



**Raphael & another v Righa (Environment and Land Appeal E007 of 2023)
[2025] KEELC 5812 (KLR) (Environment and Land) (29 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5812 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E007 OF 2023**

**EK WABWOTO, J
JULY 29, 2025**

BETWEEN

MATLIDA JUMWA RAPHAEL 1ST APPELLANT

MARRIAM KIRERI MWANDA 2ND APPELLANT

AND

PAULINE WAKIO RIGHA RESPONDENT

RULING

1. This is a ruling in respect to a Notice of Motion dated 5th May 2025 in which the Respondent/Applicant seeks stay of execution pending appeal.
2. The Respondent contends that judgment against her was delivered on 22nd November 2024. Being dissatisfied with the said judgment, she has preferred an appeal against the said judgment to the Court of Appeal. She therefore prays that there be stay of execution of the said judgment as she pursues her appeal.
3. The application is opposed by the Appellants through a replying affidavit sworn on 22nd July, 2025. The Appellants contend that the Application has not met the threshold for grant of stay pending appeal. The Appellants states that the court had already rendered judgment, the application has been brought eight months after judgment was delivered and they would be denied the fruits of their judgment.
4. Counsel for the parties were allowed to make oral submissions on 29th July 2025 in respect to the said application. Learned Counsel Mr. Mosioma submitted on behalf of the Respondent/Applicant while Learned Counsel Mr. Mutinda submitted on behalf of the Appellants. Counsel for the Applicant relied on the affidavits sworn by Pauline Wakio Righa on 5th May 2025 and 28th July 2025.



5. I have considered the application, oral submissions made by the counsel for the parties and the rival affidavits filed. The only issue for determination is whether this court should grant a stay of execution.
6. The issue of whether to grant stay pending appeal is a matter of discretion. This discretion is fettered by four conditions. First, an applicant must demonstrate that there is just cause to grant stay. Second, the Applicant has to demonstrate that he or she will suffer substantial loss should stay not be granted. Third, there has to be security provided for the due performance of the decree as may ultimately be binding upon the Applicant. Fourth, the application has to be brought without unreasonable delay.
7. The principles are further outlined under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, which provides:
 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings 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 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.
8. A stay of execution under order 42 of the Civil Procedure Rules is an interim order to suspend the rights of one party who is aggrieved with the judgment of the trial; court or tribunal and wishes to exercise his or her right of appeal. Its main objective is to protect the substratum of the suit by delaying the execution process like attachment until the determination of the appeal. Being a discretionally remedy the applicant must demonstrate that he or she has approached the court of equity with clean hands as succinctly stated in the case of *Jajbhay v Cassim* 1939 AD 537-551 the court held on this maxim that: “All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice.”
9. The general principle of law is that the successful litigant in possession of a valid court judgement is entitled to the fruits of judgement unless there exist exceptional circumstances to deny him or her that right.
10. In considering an application for stay of execution I am guided by the case of *Butt vs Rent Restriction Tribunal Civil App No. NAI 6 of 1979* (Madan, Miller and Porter JJA) where the following guidelines were given:

“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.

The general principal 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. 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. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

11. It is clear that for the Court to grant stay of execution, the Applicants needs to satisfy the Court that they will suffer substantial loss. In the case of Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007 the court stated: -

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue.

The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

12. In Bungoma HC Miscellaneous Application No 42 of 2011 James Wangalwa and another Vs. Agnes Naliaka Cheseto the court further discussed what substantial loss entails:

“The application 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.”

13. The Applicant should not only state that she is likely to suffer substantial loss but must also prove that she will suffer loss. The Applicant bears the burden of proving that by refusal to grant stay of execution she stands to suffer substantial loss

14. The mere filing of a Notice of Appeal does not automatically warrant the issuance of orders of stay of execution of the decree. In the present situation, the Applicant has demonstrated that an appeal has been filed at the Court of Appeal.

15. Back to the issue on whether the Applicant will suffer substantial loss if stay of execution is not granted, the Applicant submitted that if the Respondents are allowed to execute the judgement then the appeal will be rendered nugatory. I note that if the Respondents were to execute the decree, it will indeed render the appeal nugatory. However, the court if also aware of the fact that the Appellants are entitled to the fruits of their judgment. In view of the foregoing and for the interest of justice this court shall grant a stay limited for a particular duration so that the Applicant herein does not sit back and fail to prosecute her appeal lodged at the Court of Appeal.

16. In conclusion the following orders are hereby issued in respect to the application dated 5th May 2025 -

- i. An order staying the execution of the Judgment and Decree delivered on 22nd November 2024 be and is hereby granted for 180 days.
- ii. Costs of this application to abide the outcome of the Appeal.

It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29TH JULY 2025.

E. K. WABWOTO

JUDGE

