



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gikoi v Kahiu & 4 others (Environment and Land Case  
E743 of 2017) [2025] KEELC 5756 (KLR) (29 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5756 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND CASE E743 OF 2017**

**JM ONYANGO, J**

**JULY 29, 2025**

**BETWEEN**

**MICHAEL KAMINJA GIKOI ..... PLAINTIFF**

**AND**

**ZEPHANIAH MWANGI KAHIU ..... 1<sup>ST</sup> DEFENDANT**

**ALICE KENDI MWIKINYA ..... 2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR, KIAMBU COUNTY ..... 3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**ICEA LION LIFE ASSURANCE CO LTD ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion dated 21st March 2025 the 2nd and 5th Defendants seek stay of execution pending an intended appeal against the judgment of this court delivered on 12th February 2025. The grounds upon which the application is predicated are enumerated on the face of the Notice of Motion and in the Affidavits of Alice Kendi Mwikinya (2nd Defendant) and Kevin Nyakeri (the Chief Financial Officer of the 5th Defendant) both sworn on 20th March 2025.
2. In their Supporting Affidavits, the 2nd and 5th Defendants depose that Judgment was entered in favour of the Plaintiff and against the Defendants on 12th February 2025, essentially declaring the Plaintiff as the legitimate owner of Land Parcel Number Kiambaa/Kanunga/2215 (the suit property).
3. They further contend that the court declared that the title documents held by the 2nd Defendant in relation to the suit property were invalid and annulled the charge held in favour of the 5th Defendant.
4. The 2nd and 5th Defendants contend that they are dissatisfied with the said Judgment and they have instructed their advocates on record to lodge an appeal to the Court of Appeal.



5. They add that their advocates on record had followed up with the court registry on several occasions to collect a copy of the Judgment, only to find the same posted on the Kenya Law website. They have attached copies of the letters dated 20th and 27th February 2025 addressed to the Deputy Registrar, requesting for a copy of the Judgment. They add that the court [Hon. Eboso J] issued a 30-day stay of execution which was set to lapse on 23rd March 2025.
6. They aver that the Plaintiff has actual possession of the suit property and they are apprehensive that unless an order for stay of execution is granted, he will proceed to transfer, lease, charge, pledge, dispose or otherwise part with possession of the same, to their detriment. They further aver that if the stay of execution pending appeal is not granted and the appeal is successful, they will suffer substantial loss because the Plaintiff may deal with the property in a manner adverse to their interest.
7. They assert that it is in the interest of justice that there be a stay of execution pending the hearing and determination of the intended appeal. In conclusion, they state that no prejudice will be suffered by the Plaintiff if the orders sought are granted as he has had possession of the suit property, and he can continue to have possession while the appeal is being heard in the court of appeal.
8. In opposing the application, Michael Kaminja Gikoi (the Plaintiff) filed a Replying Affidavit sworn on 23rd April 2025 in which he contends that the application lacks urgency, is incompetent, and amounts to an afterthought. It is further his position that the application is misadvised, misconceived, frivolous, baseless, scandalous, bad in law, and incapable of entitling the 2nd and 5th Defendants to the reliefs sought.
9. The Plaintiff depones that there has been an inordinate and inexcusable delay in bringing the instant application, which was filed on 21st March 2025, despite the court having rendered Judgment in his favour on 12th February 2025. He states that the said Judgment decreed that the suit property belongs to him.
10. It is the Plaintiff's position that the Applicants have failed to provide any explanation for the delay, and as such, there exists no compelling reason for this Court to exercise its discretion in their favour.
11. The Plaintiff further asserts that the 2nd and 5th Defendants have not attached a draft memorandum of appeal to their application to demonstrate the existence of an arguable appeal with any reasonable chance of success. He maintains that this omission alone is sufficient ground to dismiss the application.
12. The Plaintiff depones that the application amounts to an abuse of court process and was filed solely with the aim of delaying, sabotaging, or obstructing the execution of the valid judgment. He avers that the 2nd and 5th Defendants have come before this Court with unclean hands and are guilty of material non-disclosure, rendering them undeserving of the discretionary orders they seek.
13. The Plaintiff contends that the 2nd and 5th Defendants are not deserving of audience in respect to this application and points out that, in any event, they have not paid the costs awarded in the original suit.
14. He further depones that the 2nd and 5th Defendants have not demonstrated or substantiated any form of loss they may suffer should the application be dismissed, nor have they shown that costs would be inadequate to compensate any such alleged loss.
15. He states that, contrary to the 2nd and 5th Defendants' insinuations, stay orders are not granted as of right but lie within the Court's discretion and are only available to deserving litigants. It is his position that the 2nd and 5th Defendants have failed to present any material that would persuade the Court to exercise that discretion in their favour.



16. The Plaintiff argues that the mere assertion that the Applicants' appeal has prospects of success is not, in itself, a valid ground for the orders sought, since the outcome of any appeal is inherently uncertain. He maintains that he stands to suffer significant prejudice should the application be allowed, having been deprived of the opportunity to utilize the suit land for many years, and emphasizes that delayed justice amounts to denied justice.
17. The Plaintiff states the 2nd and 5th Defendants have not satisfied the legal requirements under Order 42 Rule 6 for the grant of stay pending appeal. In particular, they have failed to demonstrate: a) the prejudice they would suffer if stay is denied; b) willingness to furnish security for the performance of the decree; and c) that the application was filed without delay.
18. He therefore asserts that the present application does not serve the ends of justice and ought to be dismissed with costs. The Plaintiff alleges that the application has been brought merely as a tactic to delay justice to his detriment. He maintains that, contrary to the Applicants' allegations, the balance of convenience weighs in his favour. The Plaintiff urges the Court to dismiss the application with costs, reiterating that justice delayed is justice denied. He further contends that the 2nd and 5th Defendants will suffer no prejudice if the orders sought are denied, as they were accorded a fair hearing on the merits.
19. Finally, the Plaintiff concludes that the 2nd and 5th Defendants are not entitled to the reliefs sought, and that the application is legally untenable, motivated by ulterior motives, and aimed at dragging him through unnecessary litigation.
20. The application was disposed of through written submissions and both parties filed their submissions which I have carefully considered.
21. The only issue for determination is whether a stay of execution should be granted. Order 42 Rule 6 of the Civil Procedure Rules sets out the conditions that one should meet in order to qualify for an order of stay pending appeal. In particular Order 42 Rule 6(2) provides as follows:
  - (2) 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.
22. In order to grant the order for stay of execution the court must be satisfied that the above three conditions have been met. The first condition is that the 2nd and 5th Defendants must demonstrate that if the stay is not granted, they shall suffer substantial loss. As to what amounts to substantial loss the court in *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR observed 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 ... 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.”



23. In the case of Michael Ntouthi Mitheu v Abraham Kivondo Musau (2021) eKLR the Court relied on the case of Samvir Trustee Limited v Guardian Bank Limited (Nairobi (Milimani) HCCC No.795 of 1997 where Justice Warsame (as he then was) held that:

“....It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss.. At the stage of the application for stay of execution pending appeal, the court must ensure the parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the right and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

24. I will now proceed to determine if the 2nd and 5th Defendants have met the conditions for stay set out in Order 42 Rule 6 of the Civil Procedure Rules. On the question of substantial loss, it is not in dispute that the Plaintiff is in legal and actual possession of the suit property and if he were to dispose of it before the appeal is heard and determined, it would occasion the 2nd and 5th Defendants substantial loss. Their appeal would thus be reduced to an academic exercise.

25. On whether the application for stay of execution was filed without undue delay, Judgment in the suit was delivered on 12th February 2025 and the application was filed on 21st March 2025, slightly over a month later. The 2nd and 5th Defendants have attributed the late filing of this application to the fact that they did not have a copy of the impugned Judgment. They have annexed letters addressed to the Deputy Registrar requesting for a copy of the said Judgment. They have contended that they eventually got a copy of the Judgment from the Kenya Law Website. This court finds that there was no inordinate delay in filing this application and that the slight delay has been explained.

26. Regarding the question of security for costs, the 2nd and 5th Defendants have not offered any security for the due performance of the decree. It has been submitted on their behalf that since the dispute concerns land, the requirement for the deposit of security for the due performance of the decree is unnecessary. Their counsel has further argued that because the Plaintiff is currently in actual possession of the suit property, there is no justification for ordering the deposit of security. In their view, any prejudice that the Plaintiff might suffer in the interim can be adequately compensated through an award of costs.

27. In the case of Arun C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates, Nrb Misc. Civil Application No. 802 Of 2010, the court observed as follows:

‘The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor...Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.’



28. In the interest of justice and so as to ensure that the interests of both parties are taken care of, I grant a stay of execution pending appeal on condition that the 2nd and 5th Defendants deposit the sum of Kshs.300,000 in court within 30 days failing which the order for stay shall automatically lapse.

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

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**J. M ONYANGO**

**JUDGE**

In the presence of:

1. Miss Chepkwony for Ms Muhuri for the 2nd and 5th Defendants
2. Mr Kagunza for the Plaintiff

Court Assistant: Hinga

