



Murungi & 5 others v Momanyi (Environment and Land Appeal E056 of 2024) [2025] KEELC 5692 (KLR) (30 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5692 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E056 OF 2024
NA MATHEKA, J
JULY 30, 2025**

BETWEEN

**NELLY GATAKAA MURUNGI 1ST APPELLANT
SAWASAWA HOUSING ESTATE CO. LTD 2ND APPELLANT
CHAIRMAN 3RD APPELLANT
DIRECTOR 4TH APPELLANT
SECRETARY 5TH APPELLANT
PAUL KAGIRI 6TH APPELLANT**

AND

BENSON NYANYUKI MOMANYI RESPONDENT

RULING

1. The application is dated 19th February 2025 and is brought under Order 42 Rule 6 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders;
 1. That this application be certified as urgent and service in the first instance be dispensed with.
 2. That pending the inter partes hearing and determination of this Application, this Honourable Court do issue an order of stay of the execution of the Judgment and Orders of Hon. Daffline Nyaboke Sure (Principal Magistrate) in Kangundo ELC E046 of 2022 dated 30th September, 2024 and all its consequential orders/decrees thereof.
 3. That pending the hearing and determination of High Court Land Appeal No. ELCLA/E056 of 2024, this Honourable Court do issue an order of stay of the execution of the Judgment



and Orders of Hon. Daffline Nyaboke Sure (Principal Magistrate) in Kangundo ELC E046 of 2022 dated 30th September, 2024 and all its consequential orders/decrees thereof.

4. That the costs of this Application be provided for.
2. It is supported by the following grounds and the annexed Affidavit of Nelly Gatakaa Murungi and further grounds that on 30th September, 2024, Kangundo Magistrate's Court passed Judgment against the Applicants. That being dissatisfied with the said Judgment of 30th September, 2024, the Applicants herein filed Appeal in High Court at Machakos Environment and Court being Appeal Number ELCLA/E056 of 2024. That the Appellants have an arguable Appeal with high chances of success. That if the orders sought are not granted, the Appeal will be rendered nugatory since the Applicant will have proceeded with execution and may dispose the disputed land which is the substratum of the Appeal and which cannot be compensated by way of damages. That Applicants have appealed against the said Judgment and are apprehensive that unless this Honourable Court intervenes, the Respondent will proceed with execution thus rendering the Appeal nugatory as the amount paid may not be recovered and the disputed plot may have been disposed. That the Respondent has applied for Decree hence there is a serious and imminent threat and possibility of execution of the resultant decree. That substantial loss may result to the Applicants if the Appeal is allowed since the Applicants will have been compelled to pay the damages awarded and the cost of suit which may not be recovered from the Respondent. That the Application has been made without unreasonable delay. That the Applicants shall abide to such security as the court orders for the due performance of the Judgment, Orders or Decree. That the Applicants will suffer irreparable and substantial loss should they be compelled to pay the Judgment amount which may not be recovered. That no prejudice will be occasioned to the Respondent if the Orders sought are granted because the Respondent is in actual possession of the disputed plot. That it is in the interest of justice that the prayers sought in the Application be granted since the purpose of stay is to maintain the status quo and preserve the substratum of the Appeal.
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) vs 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 vs 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 vs 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 vs 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. As to whether the Application has been filed without undue delay, judgment was entered on 30th September, 2024 and the application was filed on 20th February 2024, four months later. This court thus finds that there has been inordinate delay in filing the application for stay of execution.
11. The Applicants submit that they are likely to suffer irreparable damage and substantial loss should they be compelled to pay the judgement amount which is quite a punitive amount. That this would frustrate and cripple their business. That they have appealed against the whole judgement and the decretal sum which they feel is excessive. That they may not also be able to recover the same from the respondent should the appeal be successful.
12. On substantial loss, the respondent stated that they are in use and occupation of the suit land since 2016. That the Respondent is a lecturer and a bishop of the church and will be able to refund the money should the appeal be successful. That this application has been brought in bad faith and at the last minute. I concur with the Respondents submissions that this is a money decree and the court can order a refund should the Applicant be successful in the appeal. That the applicant is in possession and occupation of the suit land and the substantial loss has not been established. Granting stay in this matter would lead to further delay and inconvenience to the Respondent who requires to enjoy the fruits of their judgment. It is trite law that litigation must come to an end and thus it would be more prejudicial to the Respondent if the orders of stay are granted.
13. Further, I am not persuaded 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 not fulfilled the above grounds mentioned to enable me grant the stay. I find that the application is unmerited and I dismiss it with costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE

