

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC NO. 350 OF 2014

YASMIN ANWAR KHAN YUSUF
PLAINTIFF

VERSUS

SAMUEL GITUGI MAINA 1ST
DEFENDANT

VIRGINIA WANGUI NJOROGE 2ND
DEFENDANT

MINI BAKERIES (NAIROBI) LIMITED 3RD
DEFENDANT

RULING

1. The 3rd Defendant has filed a Notice of Motion Application dated 4th June 2025 through which it has sought the following orders:

- a. ***That pending the hearing and determination of Nairobi Court of Appeal Civil Appeal No. E617 of 2021, this Honourable Court be pleased to grant an order of stay of execution of the Decree and Judgement delivered on 4th March 2021 by Honourable Justice E.O. Obaga in Nairobi ELC Case No. 350 of 2014.***
- b. ***That the costs of this application be provided for.***

2. The application is supported by the Affidavit of Elka Motanya, the Legal Manager at Mini Bakeries, the 3rd Defendant. He deponed that judgment was delivered on 4th March 2021 by Obaga J in favour of the Plaintiff; that the 3rd Defendant's Counterclaim was dismissed; and that the costs were awarded to the 1st Defendant. He further deponed that the 3rd Defendant, being dissatisfied with the judgment and decree, lodged an appeal in the Court of Appeal being Nairobi COACA/E617/2021, having filed a Notice of Appeal dated 4th March 2021, which appeal is pending hearing and determination.
3. Mr. Motanya deponed that the Plaintiff has commenced steps towards execution of the decree and that there is a real risk that the Plaintiff may dispose of or otherwise interfere with the suit property, in a manner that may render the appeal nugatory.
4. He further stated that persons alleged to be acting on the Plaintiff's instructions unlawfully gained access to the suit property, evicted the 3rd Defendant's security personnel and commenced demolition of structures erected thereon.
5. According to the deponent, the intended appeal is arguable and has high chances of success and that unless stay is granted, the 3rd Defendant will suffer substantial and irreparable loss. He asserted that the demolition of structures and interference with possession will materially prejudice the 3rd Defendant's position in the appeal and may

render the appeal nugatory, the harm may be irreversible and not adequately compensable by an award of damages.

6. It was further deponed that the execution being pursued is irregular and unlawful for the reason that costs have not been taxed and ascertained. It was also contended that the decree sought to be executed is more than one year old and yet no Notice to Show Cause has been issued in accordance with **Order 22 Rule 18** of the **Civil Procedure Rules**. In the deponent's view, the intended execution is therefore irregular and liable to be set aside.
7. The deponent stated that in the absence of protective orders, the suit property remains exposed to disposal, transfer or destruction, and that unless this court grants stay preserves the *status quo* pending determination of the appeal, the 3rd Defendant's appeal will be rendered nugatory and the 3rd Defendant will suffer irreparable harm.
8. Mr. Motanya deponed that the application was filed timeously and without unreasonable delay upon discovery of the alleged unlawful acts by the Plaintiff. He asserted that no prejudice will be occasioned to the Plaintiff if the orders sought are granted, whereas the 3rd Defendant stands to suffer grave injustice if the application is declined.
9. The application is opposed. The Plaintiff filed a Replying Affidavit sworn by Mary Wamaitha Kagiri on 25th July, 2025. She deponed that she is the widow of the late David Kagiri

Muhia, who passed on while the suit was pending. She stated that she and her late husband assisted the Plaintiff to purchase the suit land from the original owner, Enid Nyambura Nyanja, and that upon purchase, she and her late husband remained on the land as caretakers.

- 10.** She deponed that in 2013, they learnt of the Defendants' attempts to encroach on the land, whereupon they informed the Plaintiff. She stated that the Plaintiff returned to Kenya and obtained an injunction issued on 21st March, 2014, restraining the Defendants from interfering with the suit property. She deponed that the injunction remained in force throughout the trial until when judgment was delivered in favour of the Plaintiff, whereupon the orders were made permanent, and that she continued to safeguard the land and resist attempts by strangers to encroach on it.
- 11.** Mary Wamaitha Kagiri deponed that in June 2025, on the Plaintiff's instruction, she erected a barbed wire fence around the suit property to further protect it from incursions.
- 12.** The deponent denied the allegations of trespass and asserted that it is the Defendants who have, for the last ten years, been kept out of the suit property by court orders. She further contended that the 3rd Defendant is seeking to use the present application to obtain access that was previously denied, and that in any event, the application has not been

brought without undue delay, the 3rd Defendant having taken no action for about four years.

13. The parties filed written submissions and authorities, which I have considered.

Analysis and Determination

14. Upon consideration of the application, the response and the submissions filed, the issue for this court's determination is whether the 3rd Defendant has satisfied the legal threshold for the grant of orders of stay of execution pending the hearing and determination of **Civil Appeal No. E017 of 2021** before the Court of Appeal.
15. By way of background, the Plaintiffs commenced this suit by way of a Plaint in which they sought, inter alia, a permanent injunction restraining the Defendants from trespassing upon, alienating, or otherwise interfering with the suit property known as L.R. No. Ngong/Ngong/15418. The Plaintiffs contended that the 1st and 2nd Defendants unlawfully and fraudulently procured the transfer of the said property, thereafter subdivided it into two portions, and subsequently caused the resultant parcels to be transferred to the 3rd Defendant.
16. Judgment in this matter was delivered on 4th March 2021 in favour of the Plaintiff, the court having found that she had proved her case on a balance of probabilities. The 3rd

Defendant's counterclaim was accordingly dismissed. The court thereafter issued the following orders:

- a. *The subdivision of LR Ngong/Ngong/15418 by the 1st and 2nd Defendants which results in LR No. Ngong/Ngong/57743 and Ngong/Ngong/57744 which were subsequently transferred to the 3rd Defendant are hereby annulled.*
- b. *A permanent injunction is hereby issued restraining the Defendants jointly and severally from entering or in any manner interfering with the Plaintiff's proprietorship and possession of LR No. Ngong/Ngong/15418.*
- c. *An order directing demolition and removal of all structures which were put up by the 3rd Defendant on LR No. Ngong/Ngong/15418.*
- d. *Costs of the suit.*

17. Aggrieved by that decision, the 3rd Defendant filed a Notice of Appeal on the same date, 4th March 2021, and subsequently lodged a Memorandum of Appeal on 25th October 2021. The present application, filed on 4th June 2025, seeks to stay the execution of the said judgment and decree pending appeal.

18. The jurisdiction of this court to grant stay of execution pending appeal is anchored in **Order 42 rule 6(1) and (2)** of the **Civil Procedure Rules**. Under this provision, an

applicant must satisfy three cumulative conditions: that the application has been made without unreasonable delay; that substantial loss may result unless the order is made; and that such security as the court may order for the due performance of the decree has been furnished. It provides that:

“(1)No appeal or second appeal shall operate as a stay of execution or proceeding 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 application being made, to consider such application and to make such order thereon as may to it seem just, 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.

(2)No order for stay of execution shall be made under subrule (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.”***

19. The Court of Appeal has held that these conditions are mandatory and circumscribe the court’s discretion. In ***Halai & Another vs Thornton & Turpin (1963) Ltd [1990] eKLR***, the court held inter-alia:-

“The Superior Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, 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. The application must of course be made without unreasonable delay.”

20. Similarly in ***Butt vs Rent Restriction Tribunal [1982] KLR 417*** the Court of Appeal stated thus;

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be

exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal."

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

21. The first limb for consideration is whether this application was filed without unreasonable delay. The 3rd Defendants' counsel submitted that the application was filed promptly upon the Plaintiff's agents gaining access to the suit property and evicting the 3rd Defendant's security personnel between May and June 2025.

22. What constitutes unreasonable delay is a matter dependent on the circumstances of each case. In **Jaber Mohsen Ali & another vs Priscillah Boit & another [2014] eKLR**, the court held that:

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.”

23. In the present matter, judgment was delivered on 4th March 2021, while the application for stay was filed on 4th June

2025, a period of over four years. The explanation advanced by the 3rd Defendant is that the Plaintiff took no steps to execute the decree until recently. This court is not persuaded by that explanation.

24. Upon filing an appeal, it was incumbent upon the 3rd Defendant, if desirous of preserving the subject matter, to seek stay of execution timeously. The inaction of the decree holder does not absolve the judgment debtor from the obligation to protect its appellate rights. The court therefore finds that the delay of more than four years in filing the present application is inordinate.
25. The second consideration is whether the applicant will suffer irreparable loss if the stay orders sought are not granted. In ***Rhoda Mukuma vs John Abuoga [1988] eKLR***, the court proffered the following definition of substantial loss:

“Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being -(a)whether substantial loss may result unless the stay is granted and the application is made without delay; and(b)the applicant has given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be

prevented, because such loss would render the appeal nugatory...”

26. In *James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] KEHC 1094 (KLR)* it was persuasively held that the fact that execution is likely to be put in motion does not amount to substantial loss. The court stated as follows:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

*The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma vs Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of*

Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus: “...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

27. The High Court in the case of ***Gianfranco Manenthi & Another vs Africa Merchant Assurance Company Ltd [2019] KEHC 7586 (KLR)*** considered several authorities on the definition of substantial loss which are reproduced hereunder:

“In the case of Federal Commission of Taxation v Myer Emporium Ltd 1986 160 CLR 220 the court held:

“It well established by authority that the discretion which it confers to order stay of proceedings is only exercised where special circumstances exist which justify departure from the ordinary rule that a successful litigant is entitled to the fruits of his litigation pending the determination of any appeal.”

Discussing the very point on substantial loss Platt, JA in the case of Kenya Shell Ltd v

Benjamin Keruga Kibiru and others 1982-85 1 KAR 1018 observed:

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented.”

In the case Pan African Insurance Co. Ltd vs International Air Transport Association High Court No. 86 of 2006 held as follows on substantial loss:

“The deponent should go a step further to lay the basis upon which court can make a finding that the applicant would suffer a substantial loss as alleged. The applicant should go beyond vague and general assertion of substantial loss in the event a stay order is not granted.”

- 28.** From the evidence on record, it is not in dispute that the Plaintiff is currently in possession of the suit properties, namely LR Nos. Ngong/Ngong/57743 and 57744. The 3rd Defendant annexed a report from SGA Security dated 6th June 2025 indicating incidences of trespass while its security personnel were still on site.
- 29.** However, at the time the present application was filed, the said security personnel had been evicted from the suit property. The Plaintiff confirmed this position, deposing that in June 2025 she erected a barbed wire fence around the suit properties pursuant to the judgment delivered on 4th March

2021 and the orders previously issued by the court. It follows that execution of the decree had substantially been effected and the Plaintiff had taken possession of the suit properties.

- 30.** Notwithstanding the foregoing, the record does not disclose that the Plaintiff made a formal application for execution as required under **Order 22 Rule 6** of the **Civil Procedure Rules**. The said provision obligates a decree holder desirous of executing a decree to first apply to the court. **Order 22 Rule 7** further requires that such an application be in writing, duly signed, and set out the requisite particulars relating to the decree and the mode of execution sought. No such application was placed before this court.
- 31.** More critically, execution in this matter was undertaken more than one year after the delivery of judgment on 4th March 2021. In such circumstances, **Order 22 Rule 18** of the **Civil Procedure Rules** makes it mandatory that the judgment debtor be served with a Notice to Show Cause why execution should not issue. The purpose of this requirement is to afford the judgment debtor an opportunity to be heard before execution is sanctioned after a prolonged lapse of time. The record before this court does not demonstrate compliance with this mandatory procedural safeguard.
- 32.** Courts have emphasized the mandatory nature of this requirement, as seen in **Rosslyn Development Limited vs Bidco Oil Refineries Limited [2014] eKLR:**

“The decree the subject of this application was drawn on the 11th of November 2011 as per the

warrants of attachment. The warrants of attachment and sale were issued on the 3rd July 2013. This a period over a year from the date the decree was issued, the decree-holder should have moved under order 22 rule 18 (1) (a) and caused the court to issue a notice to show cause against the judgment debtor/ applicant. Having not complied with the said provision, then it is only in order that the warrants of attachment and sale be cancelled. Any goods that could have been attached shall be released to the defendants unconditionally. The Respondent has a right to execute but only after it has complied with the relevant provisions of the law as provided in the Civil Procedure Rules. The order granted is that the warrants of attachment and sale be delivered to the Registrar for cancellation. Cost shall be in the cause."

33. Similarly, in *Alfred Muyeyeli & another vs Jamin Onyiri & another [2020] KEELC 1245 (KLR)*, the court held that the appellants were entitled to be served with a Notice to Show Cause to explain their non-compliance with the decree. The court emphasized that execution of a decree without adherence to the due process prescribed under **Order 22** of the **Civil Procedure Rules** is improper. On that basis, the

court found the appeal to be meritorious and allowed it with costs to the Appellants.

- 34.** More critically, execution in this matter was undertaken more than one year after the delivery of judgment on 4th March 2021. In such circumstances, **Order 22 Rule 18** of the **Civil Procedure Rules** makes it mandatory that the judgment debtor be served with a Notice to Show Cause why execution should not issue. The purpose of this requirement is to afford the judgment debtor an opportunity to be heard before execution is sanctioned after a prolonged lapse of time. The record before this court does not demonstrate compliance with this mandatory procedural safeguard.
- 35.** The said eviction and demolition were undertaken notwithstanding the pendency of an appeal. The resultant change of circumstances is not one that can easily be reversed should the appeal succeed. In the circumstances, the loss occasioned to the 3rd Defendant goes beyond the ordinary incidents of execution and strikes at the very substratum of the appeal.
- 36.** Further, it is not disputed that the costs of the suit had not been ascertained at the time execution was undertaken. **Section 94** of the **Civil Procedure Act** requires that where a decree is passed in the exercise of the court's original civil jurisdiction, and costs are yet to be ascertained, a party must first obtain leave of the court before execution can issue.

There is no evidence that such leave was sought or obtained by the Plaintiff, rendering the purported execution premature.

- 37.** While it is trite that execution per se does not constitute substantial loss, where execution that is undertaken in a manner that is unlawful, procedurally defective, and productive of irreversible consequences, the same cannot be sanctioned by the court. In the present case, the execution complained of was not anchored on a formal application for execution, was undertaken without compliance with **Section 94** of the **Civil Procedure Act**, and was effected more than one year after judgment without the issuance of a Notice to Show Cause as required under **Order 22 Rule 18** of the **Civil Procedure Rules**. Such execution cannot be upheld.
- 38.** The 3rd Defendant raised concerns regarding the manner in which the Plaintiff gained access to the suit property and invoked the provisions of **Section 152E** of the **Land Act** on eviction procedures. That reliance is, however, misplaced in the circumstances of this case. The said provisions govern evictions of persons alleged to be in unlawful occupation of land in the absence of a court order. Where, as here, eviction is undertaken pursuant to a court decree, the applicable legal framework is the Civil Procedure Act and the Civil Procedure Rules. This position was affirmed in ***Muthithi Investments Limited vs Andrew S Kyendo & 22 others [2020] eKLR***, where the court held as follows:

“Secondly, the applicant’s reliance on section 152E of the Land Act are misplaced because that framework does not relate to evictions carried out in execution of court decrees. Thirdly, there is no evidential material presented to the court to demonstrate that the decree holder has or is about to violate the eviction procedure spelt out in section 152E of the Land Act or any other section of the Land Act.”

39. A similar position was taken in ***Sabai & 4 others vs District Land Adjudication & Settlement Office, Trans- nzoia & 11 others [2022] KEELC 4874 (KLR)***, where the court stated:

“Sections 152E to 152G of the Land Act remain applicable to eviction on persons unlawfully occulting private land without a court order. In that regard, it is a mandatory requirement for the person seeking eviction to apply within the precincts of the law strictu sensu. However, my understanding of the provisions is that they remain inapplicable to court decrees unless the court has expressly directed mandatory compliance with those provisions of the law. court decrees are the end result of a process that both parties or a successful one for that matter

becomes entitled to move the judgment debtor into compliance through lawful means. However, even when doing so, care should be taken to execute the decree of eviction in a humane manner. That notwithstanding, extending the olive branch of being humane should not be abused by the judgment debtor to the extent and manner of unreasonably impeding the court process and resisting eviction if it has to be carried out. The taking advantage of the humane procedures by parties should be abhorred in toto.”

- 40.** While the execution of a decree must at all times be carried out in a humane manner, such consideration cannot be invoked to defeat or obstruct the lawful enforcement of a court order. In the present matter, the illegality identified by the court arises not from non-compliance with the Land Act, but from failure to adhere to the mandatory procedural safeguards under **Order 22** of the **Civil Procedure Rules**.
- 41.** The final limb for determination is whether the 3rd Defendant has offered such security as the court may order for the due performance of the decree. The provision of security is a mandatory statutory requirement under **Order 42 Rule 6(2) (b)** of the **Civil Procedure Rules** and serves to balance the competing rights of the parties by safeguarding the decree

holder's interests while preserving the applicant's right of appeal.

- 42.** In the present application, the 3rd Defendant did not expressly propose any form of security. The court, however, takes into account that the decree herein is not a monetary one but relates to land, possession, and injunctive relief, and that the costs of the suit are yet to be taxed. In those circumstances, the requirement for security must be applied with the necessary flexibility and in a manner that is proportionate and just.
- 43.** Taking into account that the suit property is identifiable, immovable, and capable of preservation pending appeal, and further noting that the execution complained of has already altered the status quo in a manner that may render the appeal nugatory, this court is satisfied that an order maintaining the prevailing position, coupled with appropriate conditions, would adequately secure the interests of the Plaintiff. In addition, the court considers a sum of Kshs. 500,000 to be appropriate security for the due performance of the Decree.
- 44.** In the totality of the circumstances, although the application was filed after inordinate delay, the court is persuaded that the irregular manner in which execution was undertaken, and the substantial loss occasioned thereby, justify the exercise of this court's discretion in favour of granting a

conditional stay. The court must guard against allowing procedural impropriety to defeat the right of appeal.

45. Consequently, and in the interests of justice, this court allows the application for stay of execution pending the hearing and determination of Civil Appeal No. E017 of 2021 on the following terms:

- a) A stay of execution of the Decree and Judgement delivered on 4th March 2021 is hereby granted on condition that the Plaintiffs deposit the sum of Kshs. 500,000 in a joint interest earning account held in the name of the Plaintiff's and the 3rd Defendant's counsel within 30 days from the date hereof as security pending the hearing and determination of the pending appeal, Nairobi Court of Appeal Civil Appeal No. E617 of 2021.**
- b) The parties shall maintain the *status quo* obtaining as at the date of this ruling.**
- c) The Plaintiff shall not undertake any further development, alienation, or dealing with the suit property pending the determination of Nairobi Court of Appeal Civil Appeal No. E617 of 2021.**
- d) The costs of this application shall be borne by the Plaintiff.**

**Dated, signed and delivered in Nairobi virtually this 5th day
of February, 2026**

**O. A. Angote
Judge**

In the presence of:

Ms Mbugua for Mbigi for the Plaintiff/Respondent

Ms Munene for 3rd Defendant/Applicant

Court Assistant: Tracy