



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MILIMANI, NAIROBI

ELC SUIT NO. E285 OF 2022

DOMITILLA MUMBUA KILONZO.....
PLAINTIFF/RESPONDENT

-VERSUS-

JOHN KAMAU KIIGE
DEFENDANT/APPLICANT

EMBAKASI RANCHING COMPANY
.....INTERESTED PARTY

RULING

Introduction

1. In the Notice of Motion application dated the 18th September 2025 the Applicant sought the following orders:

- a. Spent
- b. **THAT** this Honourable Court be pleased to stay the Judgement dated 25th June 2025 and all subsequent Orders and/or Decree issued by Hon. Justice E.M. Washe pending the hearing and determination of this Application.
- c. **THAT** this Honourable Court be pleased to stay the Judgement dated 25th June 2025 and all subsequent Orders and/or Decree issued by Hon. Justice E.M. Washe pending the hearing and determination of this Intended Appeal.
- d. **THAT** costs of this application be provided for

The Application is supported by the affidavit of the applicant sworn on an even date where it is deponed that he has filed a notice of appeal with an intention to appeal against the entire judgment dated 25th June 2025 delivered by Hon Justice E.M Washe

That unless the stay of execution orders is issued, he tends to suffer substantial loss being that the suit premises will be demolished and the applicant evicted.

He deponed that he has an arguable appeal with high chance of success and should the stay orders not issue the appeal will be rendered nugatory.

Respondent/plaintiff's case

The respondent opposed the application by filing grounds of objection and replying affidavit dated 2nd and 3rd October 2025 respectively.

The ground raised was that the intended application had been brought after 3 months citing inordinate delay and that further the applicant had not filed any memorandum of appeal giving reasons seeking to appeal against the said judgement.

He deponed that the applicant had not demonstrated any substantial loss he is likely to suffer if the stay is not granted and neither had he offered any security for due performance of a decree.

Applicant's Submissions

Counsel submitted that the applicant had indicated as in his supporting affidavit that he had constructed on the suit property and the execution of the judgement will have him evicted and the developments on the property demolished.

He further deponed that there was no inordinate delay and further the same delay could be substantiated. Counsel submitted that on the issue of security for cost it was at the court's discretion which they would abide by. He relied on the case of *Muchiri versus Rutere* (Environment & Land Case 319 & 316 of 2017 (Consolidated)) [2023] KEELC 22377 (KLR) (14 December 2023) (Ruling

Respondent's submissions

The respondent relied on the provision of order 42 rule 6 of the civil procedure rules which counsel indicated that for an application for stay one has to prove substantial loss, the application made without undue delay and that there is a provision for security for due performance of a decree. He submitted that there was no proof of substantial loss to warrant stay of execution. That the applicant being a trespasser and claiming loss on the basis of eviction was not proof of substantial loss relying on what was said in the case of **Machira t/a Machira advocates versus East African Standard (2002) KEHC 1167(KLR)**.

That the application had been made with inordinate delay and lastly the applicant had failed to provide the security for due performance hence not

meeting the provisions as above in order 42 rule 6 of the civil procedure rules

Analysis and Determination

2. Having considered the foregoing, the following are issues for the court's determination;

Whether the applicant is warranted to the stay of execution orders and

The Courts jurisdiction is derived from of **Order 42 rule 6 (1)** of the **Civil Procedure Rules which provides;**

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.

On the first criterion as set out in order 42 Rule 6 (2) that is whether applicant has brought this application without unreasonable delay. The application herein was filed on 18th September 2025 while judgement was entered on the 25th June 2025. In the Court's view, this delay is not unreasonable

On the second criterion, the applicant is required to establish that if the application is not allowed, substantial loss would result. Substantial loss has been defined in several judicial pronouncements. In the case of ***Francis K. Chabari & another vs Mwarania Gaichura Kairubi [2022] eKL Justice C. K. YANO quoted Geoffery Muriungi & another v John Rukunga M'imonyoso*** as to define substantial loss as follows;

“the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal”

In the requirement for the defendants/applicant to show that they will suffer substantial loss unless the order for stay is granted, he alleged and deposed that he stands to suffer significant loss and prejudice as his home stand to be demolished and the plaintiff cannot compensate him for the loss and damage should be successful in the appeal. In the case of China City Construction Company Limited & another versus Karisa (Suing as the Administrator and Legal Representative of the

Estate of the Late Didlora Mwaka Mwangala) (Civil Appeal 105 of 2023) [2024] KEHC 3323 (KLR) (8 April 2024) (Ruling), the court had this to say on substantial loss;

*““On substantial loss, it was the Appellant’s allegation that the decretal amount is substantial, if paid to the Respondent and the appeal succeeds, they may not be able to recover the same. On this principle, Platt, Ag. JA (as he then was) in **Kenya Shell Limited v Kibiru [1986] KLR 410**, at page 416 expressed himself as follows: “It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”. On his part Gachuhi, Ag. JA (as he then was) at 417 held: “It is not sufficient by merely stating that the sum of Kshs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement.*

What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."

The defendant herein did not go further to show or substantiate the nature of the loss he would suffer, that would amount to substantial loss to warrant this court stay the eviction orders against him. The plaintiff was found by the court to be the legal proprietors of the suit property, and the defendants/applicants did not show how the said plaintiff would be unable or incapable of compensating him should he emerge successful on appeal. In the case of **Machira t/a Machira & Co Advocates versus East African Standard [2002] KEHC 1167 (KLR)** the court held as follows;

"To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution, pending appeal. Of course, in the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of

procedure for handling civil cases in the courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court. This means that in whatever we do in the civil courts, we must, so far as is practicable, ensure that the parties fight it out on level ground on equal footing, attempt to minimize and save costs, ensure expeditious and fair disposal of the case in hand, allotting to every case an appropriate share of judicial resources as account is taken of the need to allot those resources to other cases, and the way a case is dealt with must be proportionate to (a) the amount of money involved, (b) the importance of the case, (c) the complexity of the issues, and (d) the financial position of the respective parties. In the exercise of any power under any rule, or in its interpretation, we must strive to give effect to this overriding objective; and it is the duty of the parties to help the court in the furtherance of the overriding objective to yield justice and fairness. So, in justice and fairness, when a party has been found by a court to be in the right at whatever stage in the litigation, he should ordinarily have access to the consequences of that judicial finding and decision and enjoy his rights as so found and determined. Any subsequent decision of the court which tends to impede the normal flow of justice, by suspending the enjoyment of the consequential benefits of one's success can only be rendered in exceptional circumstances after an exercise of great caution and finding that suspension is necessary in justice and fairness. In this

regard, this process means that in order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavit or on some other proper evidential material, that substantial loss may result to him out of all proportions in relation to the interests of justice and fairness, unless suspension or stay is ordered and the parties' positions so regulated and ordered that injustice is averted. In attempting to convince a court that substantial loss is likely to be suffered so that whatever he intends to achieve by his intended recourse to some other authority will be nugatory if ultimately he prevails, the applicant is under a duty to do more than merely repeating to the court words of the relevant statutory rule or general words used in some judgment or ruling of a court in a decided case cited as a judicial precedent to guide. It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do. If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant's business (eg appeal or

intended appeal). Sometimes litigants seek to go to a higher court or to ask for review, and simultaneously ask for further steps or execution to be stopped while they go forth, for reasons of expressing their unhappiness with what has been decided. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay merely on the ground of annoyance to feelings. Indeed, remote contingencies would not warrant the court's interference with the ordinary course of justice and the process of law. Moreover, a court will not order a stay upon a mere vague speculation; there must be the clearest ground of necessity disclosed on evidence. Commonly, the applicant may obtain a stay of further proceedings or execution, if he shows facts which point to a conclusion that to allow execution or further proceedings to go ahead before appeal concluded would let an impecunious party to pocket and squander or pilfer what may be needed in restitution if the appeal succeeds and is allowed. Another common factor in favour of the applicant is whether to proceed further or to execute may destroy the subject matter of the action and deprive the appellant or intended appellant of the means of prosecuting the appeal or intended appeal. So, really, stay is normally not to be granted, save in exceptional circumstances. As a further consideration of the principle of justice and fairness, the court abhors inexcusable delay in seeking an order for a stay. Such delay is an aspect of injustice and abuse of judicial process. The other party may take

further steps in reliance on the belated applicant's inactivity prolonged without good reason. Costs might be incurred in the meantime. There might be a change of position to the prejudice of the other party."

This court is persuaded by the above decisions, and finds that the defendant has failed to substantiate substantial loss.

The court is tasked with balancing the rights of the applicant of filing an appeal, which would call for suspension of execution, which is a lawful process, with the corresponding right of the respondents to enjoy the fruits of their judgement. For the court to find for the stay of execution, the applicant ought to among others show that they will suffer substantial loss if execution took place, but have failed to do so. This responsibility of balancing is attained through allowing justice and fairness to prevail, which in this instance calls for the dismissal of this application since no substantial loss has been proved. Consequently, this court finds it not necessary to consider the requirement of security for due performance. The application failed at the point of lack of substantial loss, on the part of the defendant/applicant, which has been held as the cornerstone of issuance of stay of execution orders

The defendants/applicants having failed in their application, then under section 27 of Civil Procedure Act chapter 21 of Laws of Kenya, should pay the plaintiffs/respondents costs.

Final disposition

In conclusion, the court finds no merit in the defendants/applicants Notice of Motion dated 26th July 2024, and orders as follows:

- a. That the said application is dismissed
- b. The defendant/applicant to pay the plaintiff/respondent costs.

It is so ordered.

DATED, SIGNED and DELIVERED virtually at **NAIROBI** on this **6TH** day of **FEBRUARY 2026.**

MOHAMMED N. KULLOW
JUDGE

Ruling delivered in the presence of: -

Ms. Nderitu..... for the Applicant

Mr. Ng'ang'a..... for the Respondent

No appearance... for the Interested Party

Philomena W...... Court Assistant