



Energy and Petroleum Regulatory Authority & another v Thirunga (Environment and Land Appeal E026 of 2025) [2026] KEELC 1862 (KLR) (24 March 2026) (Ruling)

Neutral citation: [2026] KEELC 1862 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E026 OF 2025**

**JO MBOYA, J
MARCH 24, 2026**

BETWEEN

ENERGY AND PETROLEUM REGULATORY AUTHORITY 1ST APPLICANT

THE ATTORNEY GENERAL 2ND APPLICANT

AND

BERNARD KIRIMI THIRUNGA RESPONDENT

RULING

1. Before me is the Notice of Motion Application dated the 10.03.2026, brought pursuant to the provisions of Order 42 Rule 6[1],[2],[6] of the Civil Procedure Rules, 2010; Sections 1 A, 1B, 3A and 63 [e] of the Civil Procedure Act, Chapter 21 Laws of Kenya; and the inherent jurisdiction of the court. The reliefs sought are:
 - i. That this Application be certified as urgent and service of the same be dispensed with in the first instance and prayer number 2 herein be granted in the interim.
 - ii. That pending the hearing and determination of this application, the Honourable Court be pleased to order for stay of execution of the Judgment and/or decree herein dated 12TH Day of February, 2026 pending the hearing and determination of this Application.
 - iii. That pending the hearing and determination of [sic] this application, the Honourable Court be pleased to order for stay of execution of the judgment and/or decree herein dated 12th February, 2026 pending the hearing and determination of this suit.
 - iv. That costs of this Application be provided for.
2. The Application is premised on the various grounds which have been enumerated in the body thereof. The grounds are: The Appellants herein were sued in the lower court by the Respondent; the suit in the lower court was heard and determined; the lower court delivered a Judgment on the 12.02.2026;



the Judgment of the lower court directed the Appellants to pay to and in favour of the Respondent the sum of Kshs. 4,575,000.00 for loss of assets; and Kshs. 5,773,710.00 only for loss of income. In addition, it has been stated that the Respondent was also awarded costs of the suit.

3. Furthermore, the Appellants have also contended that: The same are aggrieved by the Judgment and the consequential decree of the lower court; the Appellants have since filed an appeal; the appeal raises arguable grounds; the Appeal has overwhelming chances of success; the execution of the decree will occasion substantial loss to the Appellants; the Appellants have established/satisfied the requisite grounds to warrant the issuance of an order of stay; and the Respondent shall not suffer any prejudice if the orders sought are granted.
4. The application is supported by the affidavit of Hamid Mohammed sworn on the 10.03.2026; and the further affidavit sworn on the 23.03.2026, wherein the deponent has reiterated the grounds contained in the body to the application. In addition, the deponent has also annexed assorted documents including a copy of the judgment; and copy of the memorandum of appeal.
5. The Appellants/Applicants have thereafter invited the court to find and hold that the application beforehand is merited. In particular, it has been contended that unless the orders sought are granted, the Appellants shall be subjected to substantial loss. Moreover, it has been contended that the Appellants are state agencies/organs and the monies in question are public funds and hence the need to grant the orders of stay of execution pending the hearing and determination of the appeal.
6. The Respondent has filed a replying affidavit sworn on the 19.03.2026. The Respondent has opposed the application. The Respondent has raised various issues. The issues are: The Appellants have not satisfied the grounds to warrant the issuance of the orders of stay of execution pending appeal; the Appellants have not demonstrated a likelihood that substantial loss shall arise; the Respondent has a lawful judgment; the Respondent is entitled to partake of the fruits of the judgment. Moreover, it has been contended that the appeal under reference does not exhibit any reasonable grounds of success.
7. Flowing from the foregoing, the Respondent has invited the court to find and hold that the subject application is devoid of merits. In any event, the Respondent has posited that same is seized of the means and capacity to refund/repay the decretal sum in the event that the appeal is successful. To this end, the Respondent has invited the court to dismiss the application with costs.
8. The subject application came up for hearing today [the 24.03.2026] whereupon the advocates for the parties covenanted to canvass the application by way of oral submissions. The court thereafter issued directions and the hearing proceeded.
9. Learned counsel for Appellants/applicants adopted the grounds at the foot of the application; reiterated the contents of the supporting affidavit; and the supplementary affidavit sworn on the 23.03.2026. Thereafter, learned counsel highlighted three [3] issues. The issues are: The application has been mounted without unreasonable delay; the Appellants shall be disposed to suffer substantial loss; and the Appellants have satisfied the requisite conditions to warrant the grant of the orders of stay of execution pending appeal.
10. Learned counsel for the Respondent adopted the replying affidavit sworn on the 19.03.2026 and thereafter, highlighted three [3] key issues. The issues are: The subject application has been mounted with unreasonable delay; the Appellants have not satisfied the requisite grounds for the grant of the orders of stay of execution; and the Respondent is seized of the capacity to refund/repay the decretal sum if the appeal were to succeed.
11. Additionally, learned counsel for the Respondent has submitted that insofar as the Appellants have not offered to provide security for the due performance of the decree that may arise, then the court



- ought not to grant the orders of stay. In short, learned counsel for the Respondent has invited the court to dismiss the application.
12. Having reviewed the application dated the 10.03.2026; the supporting affidavit sworn on even date; the supplementary affidavit sworn on 23.02.2026; the replying affidavit in opposition thereto; and upon consideration of the oral submissions ventilated by/on behalf of the parties, two [2] issues crystalize for determination.
 13. The issues are: Whether the Appellants have established the conditions to warrant the grant of an order of stay of execution pending appeal or otherwise; and the security [if any] to be provided in the event of grant of an order of stay of execution.
 14. Regarding the first issue, it is imperative to highlight that an applicant, the current Appellants not excepted, who seeks to procure an order of stay of execution of decree pending the hearing and determination of an appeal; or intended appeal, is obligated to satisfy four conditions.
 15. The conditions are:
 - i. Proof that there exists sufficient cause. [see Order 42 Rule 6 [1] of the Civil Procedure Rules].
 - ii. File the Application for stay of execution timeously and without unreasonable delay [order 42 rule 6 [2] [a] of the Civil Procedure Rules].
 - iii. Demonstrate a likelihood of substantial loss occurring, if the order sought are not granted [order 42 Rule 6[2] [b] of the Civil Procedure Rules].
 - iv. Provide such security as the court may deem apposite for the decree that may ultimately arise. [See Order 42 Rule 6[2] [b] of the Civil Procedure Rules.
 16. I have looked at the application and I wish to state that the application has been mounted timeously and without unreasonable delay. Needless to say that, the judgment which is being appealed against was delivered on 12.02.2026. The subject application was filed on the 10.03.2026. To this end, there is no gainsaying that the application was timeously filed.
 17. Turning to the question of sufficient cause, I wish to state that the appellant has since filed/lodged the memorandum of appeal. The memorandum of appeal raises several pertinent and arguable issues. Among the issues that the Appellants seek to canvass include the question of whether the lower court was seized of the requisite jurisdiction to entertain the suit and render the impugned judgement.
 18. In my humble view, the memorandum of appeal that has been filed by/on behalf of the appellant raises prima facie pertinent issues. The issues shall merit investigation and interrogation by this court. Moreover, the issues are genuine and arguable. Suffice it to state that the existence of the appeal constitute[s] sufficient cause.
 19. Be that as it may, I must clarify that a prima facie Appeal, is not one that must succeed. Notably, a prima facie appeal is one that merits due interrogation and investigation[s] by the Appellate Court to discern whether there is merit[s], or otherwise.
 20. What constitute sufficient cause has been the subject of various decisions. Notably, the court in the case of Wachira Karani v Bildad Wachira [2016] KEHC 6334 (KLR) explored the scope; meaning and tenor of sufficient cause.



21. The Court stated thus:

I again repeat the question what does the phrase "Sufficient cause" mean. The Supreme Court of India in the case of *Parimal v Veena* observed that:-

"sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously".

22. The next condition relates to prove of substantial loss. It is worthy to underscore that substantial loss is such loss that my affect or impact on the appellant's and the appellant ability to operate. Substantial loss is such loss that is not readily compensable in monetary terms. Furthermore, substantial loss is reputed to be the cornerstone; fulcrum; or foundation to granting an order of stay of execution.

23. In the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] KECA 94 (KLR) the Court of Appeal underscored the importance of proving substantial loss.

24. The court stated thus:

"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."

25. Back to the question of substantial loss. The amount of money that was awarded to and in favour of the Respondent is substantial. Though the Respondent contends that same is seized of the means/capacity to repay/refund the monies in the event the appeal succeeds, the Respondent has not demonstrated such capacity. It suffices to state that the means [if any] by the Respondent is peculiarly within the knowledge of the respondent. In this regard, the Respondent bore the burden of proving his means. However, the Respondent has not demonstrated the means. No bank Statements have been tendered. Simply put, there is no proof of means. [See the provisions of Section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya]

26. Looking at the amount that was decreed by the lower court, and taking into account the provisions of section 112 of the *Evidence Act* [supra], I am persuaded that the Appellants have established/proven a likelihood of substantial loss occurring, unless the Order[s] are granted.

27. With the respect to the second issue, I wish to state that where the court is inclined to grant an order of stay of execution pending appeal, it is incumbent upon the court to consider and deal with the question of security. It suffices to state that the court is obligated to address and deal with the question of security, whether or not the applicant has proposed to provide security or otherwise. Simply put,



the discretion to deal with and determine the quantum of security [if any] to be granted belongs to the court and not the parties.

28. Additionally, it is important to highlight that while dealing with an application for stay of execution pending an appeal, the court is engaged in a balancing act, insofar as the judgement creditor has a decree and thus ought to be allowed to partake of the fruit of the judgment. On the other hand, the applicant is pursuing an undoubted right of appeal and which right ought to be protected. [See Article 48 of *the Constitution*, 2010].
29. In view of the foregoing, it is settled that a court of law must endeavor to strike a balance. The balance must be even. In this regard, I am minded to grant an order of stay of execution pending appeal. However, the Appellants cannot have it all their way. [See the holding in the case of *Butt versus Rent Restriction Tribunal* [1979] eKLR]
30. Equity and fairness demand that the Appellants must provide security. In any event, there is no gainsaying that security to be provided, must be such security that will suffice. [See the holding of in the case of *Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others* [2014] KEHC 1412 (KLR)].
31. Finally, the determination of the quantum of security also belongs to the court. Nevertheless, the court must appreciate that the security, if any, to be directed must not be such that same amounts negating the right of appeal. The quantum of security must be fair and reasonable; taking into account the obtaining circumstances, and the interest of justice.
32. In the case of *Gitahi & another v Warugongo* [1988] KECA 123 (KLR) the Court of Appeal expounded on the question of security and in particular the determination of the quantum of security.
33. The Court stated thus:

The aim is to make sure, in an even-handed manner that the appeal will not be prejudiced and that the decretal sum is available if required. The Respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it.
34. In the premises, I am minded to and do hereby order that the Appellants herein shall provide security by depositing half the decretal sum in an escrow account in the names of the advocates for the parties. For good measure, the account shall be opened and operationalized in the names of the Honourable Attorney General; and the Advocate for the Respondent.

Final orders

35. Flowing from the foregoing, the final orders that commend themselves to the court are:
 - i. The Application dated 10.03.2026 be and is hereby allowed.
 - ii. There be and is hereby granted an order of stay of execution of the judgment and the decree of the lower court dated 12th February, 2026, pending the hearing and determination of the appeal.
 - iii. The Appellants herein shall provide security by depositing half the decretal sum in an escrow in the names of advocates for the respective parties. The account shall be opened and



operationalized in the names of the Honourable Attorney General and learned counsel for the Respondent.

- iv. The Escrow account shall be opened and operationalized within 60 days from the date hereof.
- v. In default by the Appellants to comply with the said directions, the orders of stay shall lapse and the Respondent shall be at liberty to execute the decree of the lower court.
- vi. Costs of the Application shall abide the outcome of the appeal.

36. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF MARCH, 2026

OGUTTU MBOYA, FCIArb;CPM[MTI-EA]

JUDGE

In the presence of:

Court Assistant: Naserian

Ms. Miranda [Senior Litigation Counsel] for the Appellants/Applicants

Mr. Thurania Atheru for the Respondent

