



**Rukanga & another v Magondu (Environment and Land Appeal
E028 of 2022) [2025] KEELC 5369 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5369 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL E028 OF 2022**

JM MUTUNGI, J

JULY 17, 2025

BETWEEN

REGINA WANJIRU RUKANGA 1ST APPELLANT

BETHOVEN KINYUA RUKANGA 2ND APPELLANT

AND

NAHASHON WARUI MAGONDU RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 9th October 2024 brought under Order 22 Rule 25 of the *Civil Procedure Rules* and Section 3A of the *Civil Procedure Act*. The Applicants seek the following substantive order:
 - 1) That there be a stay of execution of the order dated 22nd May 2024 awarding costs to the Respondent pending the hearing and determination of Kerugoya ELC Judicial Review No. 2 of 2024.
2. The application is premised on the grounds stated on the face thereof and in the Supporting Affidavit of Regina Wanjiru Rukanga sworn on 9th October, 2024. The Applicants aver that they have filed a separate Judicial Review application, Kerugoya ELC Judicial Review No. 2 of 2024, against the National Irrigation Board, and the Respondent in the present Appeal joined as an Interested Party. In the Judicial Review, they seek an order of mandamus to compel the Board to hear their dispute relating to the suit parcel.
3. The Applicants contend that the Judicial Review proceedings relate to the same subject matter as the appeal and involve the same parties. They further aver that unless execution for the costs is stayed, they risk being committed to Civil Jail, as they are financially unable to settle the awarded costs.



4. In response, the Respondent filed Grounds of Opposition dated 16th November 2024. He averred that the Applicants had not demonstrated sufficient cause to warrant a stay and had failed to provide security for the due performance of the decree. He further pointed out that the Judgment was delivered on 6th November 2023, with costs taxed on 22nd May 2024, and that the Applicants have had ample time to satisfy the decree and they had not. Additionally, he contended that the Judicial Review proceedings were in contravention of Order 25 Rule 4 of the Civil Procedure Rules since the Applicants had not first satisfied the decree herein before filing the Judicial Review.
5. The Court directed that the matter be canvassed by way of written submissions and both parties have filed their submissions, which the Court has duly considered.
6. The Applicants in their submissions dated 29th April, 2025 reiterated that they had already been evicted from the suit parcel of land and that their claim regarding ownership remains unheard. They argue that they are at risk of committal to civil jail due to non-payment of costs, which they cannot afford. They submit that the issue of ownership should be conclusively determined before enforcement of the costs order. They relied on the decision in *Ngathiko & 6 Others v Mwaririe & 2 Others* (2022) KEELC, where the court exercised discretion to stay execution in one matter pending determination of a related suit.
7. In his submissions dated 3rd May 2025, the Respondent argued that the Applicants had failed to demonstrate sufficient cause to warrant an order of stay of execution and/or offered any security for the due performance of the decree. The Respondent emphasized that the pending Judicial Review proceedings did not constitute an Appeal, nor does the same directly challenge the costs order. The Respondent placed reliance on the case of *Grace Njeri King'ang'i v Dedan Thiong'o John & 2 Others* [CA No. E135 of 2022, Nairobi] (2023) KECA 562 (KLR), where the Court of Appeal dismissed a stay application for want of a substantive basis and lack of security.
8. I have considered the application, the grounds of opposition and parties' submissions. The sole issue for determination in the application is whether the Applicants have made out a case for an order of stay of execution of the order dated 22nd May 2024 pending the determination of Kerugoya ELC Judicial Review No. 2 of 2024.
9. Although the Applicants anchor their application on Order 22 Rule 25, it is necessary to consider the broader principles regarding stay of execution as set out under Order 42 Rule 6(2) of the *Civil Procedure Rules*, which though primarily applicable to Appeals, provide relevant guidance on Judicial discretion. The Order provides that:
 - 1) No Appeal or second Appeal shall operate as a stay of execution or proceeding 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 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.

10. The rule, therefore, requires an Applicant to demonstrate:

1. Substantial loss may result unless a stay is granted.
2. The application was made without unreasonable delay.
3. Provision of security for the due performance of the decree.

11. One of the leading authorities on the application of these principles is *Butt v Rent Restriction Tribunal* [1979] eKLR, where the Court of Appeal held that:

- “(a) The power of the Court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
- (b) Secondly, the general principle 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 the Appeal Court reverse the Judge’s discretion.
- (c) Thirdly, 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.
- (d) Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.”

12. It is also instructive to consider Order 22 Rule 25 of the *Civil Procedure Rules*, which allows a Court to stay execution of a decree where a suit is pending between the decree-holder and Judgment-debtor involving the same subject matter. It provides as follows:-

Stay of execution pending suit between decree-holder and judgment-debtor [Order 22, rule 25]

Where a suit is pending in any Court against the holder of a decree of such Court in the name of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.

13. In the present case, the Applicants have not demonstrated how they meet any of the three core requirements under Order 42 Rule 6(2). They have not shown that they will suffer substantial loss beyond the general risk of enforcement. There is also no offer of security, nor have the Applicants demonstrated that the Judicial Review matter will render the decree in this Appeal untenable or void.

14. Critically, the Judicial Review proceedings are against a third party the National Irrigation Board and seek an Order of Mandamus to compel Administrative action. The Respondent herein is only an Interested Party in those proceedings. Moreover, the orders sought in the Judicial Review are distinct



from the subject of the Appeal. The Appeal arose from a dismissal of a claim for permanent injunction. The Judicial Review application seeks to compel the National Irrigation Board to facilitate hearing a dispute relating to ownership of Rice holding No. 3201 Wamumu and has no relevance to the Appeal that has already been determined though the Appeal arose out of the determination of an order involving the same subject matter.

15. As this Court noted in its Judgment dated 16th November 2023, it confined itself to the issue of injunction as that was the sole issue in the Lower Court. The Court did not, and could not, determine ownership in that context. Likewise, the costs now under enforcement are a consequence of the Appellate jurisdiction of this Court having been invoked. The Appeal was determined on its merits and Judgment rendered. Judicial Review, even if successful, would not reverse or nullify the costs order as it would simply direct the National Irrigation Board to hear the Applicants. The Court finds that the instant application appears to be a tactical attempt to delay compliance with the judgment. There is no basis to stay the execution, and the circumstances do not warrant any equitable intervention. The contention by the Applicant that they risk being committed to Civil Jail as they do not have the means to settle the costs cannot justify the order to stay execution for the costs. The execution for the payment of costs is a lawful process. The Applicants if they have no means to pay the costs they can demonstrate that to the Court before which the execution is sought and that Court will make its determination.
16. In view of the foregoing, I find that the Applicants have not satisfied the conditions for the grant of stay of execution under Order 22 Rule 25 or under the principles under which stay of execution maybe granted under Order 42 Rule 6(2). The pending Judicial Review proceedings cannot provide a sufficient or justifiable reason to order stay of execution for the costs awarded to the Respondent.
17. The Applicants application dated 9th October 2024 is accordingly dismissed with costs to the Respondent.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 17TH DAY OF JULY 2025.

J. M. MUTUNGI

ELC - JUDGE

