



**Kariuki v Cheruiyot (Environment and Land Appeal
E041 of 2023) [2025] KEELC 5629 (KLR) (30 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5629 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E041 OF 2023**

MAO ODENY, J

JULY 30, 2025

BETWEEN

FESTUS KIRIITHI KARIUKI APPELLANT

AND

VICTOR CHERUIYOT RESPONDENT

RULING

1. This ruling is in respect of the Respondent’s Notice of Motion application dated 19th January, 2025 which seeks the following orders:
 - a. Spent
 - b. That this Honorable Court be pleased to vary, alter, set aside and/or review its proceeding of 16th December, 2024 and subsequent order arising thereto to allow the Applicant application dated 9th October, 2024.
 - c. That upon grant of order 2 above the Respondent/Applicant replying affidavit dated 16th November, 2024 be deemed as properly filed and the Applicant/Respondent’s application dated 9th October, 2024 be fixed for hearing and determined on merit. (sic)
 - d. That cost of this application be provided for.
2. The Application is supported by the annexed affidavit of Victor Cheruiyot, who deponed that the Appellant filed an application dated 9th October 2024 seeking stay of execution of a lower court judgment delivered on 11th October, 2023. He deponed that his advocates were served with the application on 16th November, 2024 and he filed a Replying Affidavit.
3. He deponed that as a matter of procedure, parties by law are required to take directions on the disposal of the application, however, the court proceeded to allow the application without considering the



Applicant's response which was filed on the e-filing platform on 16th November, 2024. The Applicant further deponed that the Application dated 9th October, 2024, should be heard on merit.

4. Festus Kiriithi Kariuki filed a Replying Affidavit sworn on 27th January, 2024, and opposed the application and prayed that it be dismissed with costs. He also prayed that the warrant of attachment be set aside.

Respondent/applicant's Submissions

5. Counsel for the Respondent/Applicant filed submissions dated 14th May 2025, and submitted that the proceedings of 16th December, 2024, gave the Appellant stay of execution orders ex-parte without the Respondent's participation, that the reply to the application was filed on the e-filing portal on 16th November, 2024, yet it was not considered.
6. Counsel submitted that while allowing the application, the court did not take into account guiding principles of stay of execution pending appeal provided for under Order 42 Rule 6 (2) of the [Civil Procedure Rules](#). Counsel asked the court to allow the application and the Appellant to bear the costs.

Appellant's Submissions

7. The Appellant filed submissions dated 17th June, 2025 and identified the issues for determination as:
 - a. Whether the Respondent is entitled to the orders sought?
 - b. Who should bear the cost of this application?
8. He submitted that the Applicant has not demonstrated that if the prayers are granted, he is in a position to refund the money should the appeal succeed, and urged the court to dismiss the application with costs to the Appellant.

Analysis and Determination

9. The issue for determination is whether the court should vary/set aside the orders of stay of execution and hear the application dated 8th October 2024 on merit.
10. The Appellant filed the application dated 9th October 2024 under certificate of urgency and on 17th October 2024 the court considered the application and gave the following directions:
 1. That the Applicant serves the application within 7 days
 2. That the respondent files a response within 7 days upon service
 3. That a temporary stay of execution is hereby issued pending the hearing of this application inter partes.
 4. Mention for further orders on 6th November 2024
11. The same came up for mention on 6th November, 2024 in the presence of the Appellant and in the absence of counsel for the Respondent. The Appellant informed the court that he had served the application and filed an Affidavit of service, but had not received any response to the Application. The Appellant urged the court to allow the application since there was no response filed as directed by the court. The court therefore considered the application and allowed the same as prayed.
12. On 16th December, 2024, counsel for the Respondent informed the court that they were never served with the application prompting the filing of the present application. This court has looked at the



Affidavit of Service filed by the Appellant sworn on 5th November, 2023. The Appellant deponed at paragraph 2 and 3 as follows:

“ That on 19th Oct 2024 I sent a copy of the court directions to the respondents advocates on record through his email.

That on 22nd Oct 2024 I sent a copy of pleading which include application, certificate of urgency, notice of motion, supporting affidavits and annexures to the respondent advocates on record through his email.” (sic). The CTS platform further shows that the email was sent from xxx.com to xxx.com

13. The pleadings filed herein show that the Respondent’s counsel email address is xxx.com . In the case of *Union Insurance Co. of Kenya Ltd. v Ramzan Abdul Dhanji* Civil Application No. Nai. 179 of 1998 the Court of Appeal held that:

“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”

14. Counsel for the Respondent/Applicant has not denied that the above email xxx.com belongs to him. Where a party has been served and neither files a response nor appears in court, the court may proceed without their input or attendance.
15. The remedy of the Respondent/Applicant lies in fast tracking the hearing of this Appeal. There is no good reason advanced by the Respondent/Applicant why this court should vary or set aside the orders in respect of the Application dated 9th October 2024. The upshot is that the Application dated 19th January, 2025 is hereby dismissed with each party bearing their own costs.
16. Parties to fast track the hearing of this Appeal. Appellant to file a record of Appeal within 45 days, failure to which the stay lapses.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 30TH DAY OF JULY 2025.

M. A. ODENY

JUDGE

