

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ELC CASE NO. 43 OF 2020

JULIA WANGARI
NJUNGUNA.....PLAINTIFF/
RESPONDENT

VERSUS

MATTHEW
NGETICH.....DEFENDANT/APPLICANT

RULING

This ruling is in respect of the Defendant/Applicant's Notice of Motion application dated 15th October, 2025 which sought the following orders;

- 1. Spent.**
- 2. Spent.**
- 3. THAT the Honourable Court be pleased to issue orders of stay of execution of the judgment and decree issued on 27th April, 2023 in this matter and all consequential orders therein**

pending the hearing and determination of the relevant appeal filed in the Court of Appeal.

4. THAT costs of this application be provided for.

The application was supported by the affidavit of MATTHEW NGETICH sworn on 15th October, 2025. He stated that the Plaintiff/Respondent filed the suit and judgment was delivered against him on 27th April, 2023. He further stated that he filed an application dated 15th May, 2025 that sought for orders to set aside the ex-parte proceedings and also stay of execution. He added that the orders were never granted and being dissatisfied with the same, he filed an appeal which he served and requested for typed proceedings. He stated that the judgment was irregular since the same had been issued based on ex-parte proceedings thus not aware of the hearing date. He went on to state that he had been unwell for a long time and that his advocate on record had left practice hence unable to prosecute the matter. He also stated that the matter was heard and determined yet he had not been heard. He stated that he had an arguable appeal and if the

stay orders sought are not granted, he stood to suffer irreparable loss and his appeal rendered nugatory.

Response

Respondent filed her Replying Affidavit sworn on 29th May, 2025 where she averred that the application was a mere afterthought and a delaying tactic. She averred that the Applicant had previously filed and unsuccessfully prosecuted a similar application for stay which the court dismissed on its merits. She averred that the application was res judicata and in contravention of Section 7 of the Civil Procedure Act. She further averred that the application for stay of execution pending appeal was premature since a Notice of Appeal alone did not constitute an appeal. She added that the Applicant's ailment had no bearing on the proceedings nor judgment. She also averred that the judgment dated 27th April, 2023 was final and no appeal has since been lodged. She went on to aver that the Applicant has not shown any substantial loss he stood to suffer nor offered any

security for performance of the decree. She further stated that she continues to be prejudiced by the delayed enjoyment of the fruits of a lawful judgment. She stated that the Applicant failed to satisfy the threshold for grant on the orders sought and urged the court to dismiss the application with costs.

The Applicant in response filed a supplementary affidavit sworn on 4th November, 2025 where he reiterated the contents of his supporting affidavit and stated that the only reason the Respondent obtained a judgment in his favour was because he (Applicant) was not present in court to give evidence in his defence. He denied that the application was res judicata and an afterthought.

Submissions

Counsel for the Applicant filed his submissions dated 12th September, 2025 where he gave a summary of the case and submits that the present application sought to set aside an ex-parte judgment. He submits that the judgment was issued ex-parte since the Applicant was not present in court at the time of hearing. He further submits that the reason for non-attendance

was because his advocate was not available and also on account of illness. He went on to submit that the judgment was yet to be fully effected since the land was still in his name and that no decree had been formally extracted for execution. He relied on **Order 12 of the Civil Procedure Rules** and the case of **Shanzu Investment Ltd V Commissioner of Lands Civil Appeal No. 100 of 1993** and **Tree Shade Motor Ltd V D.T Dobie Co. Ltd (Civil Appeal No. 38 of 1998)**.

In conclusion he urged that court to allow the application for being merited as the Applicant explained his inability to attend court.

Counsel for the Respondent on the other hand filed her submissions dated 12th November, 2025 where she identified two issues for determination. The first issue was whether the Applicant has met the threshold for staying execution of a regular judgment She relied on **Order 22 Rule 22** and **Order 42 Rule 6(2) of the Civil Procedure Rules**. It was her submission that three conditions ought to be satisfied to warrant issuance of orders for stay of execution pending appeal. On the first limb of

substantial loss, she cited among others the case of **James Wangalwa & another V Agnes Naliaka Cheseto (2012) eKLR** and **RWW V EKW [2019] eKLR**. Counsel submits that the Applicant failed to demonstrate any form of substantial loss he stood to suffer if the decree is executed. She submits that the Applicant stated that he risked eviction from the suit property yet the court found that the registration was fraudulent.

On the second limb of unreasonable delay, it was her submission that judgment was delivered on 27th April, 2025 while the present application was filed on 15th October, 2025 after an unsuccessful attempt to also stay and set aside the judgment vide an application dated 15th May, 2025. She relied on the Court of Appeal case in **Ivita V Kyumbu [1984] KLR 441** and submits that there was a delay of about two years. She added that the Applicant gave reason of illness as cause of delay but evidence confirmed that he was discharged from hospital on 30th March, 2023 before delivery of judgment. She further submits that the memorandum of appeal did not raise any credible evidence to

demonstrate the nature of substantial loss he stood to suffer if execution proceeded.

On the final condition on security for due performance of the decree, counsel relied on the case of **John Odongo V Joyce Irungu Muhatia (2014) eKLR**. It was her submission that the Applicant has neither offered nor expressed any willingness to provide security. She submits that the Applicant failed to satisfy this this limb. She further relied on the Court of Appeal case in **Uhuru Highway Development Ltd V Central Bank of Kenya & 2 Others [1996] eKLR** and submits that the instant application was res judicata having been previously heard and determined vide a ruling dated 25th September, 2025. She further submits that the current application raised identical issues, same parties and sought for the same orders already declined by this court.

Analysis and determination

The Court has considered the application, replying affidavits and submissions and the main issue for determination is whether the application is merited.

Order 42 Rule 6 (1)(2) of the Civil Procedure Rules provides as follows;

“(2) 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.

In **RWW V EKW [2019] eKLR** the court held as follows:

“...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.”

For this court to grant an order of stay of execution, the Applicant must demonstrate that he filed the application under consideration without unreasonable delay, that he will suffer substantial loss if the orders sought are not granted and that he was willing to deposit security for costs. It is also noteworthy that the court should endeavor to balance the interests of both the successful party in litigation so as not to unnecessarily bar them from enjoying the fruits of judgment and that of the Appellant whose appeal may succeed and be rendered nugatory if stay of execution is not granted.

Before delving into whether the requirements for stay have been met by the Applicant, a precursor perusal of the record shows

that judgement in the matter was delivered on 27th April, 2023. Notably, the Applicant filed a Notice of Appeal on 6th November, 2025 on this court's ruling delivered on 25th September, 2025. It is also not in dispute that the ruling being appealed was with regard to an application by the Applicant dated 15th May, 2025 which sought for review of the of the judgment delivered on 27th April, 2025. In the ruling, the court dismissed the application for review which it is now the basis of the appeal.

It is trite law that parties are bound by their pleadings. In the case of **Odinga & another V Independent Electoral and Boundaries Commission & 2 others (Presidential Election Petition 1 of 2017) [2017] KESC 33 (KLR)** the court held that:

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are

likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...”

In the instant suit, it is not in dispute that from prayer 3 of the present application, the Applicant seeks for stay of execution of the judgment and decree issued on 27th April, 2023 and not the ruling to which he has appealed from. Consequently, it remains that the application is incompetent and misplaced as the court cannot grant stay orders on a judgment that was even yet to be appealed. The upshot of the foregoing is that the application lacks merit and is therefore dismissed with cost to the Respondent. Orders accordingly. **RULING DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAKURU THIS 4TH DECEMBER 2025.**

A.O.OMBWAYO

JUDGE

