REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELCLA NO. E040 OF 2025

GRACE NYABOKE MOMANYI.....APPELLANT/APPLICANT

VERSUS

NICHOLAS NYAMWEYA NYARIKI.....RESPONDENT

RULING

(On whether the appellant's application, brought before filing a similar one in the trial court, for stay of execution pending appeal complies with Order 42 Rule 6 of the Civil Procedure Rules, 2010**)**

Introduction

1. The appellant/applicant filed a memorandum of appeal dated 3rd December, 2025. On 8th December 2025, the appellant/applicant filed an application seeking stay of execution pending appeal before this court. The court invited the parties to address it on the compliance of the application with Order 42 rule 6 of the Civil Procedure Rules, 2010.

Arguments of the parties

2. The appellant/applicant argued that a stay of execution application can be made either before the trial court or to the court before whom the appeal has been lodged. On this basis, she argued that, the instant appeal, having been lodged before the appellate court was properly before the court.
3. The respondent on the other hand argued that Order 42 Rule 6 of the Civil Procedure Rules 2010 mandates parties to file stay of execution application before the trial court and only when such application is decline can they move to the appellate court for the same application.

Issues, analysis and determination

4. The main issue for determination in this application is whether the appellant's/applicant's stay of execution pending appeal application complies with Order 42 Rule 6 of The Civil Procedure Rules, considering the same was not filed at the trial court. The court will also determine who should bear the costs of the application.
5. **Order 42** of the **Rules**. In particular, **Order 42 Rule 6(1)** provides that:

"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from <u>except in so far as the court appealed from may order but</u>, the court appealed from may for sufficient cause order stay of execution of such decree or order, <u>and whether the application for such stay shall have been granted or refused by the court appealed from</u>, <u>the court to which such appeal is preferred shall be at liberty</u>, on application being made, to consider such application and to make such order thereon as may to it seem just, <u>and 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 such order set aside</u>."

<u>appellate court to have such order set aside</u>."

6. The effect of the above provision is that, an Appellant aggrieved by an order or decree of a subordinate Court moves the Appellate Court either on a first appeal (where the appeal is first) or on a second appeal (where the appeal is preferred as a second one in case there was an earlier one

to a Court subordinate to the Superior Court) moves the Superior Court for stay of proceedings or execution he/she/it should have moved the court appealed from for similar orders. The above provisions are couched in mandatory terms. Only upon fulfillment of that step shall the Superior Court be seized of jurisdiction to handle an application for stay of proceedings or execution. This is clearly provided for in the sub-Rule that "*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 such order set aside."*

7. The import of the aforestated ins that an Appellant can only apply to the Appellate Court to set aside the order (of stay of execution or proceedings) of the Court appealed from if he/she/it is aggrieved by such an order. It means further that he/she/it or the adverse party must have moved the subordinate Court, the Court shall have rendered itself on the application, and the party is aggrieved by the decision of that Court and moves the Appellate Court. As such, an appellant ought not and should never side-step the

subordinate court and attempt successfully to move the appellant for orders he/she should have sought formally in that court. This is akin to forum shopping and a direct call for a breakdown of the rule of law. Laws are enacted for the proper ordering of and to avoid arbitrariness in actions of people in society. While rules of procedure are not to be mistresses to stress and commandeer or constrain free moral agents of reason they were designed for orderliness, fairness and justice. It would be a dark day for judges and judicial officers to encourage infractions of the law which they took oath to uphold. Thus, in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others [2013] Eklr,** Kiage JA held:

> "***I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of***

procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."

8. From the above excerpt, it is clear that both substantive and procedural laws and indeed any other that is constitutional ought to be followed by all and sundry within the Republic. Thus, in regard to compliance with **Order 42 Rule 6(1)** of the **Civil Procedure Rules**, the learned judge in **Vipingo Ridge Limited v Swalehe Ngonge Mpitta [2021] eKLR** held:-

> "***A plain reading of the provision requires that before an Applicant seeking stay pending appeal moves the appellate court for stay orders, he/she must first have applied for the orders before the trial court. And there must be evidence that the trial court pronounced itself on the application whether it granted or declined to grant it.***
>
> ***12. It appears to me therefore that it would be irregular for such applicant to move the appellate court without first approaching the trial court on the matter and the trial court pronouncing itself on it one way or the other***."

9. Equally, in **Pius Mbithi & Another v Daniel Mutiria & Another [2017] eKLR**, it was held that:

> "***I read and understand the rule to dictate that the first port of call by an application for stay pending appeal is the trial court and that once it considers and determines the application then an aggrieved party has the liberty to approach this court and have the orders so issued set aside. 17. Put in the context of the matter before me it is clear that the trial court has not been afforded the opportunity to hear and determine any application for stay. That being the position, and being a court of law applying the law as enacted, this court must tell the applicant that the law is for all to be observed and not be side-stepped. I am in no doubt that the application seeking stay before this court as the appellate court is prematurely made and does not lie.***"

10. Additionally, in **Mwangi v Mokaya (Environment and Land Appeal 17 Of 2022) [2022] KEELC 14835 (KLR) (17 NOVEMBER 2022) (Ruling)** this Court held that

> "***A plain grammatical or textual reading of this terminology reading of the text above, particularly, the underlined phrase is to the effect that a party is not permitted to skip the must important point as the first point of call: the respective trial magistrate or judge against whose order or judgment an appeal is preferred. After he or she has moved the Court and his Application is granted or not, depending on how he views the decision, then he/she will file another application in the Court appealed to. It is upon this step having been taken that the application for stay of proceedings in the trial can be considered by the appellate Court. Absent of this step, the application filed for stay of execution or proceedings directly to the appealed to is improper***."

11. Lastly, in **Anyenda v Simidi & 12 others (Environment and Land Appeal 1 of 2023) [2023] KEELC 21845 (KLR) (24 November 2023) (Ruling)**, this Court, in addressing a similar point of law, held as follows:

> ***"This Court has, for reason of emphasis, underlined the relevant phrases in the provision in relation to the instant Application. The above Rule is to the effect that before an Appellant aggrieved by an order or decree of a subordinate Court moves the Appellate Court either on a first appeal (where the appeal is first) or on a second appeal (where the appeal is preferred as a second one in case there was an earlier one to a Court subordinate to the Superior Court) moves the Superior Court for stay of proceedings or execution he/she/it should have moved the court appealed from for similar orders. This is not optional but a compulsory step. Only upon fulfillment of that step shall the Superior Court be seized of jurisdiction to handle an application***

for stay of proceedings or execution. This is clearly provided for in the sub-Rule that "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 such order set aside.""

12. In the instant Application, the applicant maintained that Order 42 Rule 6 of the Civil Procedure rules allows an appellant to file an application for stay of execution, either before the trial court or before the appellate court. I respectfully disagree with the appellant. The above cited authorities and statutory provisions give guidance to parties on the correct order of filing stay of execution applications pending appeal. The instant application is therefore premature and incompetent. It was brought before a Forum which could not assume jurisdiction before the conditional step could be taken by the appellant.

13. The upshot of the foregoing is that this court will not delve into the merits of the instant application because the

party o. the same is hereby struck with costs to the respondent.

14. Having so found as above, the court, in the interest of justice, grants a temporary conditional stay of execution of the decree of the trial court for a period of fourteen (14) days to allow the appellant to file her application in the appropriate forum, if she so desires, failing which these orders shall lapse automatically.

15. Additionally, and in order for this Court to consider the instant appeal in terms of **Order 42 Rules 2** and **11** of the **Civil Procedure Rules**, **2010**, the Appellant is directed to file the decree appealed from within the next **14** days of this order and move this Court within that period to consider the Appeal accordingly. The appeal be mentioned on 17th February 2026.

16. Orders accordingly.

Ruling dated, signed and delivered virtually via the Teams Platform this 29th day of December 2025.

HON. DR. IUR NYAGAKA

JUDGE

In the presence of,

Ms. Lola, Court Assistant

Mr. Kisera Advocate for appellant

Mr. Kisia Advocate for the Respondent