



REPUBLIC OF KENYA



**Musyoka v Kungu (Environment and Land Appeal E063 of 2024)
[2025] KEELC 5670 (KLR) (30 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5670 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E063 OF 2024**

NA MATHEKA, J

JULY 30, 2025

BETWEEN

RICHARD MULWA MUSYOKA APPELLANT

AND

FAITH MELI KUNGU RESPONDENT

RULING

1. The application is dated 18th November 2024 and is brought under Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act, Article 159(2) (a) of the Constitution of Kenya seeking the following orders;
 1. That this Application be certified urgent and heard *ex parte* in the first instance.
 2. That this Honourable Court be pleased to issue an order of stay of execution of the Judgment delivered on 29th October, 2024 by the lower court Machakos CMCC 1142 of 2013 *Faith Meli Kungu v Richard Mulwa Musyoka* pending the hearing and determination of this Application.
 3. That this Honourable Court be pleased to issue an order of stay of execution of the Judgment delivered on 29th October, 2024 by the lower court Machakos CMCC. 1142 of 2013 *Faith Meli Kungu v Richard Mulwa Musyoka* pending the hearing and determination of this Appeal.
 4. That cost of this Application be borne by the Respondents herein.
2. It is based on the Affidavit in support of the Application sworn by Richard Mulwa Musyoka and grounds that the lower court in Machakos CMCC 1142 of 2013 delivered Judgment in favour of the Respondent on 29th October, 2024. That the said Judgment *inter alia* ordered the Appellant herein in to pay the Respondent a sum of Kshs. 700,000/= within 30 days from the date of the Judgment failure



to which the land the Appellant had bought from the Respondent will revert back to the Respondent and the Appellant is apprehensive that the Respondent will commence execution of the Judgment and thus rendering the Appeal nugatory. That the Appellant feels aggrieved and/or dissatisfied by the decision of the lower court and has resolved to institute an Appeal at this Honourable Court. That the Appellant has an arguable Appeal case which has high chances of success as evidenced by the Memorandum of Appeal and thus ought to be determined on merit. That there is need of issuance of the stay orders prayed of herein so as to protect the Appellant's constitutional right of Appeal and not to render the Appeal nugatory. That in the event that stay is refused, the Appeal shall be rendered nugatory as the judgment will be executed and the Appellant will lose the property he had bought yet he was never given an opportunity to defend himself and the trial court lacked territorial jurisdiction. That no prejudice shall be suffered by the Respondent if the Application is allowed as it is brought in good faith as she is still in possession of the Kshs. 1,022,000 already paid by the Appellant/Applicant as purchase price. That it is in interest of justice that the orders sought for herein are granted.

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.”

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.”

4. 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.

5. 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."

6. 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....."

7. 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

8. 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."

9. The Respondent stated that the Applicant is a vexatious litigant and has filed other suits in different courts on the same matter. That the lower court judgement has already been executed and the Applicant has been evicted. That the Respondent is in possession of the suit property and there is nothing to stay. That they have failed to establish that substantial loss will be suffered.

10. I find that the applicant is not guilty of laches as judgement was delivered on 29th October 2024 and this application was filed on 23rd November 2024. The Plaintiff/Applicant submitted that the said Judgment inter alia ordered the Appellant herein in to pay the Respondent a sum of Kshs. 700,000/= within 30 days from the date of the Judgment failure to which the land the Appellant had bought from the Respondent will revert back to the Respondent and the Appellant is apprehensive that the Respondent will commence execution of the Judgment and thus rendering the Appeal nugatory. Be



that as it may, the Respondent stated that the judgement had already been executed and there was nothing to stay. I also find that the Applicant is forum shopping by filing multiple suits in various court i.e. EJR No. 003 of 2023 and HCCCPET No. 11 of 2025. 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

