Irungu & another v Irungu (Civil Appeal E222 of 2025)
[2026] KEHC 6160 (KLR) (7 May 2026) (Ruling)

Neutral citation: [2026] KEHC 6160 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E222 OF 2025

FN MUCHEMI, J

MAY 7, 2026

BETWEEN

JOHNSON MACHARIA IRUNGU ..... 1ST APPLICANT

EDWIN IRUNGU ..... 2ND APPLICANT

AND

DISMUS WAWERU IRUNGU ..... RESPONDENT

RULING

1. The application for determination dated 4th November 2025 seeks for orders of stay of execution in respect of the judgment in Thika CM Civil Suit No. 199 of 2019 delivered on 13th August 2024 pending the hearing and determination of the appeal.

2. In opposition to the application, the respondent filed a Replying Affidavit dated 8th December 2025.

Applicants' Case

3. The applicants state that judgment in the lower court was delivered on 13th August 2024 and being aggrieved by the said decision, they lodged an appeal herein. The applicants further state that the appeal raises arguable points of law and fact.

4. The applicants state that the respondent is threatening to execute the decree and orders resulting from the said judgment and the same shall be rendered nugatory unless the court grants the orders sought as the judgment contains orders of eviction and once carried out the appeal will have no meaning.

The Respondent's Case

5. The respondent states the applicants are his step brothers. He further states that he is the registered owner of LR No. 87 Thika Municipality having acquired the same in the year 1998. In the year 1999, he

sought the services of a contractor and developed the suit property by construction two five bedroom residential houses on the suit property at a cots of Kshs 19 million.

6. The respondent avers that when he bought the suit property none of his siblings were gainfully employed and they depended on him for sustenance. Upon completion of the structures, the 1st applicant took possession in 2012 together with all his siblings present in Kenya then. The 2nd applicant was at that time studying at the university at the time and he lived in the suit property during holidays. The respondent states that since 2012, the applicants have been living in his houses with his permission but he never permitted them to let one house.

7. The respondent states that the applicants have lived on his suit property for over five years which is sufficient to have looked for alternative accommodation awaiting for the respondent to get their own for the reason that the offer to reside in the houses was temporary. The lower court rendered its judgment on 13th August 2025 directing the applicants to vacate from the suit premises within 90 days failure to which eviction would issue. The respondent argues that the applicants are acting in bad faith as they cannot seek stay of execution while they are just tenants in the said houses.

8. The respondent argues that since the suit property has appreciated in value and considering the houses are being subjected to dilapidation owing to wear and tear for over six years of occupation, they seek that a conditional order compelling the applicants to furnish them with security equivalent to the value of the suit property be issued in his favour. The respondent further argues that he bought a plot consisting of 12 rooms in Makongeni and asked his step father to take two rooms and be the caretaker for the rest and use the rent collected therefrom to maintain the Makongeni property and his other property at Section 9. To date he lives there with his wife and children but the applicants have declined to move back to Makongeni to stay with their father.

9. The respondent states that the applicants have never paid a shilling for rent in relocation to use of his houses since 2012 to date and they have been hostile to him in regard to use of a property manager. Two property managers deployed earlier at different times were chased away by the applicants. The respondent avers that the applicants are collecting monthly rent of Kshs. 50,000/- and do not remit the said amount to him though he is the proprietor of the rental housing units.

10. The respondent states that he intends to renovate the houses for his personal use and for renting out. He states that he has tenants who are ready to move in immediately. In the event the applicants intend to extend their stay, he demands for monthly rent tabulated at Kshs. 85,000/- from each house failure to which eviction shall issue.

11. The respondent argues that the applicants' presence on his property and blatant refusal to move out amounts to trespass.

12. Parties disposed of the application by way of written submissions.

The Applicants' Submissions

13. The applicants submit that if the respondent is not ordered to stop evicting them from the suit premises he will evict them thereby rendering them homeless. The applicants submit that they are brothers with the respondent and that the respondent is lucky in life for being financially endowed but yet he is not willing to provide them with alternative accommodation and therefore it is only fair that he be prevented from evicting them from the suit premises.

The Respondent's Submissions

14. The respondent submits that the applicants are adults aged 50 and 38 years and the assertion that they will be rendered homeless because they are not men of means and that they ought to continue living on the suit property because he is a man of means has no probative value as he has no legal or moral obligation to cater for the two grown men that are capable of fending for themselves.

15. The respondent argues that apprehension of eviction does not suffice as substantial loss. Further the applicants have not specified and demonstrated in what manner substantial loss will be occasioned absent ownership documents of the suit property. To support his contentions, the respondent relies on the cases of Kenya Shell Limited vs Benjamin Karuga Kibiru & Another [1986] KECA 94 (KLR); Equity Bank Limited vs Taiga Adams Company Limited Civil Appeal No. 722 of 2000 and Mereka vs Sikalieh Chairman Karen Langata District Association [2026] KEHC 490 (KLR).

16. The respondent relies on the cases of Equity Bank Limited vs Taiga Adams Company Limited [2006] KEHC 860 (KLR) and Luxus Woods (K) Limited vs Patrick Amugune Kamadi [2016] eKLR and submits that although the applicants have claimed that they are willing to abide by any condition that may be set forth by the Honourable Court, they have not specified the amount they are willing to pay as a condition for issue of orders for stay. The respondent further argues that in the event that` the court allows the instant application, the applicants ought to be ordered to deposit security in a joint interest earnings account in the names of the advocates for the parties in the sum of Kshs. 10 million plus costs of the lower court suit within 14 days.

17. Relying on the cases of Antoine Ndiaye vs African Virtual University [2015] eKLR and Kenya Flexogravure Limited vs Francis Njenga Mburu [2014] eKLR, the respondent submits that he has a valid judgment and should not be further delayed from enjoying the fruits thereof.

The Law

Whether the applicants have satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

18. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-

    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 orders 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 1st 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.

19. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

    1. Substantial loss may result to him/her unless the order is made;

    2. That the application has been made without unreasonable delay; and

    3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

20. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-

> " 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."

21. The applicants argue that they are apprehensive that the respondent shall proceed with execution at any time rendering the intended appeal nugatory and leaving them homeless.

22. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicants are required to show that execution shall irreparably affect them or will alter the status quo to their detriment therefore rendering the appeal nugatory. On perusal of the record, it is noted that the applicants do not dispute that the respondent is the registered owner of LR. No. 87 Thika Municipality and that he allowed them stay there temporarily as they looked for their own accommodation being their step brother. The applicants have just argued that since the respondent is a man of means he should let them stay there or offer them alternative accommodation if they have to vacate the houses. The arguments by the applicants are not based on any law or on valid facts. The applicants plead entitlement as the step brothers of the respondent which is not acceptable. The applicants are adults who have not shown gratitude for the gift of free accommodation given to them by their brother who spent his hard-earned resources to develop the units with a view of earning income from the project. It is unfortunate that the respondent's generosity has been abused by his own brothers and has now resulted in court battles.

23. From the facts of this application, it is clear that the that the applicants will not suffer any substantial loss as they have admitted to staying at the suit premises which the respondent owns and that they have been there for more than ten (10) years having refused to vacate the premises. Conversely, it is the respondent who stands to suffer substantial loss as the applicants have admitted to renting out the premises for their own gain and not sharing the proceeds with the respondent yet the property belongs to the respondent. The prolonged occupation by the applicants will continue to hurt the respondent for another several years. It is therefore my considered view that the applicants have not demonstrated that they stand to suffer substantial loss in the event that the orders sought are not granted.

    Has the application has been made without unreasonable delay

24. Judgment was delivered on 13th August 2025 and the applicants filed the instant application on 4th November 2025 which is a duration of three months. The applicants have not explained why it took them three months to file the instant application. It is therefore my considered view that there has been an inordinate and inexcusable delay in filing the present application.

Security of costs

25. The purpose of security was explained in the case of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR the court stated:-

> " 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 the 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.

26. Evidently, the issue of security is discretionary and it is upon the court to determine the same depending on the facts of each case. The applicants have not offered any form of security knowing very well that it is a requirement in an application of this nature.

27. Additionally, grant of stay being a discretionary order, the court is expected to balance out the interests of the successful litigant and the applicant's unfettered right to file an appeal to fully ventilate his grievances. This was well stated in the case of M/s Porteitz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1997 where the court held:-

> " That the right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right."

28. Bearing the said balance in mind, the suit in the lower court was filed in the year 2019 and judgment was delivered on 13th August 2025 that is 6 years. Thus, the respondent has been kept away from his lawful property for six years and it would be unjust to continue with delay of execution considering that there is no dispute as he is the registered owner of the suit property.

29. I have perused the grounds of appeal in the memorandum of Appeal dated 20th August 2025 and without going into the merits of the appeal noted that they do not raise arguable points of law.

30. Consequently, I find that the applicants have failed to meet the threshold of granting stay pending appeal as set out in Order 42 Rule 1 of the Civil Procedure Rules.

31. Accordingly, it is my considered view that the application dated 4th November 2025 lacks merit and is hereby dismissed with costs to the respondent.

32. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 7TH DAY OF MAY 2026.

F. MUCHEMI

JUDGE