



Isaiah ((Suing on her behalf and on behalf of the following other persons) Regina Kemunto Nyakundi Samuel Kimani Mathu Johana Ndungu Kibaara Wily Owiso Okoth Holy Trinity Church in Africa (Through its Registered Trustees)) v Kimani ((Sued as the Legal Representative and Administrator of the Estate of the Late Kimanzi Munga Ndonga)) (Enviromental and Land Originating Summons 280 of 2018) [2025] KEELC 5604 (KLR) (29 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5604 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 280 OF 2018**

MAO ODENY, J

JULY 29, 2025

BETWEEN

MIRIAM MUTHINI ISIAH PLAINTIFF

(SUING ON HER BEHALF AND ON BEHALF OF THE FOLLOWING OTHER PERSONS) REGINA KEMUNTO NYAKUNDI SAMUEL KIMANI MATHU JOHANA NDUNGU KIBAARA WILY OWISO OKOTH HOLY TRINITY CHURCH IN AFRICA (THROUGH ITS REGISTERED TRUSTEES)

AND

MARY MARTHA WANJERI KIMANI RESPONDENT

(SUED AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF THE LATE KIMANZI MUNGA NDONGA)

RULING

1. This ruling is in respect of the Plaintiff/Applicants' Notice of Motion application dated 19th December, 2023 which seeks the following orders:
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to grant an order for a Stay of execution and or implementation of its Judgment delivered on 22nd September 2023 pending the hearing and determination of the Applicant's Appeal against the said Judgment in the Court of Appeal.
 - d. That the costs of this Application be provided for.



2. The application is supported by the annexed affidavit of Miriam Muthini Isaiah sworn on 19th December, 2023, where she deponed that if the orders issued pursuant to the Judgment of 22nd September, 2023, are implemented/executed, this application shall become an academic exercise and the Appeal in the Court of Appeal shall be rendered nugatory. She urged the court to allow the application as prayed to preserve the substratum of the appeal and that she is ready and willing to abide by the conditions set by the court.
3. Mary Martha Wanjeri Kimani filed a Replying Affidavit sworn on 14th April, 2025, and deponed that the Applicants were given ninety days to vacate the suit property pursuant to the judgment delivered on 22nd September, 2023. She further stated that the Applicants filed a Notice of Appeal on 20th December, 2023, just four days before the expiry of the ninety days' period.
4. It was her deposition that it has been exactly one year and two months since the Applicants put in their Notice of Appeal, however to date, they have not proceeded to file their appeal in court and have not shown any intentions of doing so and urged the court to dismiss the Application with costs.

Applicants' Submissions

5. Counsel for the Applicants filed submissions dated 31st May, 2025, and submitted that if the Applicants' families are evicted, their appeal in the Court of Appeal shall be rendered nugatory. Counsel further submitted that it is the Applicants and their families that are in actual occupation and possession of the subject parcel and that they shall suffer substantial loss if the judgment is executed.
6. Mr. Karanja Mbugua relied on the case of *Butt v Rent Restriction Tribunal* [1979] EA and submitted that the Respondent shall suffer no prejudice if the Plaintiff remains on the land while the Appeal is being heard and decided by the Court of Appeal.

Respondent's Submissions

7. Counsel for the Respondent filed submissions dated 12th June, 2025, and identified the issue for determination as whether the Plaintiff/Applicant has met the required standards for issuance of stay of execution. Counsel relied on Order 42 Rule 6 (2) of the *Civil Procedure Rules*, submitted that the Respondent has suffered, and continues to suffer the consequences of being denied his legal rights as a lawful owner of the suit property.
8. Mr. Mutai relied on the case of *Mohamed Salim T/A Choice Butchery v Nasserpuria Memon Jamat* (2013) eKLR, and submitted that the Plaintiff/Applicant has not satisfied the requirement of substantial loss for stay of execution to be granted.
9. It was counsel's further submission that the suit property will still be intact and in the event the intended appeal succeeds, it will still be available to the applicant, as the Respondent does not intend to sell it. Counsel relied on the case of *Richard Kubondo v Ndungu Waweru* [2019] eKLR and submitted that the intended Appeal will not be rendered nugatory.
10. Mr. Mutai also submitted that this application was filed on 19th December, 2023 and a Notice of intention to Appeal was filed on 25th September, 2023, whereas to date, the said Applicants are yet to file the appeal, 240 days down the line, despite the statutory 60 days upon filing of the Notice of Appeal. Counsel submitted that the Plaintiff/Applicants have not stated whether they are willing to comply with such terms of security as may be imposed by this Honourable Court and urged the court to dismiss the application with costs.



Analysis and Determination

11. The issue for determination is whether this court should grant an order for a stay of execution of the Judgment delivered on 22nd September 2023, pending the hearing and determination of the Applicant's Appeal against the said Judgment in the Court of Appeal.
12. Order 42 Rule 6 of the [Civil Procedure Rules](#) governs applications for stay of execution and guides the court on whether to grant stay of execution or not. A party must file the application without undue delay, must prove that he/she will suffer substantial loss if stay orders are not granted, and offer such security as the court orders for the due performance of such decree or order as may ultimately be binding on him/her.
13. The judgment in issue was delivered on 22nd September, 2023 and the application was filed on 19th December, 2023, while the Notice of Appeal was filed on 25th September, 2023. The Respondent submitted that to date the Applicants have not filed an appeal after a lapse of 240 days.
14. The application may have been filed timeously, but what is glaring is that, the court granted the Applicants 90 days stay to vacate the suit land, however the Applicants waited until 20th December 2023, four days to the expiry of the 90 days' to file a Notice of Appeal. There is no evidence that such an Appeal has been filed which can be argued that it will be rendered nugatory if the application for a stay of execution is not granted.
15. The issue should not arise on the delay in typing of proceedings, as in the Environment and Land Court in Nakuru, proceedings are typed in real time hence they are always ready which I commend the practice. There would be no excuse for not filing the Appeal in record time within the stipulated period. The Respondent stated that the Judgment was delivered in September 2023 and they have not been able to enjoy the fruits of the judgment and further that there is no evidence of any appeal filed. It is also noted that the Applicants filed the application four days to the expiry of the 90-day stay period.
16. The essence of an application for stay of execution the essence of an application for stay pending appeal is to preserve the subject matter of litigation to avoid a situation where a successful appellant only gets a paper judgment. Conversely, it should be noted that the respondent being a successful litigant is also entitled to the fruits of his/her judgment. The court therefore must balance the interests of both parties as was held in the case of [RWW v EKW](#) [2019] eKLR, as follows:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

17. The Applicants averred that they are in occupation of the suit land and that if they are evicted, they will suffer loss. In a case where the court has rendered a judgment that a party should be evicted from the suit land, the argument that the eviction will cause substantial loss may not be tenable, as the execution is pursuant to a lawful court decree. An Applicant must go a step further to explain how he/she will suffer substantial loss and not merely state that there is imminent eviction. Does the Applicant meet



the threshold for the grant of stay of execution as provided for under Order 42 Rule 6 of the Civil Procedure Rules? Does the Applicant have an arguable appeal, which will be rendered nugatory if the orders are not granted?

18. In the case of Charles Wabome Gethi v Angela Wairimu Gethi [2008] eKLR, the Court of Appeal held that:

“... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”

19. In the case of Karungu v Masira & another (Environment & Land Case 540 of 2016) [2024] KEELC 5683 (KLR) (25 July 2024) (Ruling) this court held that:

“It should also be noted that where there is an order of eviction, it is not enough to say that a party shall be evicted, as that is a decree that was issued after the parties have been heard and a case is determined. A mere mention of imminent eviction is not proof of substantial loss”

20. The Applicants have also stated that they have an arguable Appeal and if stay orders are not granted, their appeal will be rendered nugatory. As to what constitutes an arguable appeal, the Court of Appeal in Nairobi Women’s Hospital v Purity Kemunto [2018] eKLR held that:

“To say that an appeal is arguable is another way of saying that it is not frivolous and that it raises a bona fide issue deserving full consideration by the Court. Even one bona fide issue will satisfy the requirement, for the law does not look for a multiplicity of arguable issues.”

21. Where substantial loss has not been shown, then, there would be no need to grant stay of execution orders like in this case. If the Appeal succeeds, then the court has the power to undo what has been done.

22. I have considered the application and submissions by counsel and find that the Applicants have not satisfied the conditions set out in Order 42 rule 6 of the Civil Procedure Rules and hence the application is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 29TH DAY OF JULY 2025.

M. A. ODENY

JUDGE

