



Kamau & 2 others (Sued as Trustees of Rasmakena Welfare Group) v Muthambiri & 2 others (Environment and Land Appeal E062 of 2024) [2025] KEELC 5691 (KLR) (30 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5691 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E062 OF 2024**

NA MATHEKA, J

JULY 30, 2025

BETWEEN

**ROSE WAIRIMU KAMAU, DIANA WAKESHO NJAU & BEATRICE
GATHONI KURIA (SUED AS TRUSTEES OF RASMAKENA WELFARE
GROUP) APPELLANT**

AND

**CATHERINE WAMBUI MUTHAMBIRI 1ST RESPONDENT
JOHN HARAMBEE GIKONGO 2ND RESPONDENT
SIMON KARURI THEURI 3RD RESPONDENT**

RULING

1. The application is dated 14th November 2024 and is brought under Order 42 Rule 6 Section 1A and 3A of the *Civil Procedure Rules* seeking the following orders;
 1. That this Motion be certified urgent and be heard forthwith exparte on account of the urgency.
 2. That upon exparte hearing this Honourable Court deem it fit to grant an order staying execution of the Judgment and Decree given by the trial court on 17th October, 2024 pending the hearing and determination of this Application.
 3. That upon inter-partes hearing this Honourable Court deem it fit to grant an order staying execution of the Judgment and the Decree of the trial court given on 17th October, 2024 pending the hearing and determination of this Appeal
 4. That costs of this Application be provided for.
2. It is brought upon the following grounds that on 17th October, 2024 the trial court Hon. K. Suter delivered a Judgment whereby she held that the suit land had been procured through a fraudulent



scheme and ordered cancellation of the 1st Respondent's title and transfer of the land to the 2nd Respondent. The Appellant/Applicant were dissatisfied with the Judgment and the Decree of the trial court and have exercised their undoubted right of Appeal. That the Appeal is triable on very weighty grounds as set out in the Memorandum of Appeal herein. That in the meantime the 2nd Respondent has commenced the process of acquisition of the Decree and execution thereof. That if execution proceeds the Appeal will be rendered nugatory as the Applicant has no way of stopping the 2nd Respondent from alienation the land once it is transferred to him. That even execution for recovery of costs would expose the Applicants to substantial loss as the 2nd Respondent carried himself as person who could not pay for the land at the time of allocation and his means of refunding any money paid to him remain uncertain. That this Honourable Court has jurisdiction and discretion to grant the orders sought in the interest of justice.

3. This court has considered the application and the submissions therein. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the *Civil Procedure Rules* as follows;

“No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”

4. Order 42, rule 6 states:

“No order for stay of execution shall be made under sub-rule (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.”

5. The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

6. The principles governing the exercise of the court's jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicant must show that they have an arguable appeal and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of *Reliance Bank Ltd (In Liquidation) v Norlake Investments Ltd* – Civil Appl. No. Nai. 93/02 (UR), thus;



Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,
 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”
7. The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in *Chris Munga N. Bichange v Richard Nyagaka Tongi & 2 Others* eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus;

..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

8. In the case of *Mohamed Salim T/A Choice Butchery v Nasserpuria Memon Jamat* (2013) eKLR, the court stated that;

That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right

9. We are further guided by the court’s decision in *Carter & Sons Ltd v Deposit Protection Fund Board & 2 Others* Civil Appeal No. 291 of 1997, at Page 4 as follows:

... the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . . 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, and the application must, of course, be made without unreasonable delay.”

10. The Respondents stated that the Applicant has not established any substantial loss as the suit property is in the 2nd Respondent is in possession of the suit property and the title is in the name of the 1st Respondent. That the Appellant was merely joined in the suit by the 2nd Respondent in the counterclaim as persons who duped and sold to the 1st Respondent a title acquired unprocedurally and illegally having been allotted to the 2nd Respondent who is in possession. That they have failed to establish that substantial loss will be suffered.

11. I find that the applicant is not guilty of laches as judgement was delivered on 17th October 2024 and this application was filed on 13th November 2024. The Plaintiff/Applicant submitted that the said Judgment the suit land had been procured through a fraudulent scheme and ordered cancellation of the 1st Respondent’s title and transfer of the land to the 2nd Respondent. I find that the Appellant is not in possession of the suit plot. I find that the draft memorandum attached to the application on the grounds of appeal does not raise an arguable appeal and I do not find that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the



applicant has failed to fulfil the above grounds mentioned to enable me grant the stay. I find that the application is not merited and is dismissed with costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE

