

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELCLA CASE NO. E121 OF 2024

SIMON NGARUIYA NJUGUNA

APPELLANT

VERSUS

JOHN MUNGAI KAMANDE GATACHU

RESPONDENT

RULING

Introduction

1. This Court is tasked with determining the Notice of Motion application dated 7th November 2024 in which the Applicant seeks the following Orders:

1. *THAT this Honourable Court be pleased to grant an order for Stay of Execution of the Judgment of the Chief Magistrates Court at Thika delivered on the 10th of October 2024 in the matter herein pending the hearing and determination of this Application.*
2. *THAT this Honourable Court be pleased to grant an Order for Stay of Execution of the Judgment of the Chief Magistrates Court at Thika delivered on the 10th of October 2024 in the matter herein pending the hearing and determination of the Appeal filed*
3. *THAT the cost of this Application be provided.*

2. The Application is premised on the grounds set out on the face of it and the supporting affidavit of Simon Ngaruiya Njuguna sworn on the same date.
3. The Applicant avers that, aggrieved by the decision of the Chief Magistrate's Court in *Thika MCL & E NO 53 OF 2020*, he has lodged an appeal which, in his estimation, raises substantial and arguable questions warranting this Court's intervention.
4. The Applicant further deposes that the Respondent has already commenced execution of the impugned judgment by cutting down his trees and banana plants and by fencing off the suit property. The Applicant contends that if such acts are allowed to continue, he will suffer grave and irreparable prejudice, and the appeal, though lawfully preferred, will be stripped of practical meaning.
5. The Applicant maintains that the appeal was instituted timeously and without unreasonable delay.
6. Accordingly, the Applicant urges this Court to allow the Application as prayed, in order to preserve the subject matter of the appeal and to prevent the appeal from being rendered an exercise in futility.
7. In response, the Respondent opposes the Application through the replying affidavit of John Mungai Kamande Gatachu sworn on 10th April 2025.
8. The Respondent contends that the Applicant has failed to demonstrate any real or cognisable prejudice likely to be suffered if the orders sought are declined.

9. The Respondent further asserts that no execution has been commenced, maintaining that no decree has been extracted, and characterise the Applicant's allegations to the contrary as false and misleading.
10. The Respondent also faults the Application for want of any offer of security, which they submit is a mandatory precondition for the grant of stay.
11. In sum, the Respondent maintains that the intended appeal is devoid of merit and urges this Court to dismiss the Application with costs.
12. The Application was canvassed by way of written submissions which were duly filed by the respective parties.

Issues for Determination

13. Having considered the application together with the supporting affidavit in support, the replying affidavit in opposition and the rival submissions, the sole issue that emerges for determination is:
Whether the Applicant has satisfied the threshold for the grant of an order of stay of execution pending appeal.

Analysis and Determination

14. The power to grant a Stay of Execution is discretionary and must be exercised judiciously, guided by well-settled principles.
15. Order 42 Rule 6 of the Civil Procedure Rules makes plain the legal compass that guides this Court's discretion in applications such as the present. It provides that:

"6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or

order appealed from except appeal case of 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 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.”

16. These provisions reflect a deliberate legislative design. An appeal, in and of itself, does not suspend execution, a party seeking reprieve must show more than conjecture.

17. In order for a stay of execution to be granted, an Applicant must demonstrate that substantial prejudice is likely to ensue if stay is declined, that the application has been brought without unreasonable delay, and that appropriate security for the due performance of the decree has been offered or can be imposed by the Court.

18. In ***Butt v Rent Restriction Tribunal [1982] KLR 417***, the Court of

Appeal held as follows:

1. *The power of the Court to grant or refuse an application for stay of execution is a discretionary one, and such discretion must be exercised in a manner that does not frustrate the right of appeal.*
 2. *The guiding principle in granting or refusing a stay is that, in the absence of compelling reasons to the contrary, a stay should be granted to ensure that an appeal is not rendered nugatory should the appellate court ultimately reverse the decision below.*
 3. *A Judge should not decline to grant a stay where good grounds exist merely on the view that a better remedy may become available to the applicant at the conclusion of the proceedings.*
 4. *In exercising its discretion, the Court will consider the special circumstances and unique requirements of each case. In Butt, such circumstances included the substantial amount of rent in dispute and the appellant's undoubted right of appeal.*
 5. *Under Order XLI Rule 4(2)(b) of the Civil Procedure Rules, the Court may, either upon application or of its own motion, order the provision of security. Failure to furnish such security as ordered will cause the stay of execution to lapse.*
19. Applying these principles to the present Application, the Court must examine three interrelated considerations. First, whether the Applicant has demonstrated that substantial prejudice will ensue should execution be allowed to proceed.
20. The Applicant avers that the Respondent has commenced acts of execution, including cutting trees and bananas and fencing the suit property. However, no evidence has been adduced to substantiate

these allegations. In the absence of proof, the likelihood of irreparable harm cannot rest on assertion alone.

21. Second, the timeliness of the Application must be assessed. The Application was filed less than a month after the judgment, and the Applicant has already lodged a Memorandum of Appeal, demonstrating both prompt action and a bona fide exercise of the right of appeal.
22. Third, while Order 42 Rule 6(2)(b) contemplates the furnishing of security to safeguard the interests of the judgment-creditor, the Court retains discretion to impose terms that balance the rights of both parties.
23. The Respondent contends that the Applicant has failed to establish any real or substantial prejudice, that execution has not commenced, that no security has been offered, and that the appeal lacks merit.
24. On the first point, the Court notes that the Applicant's allegations of execution, cutting of trees, bananas, and fencing, remain unsubstantiated by evidence. In the absence of proof, the risk of irreparable harm cannot be assumed, and the Court must treat such assertions with circumspection.
25. On the question of security, while the Respondent correctly observes that Order 42 Rule 6(2)(b) envisions the provision of security to safeguard the interests of the judgment-creditor, the Court retains the discretion to impose such terms as may be just, balancing the protection of the appeal with the Respondent's right to enjoy the judgment.

26. Finally, regarding the merits of the appeal, it is not the function of this Court at this stage to evaluate its ultimate success, but rather to assess whether refusal of a stay would render the appeal nugatory. In this regard, the filing of the Applicant's Memorandum of Appeal demonstrates a *bona fide* exercise of the right to appeal and the Court must accord it due weight.

27. In **RWW v EKW [2019] eKLR** the Court addressed stay of execution 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."

28. This essentially underscores that, while the Applicant's assertions must be supported by evidence, the Court's discretion is fundamentally engaged in balancing the legitimate rights of both parties, preserving the appeal without unjustly depriving the Respondent of the fruits of its judgment.

29. The Court notes that the Memorandum of Appeal was filed less than a month after the impugned judgment which underscores both the Applicant's diligence and the genuineness of the intended appeal.
30. Although the allegations of execution remain unsupported by evidence, the possibility of prejudice, even if not yet actualized, is a relevant consideration.
31. The Applicant has not declined to offer security, and the Court may, in its discretion, impose terms to safeguard the Respondent's interests, satisfying Order 42 Rule 6(2)(b).
32. In view of the foregoing, the Court finds that the essential conditions for the grant of a stay of execution pending appeal are satisfied.
33. Accordingly, the Court grants the Application dated 7th November 2024 for stay of execution pending appeal subject to the following conditions:

1. The Applicant shall furnish security in the sum of Ksh. 200,000/- to be deposited in a joint interest earning account in the names of the Learned Advocates representing the parties herein within 30 days from today.

2. In default of the Applicant furnishing the security for costs as ordered within the stipulated period, the order granted herein shall automatically lapse.

3. The costs shall abide the outcome of the appeal.

Dated, signed and delivered virtually, at Thika this 3rd day of February 2026

.....
J. M. ONYANGO
JUDGE

In the presence of:

1. Mr Mutitu for the Appellant
2. Mr Kimani for the Respondent

Court Assistant: Hinga

ORIGINAL