



**Mohamed v Hussein (Suing as Administrator of Sheikh Hussein Ali - Deceased) & another
(Environment and Land Appeal E009 of 2024) [2025] KEELC 5621 (KLR) (30 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5621 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT GARISSA
ENVIRONMENT AND LAND APPEAL E009 OF 2024**

JM MUTUNGI, J

JULY 30, 2025

BETWEEN

HABIBA MOHAMED APPELLANT

AND

**ADAN SHEIKH HUSSEIN (SUIING AS ADMINISTRATOR OF SHEIKH
HUSSEIN ALI - DECEASED) 1ST RESPONDENT**

**IBRAHIM SHEIKH HUSSEIN (SUIING AS ADMINISTRATOR OF SHEIKH
HUSSEIN ALI -DECEASED) 2ND RESPONDENT**

RULING

1. The Trial Court in Wajir ELC Case No. E004 of 2020 on 29th November 2024 delivered a Judgment where it found the Appellant who was the Defendant in the suit to be a trespasser on plot No R 1199/ D26/429 size 50’x100’ and ordered her to vacate from the plot within 30 days or be forcibly evicted. The Court also awarded mesne profits at Kshs 1,000/- per month for 10 years and costs of the suit.
2. The Appellant was aggrieved and dissatisfied with the Judgment and filed the instant Appeal vide the Memorandum of Appeal dated 10th December, 2024. Simultaneously with the Memorandum of Appeal the Appellant filed a Notice of Motion of even date and inter alia sought the following orders:-
 - i. This Honourable Court be pleased to issue an order staying execution of the decree made by the Magistrate’s Court on 29th November 2024 in Wajir PM CELC Case No. 4 of 2020 pending hearing and determination of this Appeal.
 - ii. This Honourable Court be pleased to issue an order staying all further proceedings in Wajir PMC ELC case No. 4 of 2020 pending hearing and determination of this Appeal.
 - iii. That costs of the application be provided for.



3. Pending the hearing of the application interpartes, the Court granted an interim stay of execution of the Judgment and decree.
4. The application was supported on the grounds set out on the body of the application and the Supporting Affidavit sworn by the Appellant. It was the Appellant's assertion that her Appeal had high chances of succeeding and that if stay of execution was not granted and she was evicted she would suffer substantial loss and her Appeal would be rendered nugatory.
5. The 1st and 2nd Respondents filed a Replying Affidavit sworn by the 1st Respondent in opposition to the application. The thrust of the Respondents Affidavit was that the Appellant's Appeal lacked merit and in that regard the Respondents reiterated to considerable extent evidence that showed they were the lawful owners of the disputed plot. That prompted the Appellant to file the Supplementary Affidavit sworn on 3rd March 2025 to rebut the allegation that she had no proof she owned the disputed plot. She averred she had occupied the disputed plot since 1982 when her deceased husband was allocated the plot.
6. The Court directed the parties to argue the application by way of written submissions. Both parties filed their respective submissions in compliance with the directions. I have perused and considered the application, the Supporting Affidavits and the Replying Affidavit and have also considered the submissions of the parties. The singular issue for determination in this application is whether the Applicant is entitled to an order of stay of execution of the Lower Courts Judgment/decree. The power of a Court to grant stay of execution of Judgment/order or decree is discretionary but such exercise of discretion by the Court has to be judicious and ought not to be exercised capriciously or whimsically. The attendant circumstances in the matter ought to be given consideration and the exercise of discretion to grant or refuse to grant stay should take account of interest of justice and ensure no party suffers any undue prejudice.
7. Under Order 42 Rule 6(1) of the Civil Procedure Rules a Court may on an application for stay pending Appeal grant stay on such terms as it may deem just. However, Order 42 Rule 6(2) specifies that for an Order of stay to be given under Rule 6(1) the Court must be satisfied that substantial loss may result unless stay was granted and that the application for stay was made without unreasonable delay. Additionally, the Court could order security to be furnished for the due performance of the decree or order that may ultimately bind the Applicant in the event the Appeal did not succeed.
8. In the Case of Congress Rental South Africa –vs- Kenyatta International Convention Centre; Co-operative Bank of Kenya Ltd & Another (Garnishee) (2019) eKLR the Court stated:-

“The purpose of an application for stay pending Appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising his right of Appeal are safeguarded. Therefore, this should be clearly demonstrated that there is indeed reason to preserve the subject matter upon which failure to do that would render the Appeal nugatory. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”
9. In the Case of Global Tours and Travel Ltd –vs- Five Continents Travel Ltd (2015) eKLR the Court outlined the factors to be considered in an application for stay of execution. The Court stated thus:-

“---- 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. Such discretion is unlimited save that by virtue of its character as a Judicial discretion; it should be exercised rationally and not capriciously or whimsically. 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 the order. And in considering those matters, it should bear in mind such factors as the need for the expeditious disposal of the case. 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 timeously.”

10. In the instant matter, it is clear that the ownership of R1199/D26/429 was in issue as between the Appellant and the Respondents. The trial Court vide the impugned Judgment determined that the plot belonged to the Respondents and ordered the Appellant to vacate from the plot. The Appellant as per the record had been in possession of the disputed plot for a long period, and it is her contention that was the place she and her late husband had established their home and that should she be evicted before her Appeal which she avers has good chances of succeeding is heard and determined she would suffer substantial loss and that her Appeal would be rendered nugatory.
11. I have perused the Memorandum of Appeal and I am satisfied the Appeal raises valid grounds and cannot be said to be frivolous. It is arguable, and in my view should the decree of the Lower Court be executed and the Appellant is evicted, she would suffer substantial loss and the Appeal could be rendered nugatory should she be successful as the plot could even get into the hands of a Third party, not party to the Appeal. There is in the premises merit in having the property the subject matter of the Appeal preserved in its current state pending the hearing and determination of the Appeal.
12. I accordingly find and hold the Appellant’s application dated 10th December 2024 has merit and I allow the same in terms of prayers (3) and (5) of the Notice of Motion.
13. The costs of the application shall abide the outcome of the Appeal.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 30TH DAY OF JULY 2025.

J. M. MUTUNGI

ELC - JUDGE

