instructs him/her to trace the file.**
- b. If the file is not traced, the Registry Supervisor circulates a memo to all staff in the Station/Registry asking them to check whether the file is in their possession. If the file is not found within 24 hours, the Supervisor will notify the Deputy Registrar.**
- c. The Deputy Registrar then initiates a special search.**
- d. If the file is not traced after this first search, the Registry Supervisor writes the words 'original file missing', in pencil, on the relevant case register**
- e. The Registry Supervisor then enters the details of the missing file in the register of missing files which is maintained by the Registry Supervisor.**
- f. After a fruitless search of 14 days, the Deputy Registrar issues a certificate to confirm the loss and recommends the reconstruction of the file.**
- g. Parties are informed of the non-availability of the file in writing by the Deputy Registrar with a recommendation for reconstruction."**

- 34.** In this case, the record shows that the file was duly reconstructed, and since such reconstruction, various applications, including the Defendant's own motion dated 13th June 2023 seeking review of judgment, have been heard and determined.
- 35.** The Defendant nonetheless contends that the reconstructed file lacks the original handwritten or typed proceedings, rendering it impossible to file a meaningful appeal. He therefore seeks stay of proceedings pending the tracing of the original record and pending an intended appeal, to enable him to exercise his constitutional and statutory right of appeal.
- 36.** At this stage, however, taxation has been concluded and the only process remaining is execution. The record confirms that taxation was finalized through a ruling delivered by the Taxing Officer on 7th February 2024, which remains unchallenged to date. Other than execution, there are no active proceedings capable of being stayed. Courts do not act in vain or issue orders devoid of practical effect. To grant a stay in the circumstances would amount to an exercise in futility.
- 37.** In any event, the lost file cannot be traced, and the same has since been reconstructed. Consequently, an order for stay pending of proceedings pending the tracing of the file, which

file cannot be traced, is in itself an oxymoron. The prayer cannot be granted.

- 38.** In any case, **Rule 29** of the **Court of Appeal Rules 2010** (now **Rule 31** of the **2022 Rules**) empowers the appellate court, in its discretion, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner. Hence, any deficiency in the record can be mitigated through mechanisms available to the appellate forum.
- 39.** Turning now to the alternative prayer, the law governing the grant of stay of execution pending appeal is similarly set out under **Order 42 Rule 6(1) and (2)** of the **Civil Procedure Rules**, which provide as follows:

“(1)No appeal or second appeal shall operate as a stay of execution or proceeding 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.”

40. In *RWW v EKW [2019] eKLR*, the court succinctly articulated the purpose of an order for stay of execution pending appeal in the following terms:

“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.”

- 41.** In **Vishram Ravji Halai vs Thornton & Turpin Civil Application No. Nairobi 15 of 1990 [1990] KLR 365**, the Court of Appeal delineated the principles governing the grant of stay of execution pending appeal. The Court held that whereas its own power to grant stay is unfettered, the High Court’s jurisdiction under Order 41 Rule 6 (as it then was) of the Civil Procedure Rules is circumscribed by three conditions: the establishment of sufficient cause, demonstration of substantial loss, and the provision of security for the due performance of the decree.
- 42.** As to what constitutes substantial loss, the court in **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR**, observed 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 ... 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.”

43. In considering an application for stay of execution pending appeal, the court must also bear in mind the right of a successful litigant to enjoy the fruits of his judgment. The Court is thereby enjoined to undertake a delicate balancing exercise, on the one hand preserving the subject matter and preventing substantial loss, and on the other, safeguarding the successful party's entitlement to the fruits of judgment. This principle was aptly articulated in **Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR** in the following terms:

“I appreciate and understand that the court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement, hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant. It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its

discretion would be guided by adequate and appropriate evidence of substantial loss. ... At this stage we must as a court ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interest of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other party. The court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrives within the corridors of the court."

44. Additionally, in exercising its discretion, this Court is guided by the constitutional imperative under **Article 159(2)(b)** that justice shall not be delayed, and that judicial discretion must serve the ends of justice.
45. The Defendant was required to establish that he stands to suffer substantial loss if stay is denied; that he approached the court timeously; and that he is willing to provide security for due performance of the decree.
46. On delay, the record shows that the ruling sought to be appealed from was delivered on 18th July 2024, yet the present application was filed on 17th September 2025, over fourteen months later. Although the Defendant attributes the delay to challenges in obtaining certified proceedings, the

letter of request dated 30th June 2024 was erroneously addressed to the Deputy Registrar, High Court Commercial and Tax Division instead of the Environment and Land Court.

- 47.** Even assuming there was administrative delay on the part of the registry, the Defendant had a duty to pursue the matter with reasonable diligence, including moving the Court of Appeal for leave to file the record out of time. No such effort has been demonstrated.
- 48.** With respect to the element of substantial loss, the Court is not persuaded that the Defendant has demonstrated that it stands to suffer any loss beyond the ordinary consequences of execution. No evidence has been placed before this Court to show that the Plaintiff is impecunious or incapable of refunding the decretal sum should the intended appeal succeed.
- 49.** In the absence of such proof, the Court finds no exceptional or compelling circumstances to justify the grant of stay. The Defendant's plea, therefore, remains unsupported by credible or empirical evidence of hardship or irreparable prejudice.
- 50.** It is not lost to this Court that the Plaintiff has drawn the court's attention to the Defendant's alleged previous proposal to liquidate the decretal sum through monthly instalments of Kshs. 50,000, contending that such conduct amounts to approbation and reprobation. The Defendant, for

his part, maintains that the said payments were made on a without prejudice basis and therefore cannot be construed as an admission of liability or waiver of his right of appeal.

51. The Court agrees that payments made without prejudice do not extinguish or compromise a litigant's statutory right of appeal. The protection afforded by that phrase is directed at preserving the confidentiality of negotiations and shielding parties from having such overtures used as admissions against them. This was held in **Millcent Wambui vs Nairobi Botanica Gardening Limited** [2013] KEELRC 557 (KLR) as follows:

“The use of the term ‘without prejudice’ is used by parties as a means to enable offers and counter offers to be made to settle disputes or claims without fear that the said letters would later be used by the opposite party as an admission of liability in the ensuing lawsuit. The words “without prejudice” impose upon the communication an exclusion of use against the party making the statement in subsequent court proceedings. It is a well-established rule that admissions, concessions or statements made by parties in the process of trying to resolve a dispute cannot be used against that party if the dispute is not resolved thus resulting in

litigation. A party making a ‘without prejudice’ offer does so on the basis that they reserve the right to assert their original position, if the offer is rejected and litigation ensues. For correspondence between parties to be protected it must be made in a genuine attempt to settle a dispute between the parties.”

- 52.** However, while such payments do not bar the Defendant from exercising his right of appeal, they equally do not suspend the operation of a valid decree or insulate him from lawful execution.
- 53.** While the Defendant invoked **Articles 27** and **48** of the Constitution, the right of access to justice must be balanced against the corresponding right of the successful party to enjoy the fruits of his judgment. In this instance, the balance of justice tilts decisively against the Defendant.
- 54.** The upshot of the foregoing is that the Defendant has not satisfied the statutory preconditions for the equitable remedy of stay of execution sought.
- 55.** This court therefore finds that the Notice of Motion dated 17th September 2025 is devoid of merit and is hereby dismissed. As costs follow the event, the costs of this application shall be borne by the Defendant.

Dated, signed and delivered in Nairobi virtually this 20th day of November, 2025.

O. A. Angote
Judge

In the presence of;

Mr. Masore Nyangau for Plaintiff/Respondent

Mr. Otieno holding brief for Oyatsi for Defendant/Applicant

Court Assistant- Tracy