



**King'ara v Spring Jill Park Limited & 2 others (Environmental and Land Originating
Summons 225 of 2017) [2025] KEELC 5402 (KLR) (16 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5402 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 225 OF 2017**

JG KEMEI, J

JULY 16, 2025

BETWEEN

PETER GICHUKI KING'ARA PLAINTIFF

AND

SPRING JILL PARK LIMITED 1ST DEFENDANT

COUNTY GOVERNMENT OF NAIRFOBI 2ND DEFENDANT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 3RD
DEFENDANT**

RULING

(In respect of Plaintiff's Application Dated 26/9/2024)

1. What is coming up for determination is the Plaintiff's application dated 26/9/2024 expressed to be brought under the provisions of Section 1A, 1B, 3A, 75 (1) and 95 of the *Civil Procedure Act* as well as Order 42 Rule 6 (1), (2) & (4) and Order 50 Rule 1 of the Civil Procedure Rules. The Plaintiff substantively prays for the following orders;
 - a. That this Honourable Court be pleased to grant stay of execution of the Judgement, decree herein and Orders of Court issued on 24/09/2024 and grant such conservatory orders restraining the 1st Respondent from destroying the Plaintiff's property pending hearing and determination of the intended Appeal.
 - b. That costs be in the cause.
2. The application is premised on the grounds on the face of it and further supported by the Plaintiff's affidavit, Peter Gichuki King'ara, deponed on the 26/09/2024. The Plaintiff restates his case as stated in the Plaint and avers that Judgment was delivered on 24/09/2024 wherein the Court dismissed his suit and allowed the 1st Respondent Counterclaim with costs. Aggrieved by the said decision, he avers



that he has preferred an appeal by filing a Notice of Appeal. He states that he is apprehensive that his properties and installations, that is generator house, gate, gatehouse and other strategic amenities and installations elected on the disputed portion of land will be destroyed without notice taking consideration that previously the boundary wall was destroyed in similar manner.

3. The Applicant contends that the substratum of the intended Appeal is at the risk of being taken out of the Court's jurisdiction which will prejudice him irreparably and obstruct access to his matrimonial home. He argues that the Respondents do not stand to lose anything and shall not be prejudiced in any manner. He asserts that he has an arguable appeal with high chances of success as evident from the attached Draft Memorandum of Appeal. That the application seeks to maintain status quo and preserve the substratum of the Appeal. He prays that the application allowed as prayed.

The 1st Defendant's Grounds of Opposition

4. The 1st Defendant opposed the application vide the Grounds of Opposition dated 15/10/2024. In its grounds of opposition, the 1st Defendant avers that the application is unmeritorious and untenable on the grounds that; the application fails to meet the threshold established by Order 42 Rule 6 of the Civil Procedure Rule by failing to demonstrate the substantial loss likely to be suffered and that the Applicant has not provided any security or shown any willingness to provide such security as the Court may direct.
5. The 1st Defendant further argues that the intended appeal is devoid of any chances of success as it is frivolous, vexatious and intended to obstruct the 1st Defendant from completing its stalled development comprising of 41 residential apartments valued at Kshs. 220, 438, 264. 68 /= and a club house thereon. That the Applicant's right of appeal is not superior to the 1st Defendant's proprietary rights of quiet possession. That the Applicant has not demonstrated that the appeal shall be rendered nugatory. That the balance of convenience tilts in disallowing the application.

The 1st Defendants Replying Affidavit

6. In its further response thereof, the 1st Defendant filed a Replying Affidavit sworn by Daniel Ojijo Agili, its Managing Director dated 7/02/2025. The deponent avers that in response to the assertion that it is likely to demolish the generator house, gate and gatehouse states avers that it is willing to issue the Plaintiff with a Notice to Vacate under Section 152E of the *Land Act*, 2012 to afford the Applicant time to remove the structures. He avers that the 1st Defendant's construction of the 41 apartments valued at Kshs. 220,438,264.68/= has stalled owing to the Plaintiff's encroachment on the 1st Defendant's property. That therefore the balance of convenience lies in disallowing the application especially since the Applicant has not given any undertaking as to damages that may arise as the 1st Defendant's property wastes away.
7. The 1st Defendant further contends that the Applicant has failed to adduce cogent evidence of substantial loss he would suffer if the stalled development is completed after the Court has affirmed its ownership. That the Applicant's right of Appeal is not superior to the 1st Defendant's proprietary rights confirmed by the Court. That staying execution would amount to sanctioning an illegality due to the Applicant's encroachment.
8. The deponent avers that the Applicant has not demonstrated how the appeal shall be rendered nugatory. That merits of the appeal are not a factor to consider when determining an application for stay of execution. That the Applicant ought to prove the conditions set under Order 42 Rule 6(2) of the Civil Procedure Rules which he has failed to prove. The 1st Defendant therefore prays that the application be dismissed with costs.



The Applicant's Supplementary Affidavit

9. The Applicant filed a Supplementary Affidavit sworn on 7/05/2024. The Applicant avers that the substratum of the appeal concerns possession of land he has occupied for years and not just structures illegally built there but also the threatened demolition that would occasion irreparable harm. He avers that indeed the substantial loss would occur as the 1st Defendant's development would alter the land permanently and the monetary compensation shall not be sufficient.
10. The Applicant avers that his claim is bona fide and that the right to appeal is constitutionally protected and not subordinate to the proprietary rights asserted by the 1st Defendant. As for security of costs, the Applicant avers that the present dispute concerns possession and title, not monetary decree and that no evidence has been presented that security is necessary to safeguard the Respondent's interests. That the balance of convenience favours maintenance of the status quo pending the appeal to avoid a multiplicity of suits and hardship to third parties who might purchase the units if construction proceeds. He therefore prays that the application be allowed as prayed.
11. By consent of the parties, the Court directed that the application be canvassed by way of written submissions. Parties complied. The Applicants' filed submissions dated 10/02/2025 whereas the 1st Defendant's submissions are dated 11/02/2025. The Court has had occasion to read through the submissions by parties and considered them.

Analysis and Determination

12. I have carefully considered the Application, Supporting Affidavit, and the Respondent's Replying Affidavit. The only issue which arise for determination is whether this Court should grant stay of execution of the Judgment 24/09/2024.
13. 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 of the Civil Procedure Rules. An Applicant for an order of stay of execution of a decree or an order pending appeal is obligated under Order 42 rule 6(2), to satisfy the following conditions, namely:
 - a. That substantial loss may result to the Applicant unless the order is granted.
 - b. That the application has been made without unreasonable delay, and
 - c. That such security as the Court orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given.
14. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The Court said 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.
15. Execution is a lawful process and it is not a ground for granting stay of execution. The Applicant is required to show how execution shall irreparably affect him or will alter the status quo to his detriment therefore rendering the appeal nugatory. With that in mind, I will proceed and determine each condition vis-a- vis the Applicant's assertions.
16. As to whether the Application has been filed without undue delay, judgment was entered on 24/09/2024. The application was filed on 26/09/2024, just two days after the Courts determination. This Court thus finds that the application has been filed without undue delay.
17. On the issue of substantial loss, in the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR the Court expressed itself as hereunder:
- “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.”
18. See also the decision in Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007 where the Court stated that:
- “The word “substantial” cannot mean the ordinary loss to which every judgement 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.....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 judgement.”
19. The Applicant contends that it stands to suffer irreparably if the orders sought are not granted as he stands to be evicted from a property he has been in possession for years. He is also apprehensive that his properties and installations, that is generator house, gate, gatehouse and other strategic amenities and installations erected on the disputed portion of land will be destroyed without notice taking into consideration that previously the boundary wall was destroyed in a similar manner. The 1st Defendant on the other hand avers that it is willing to issue the Plaintiff with a Notice to Vacate under Section 152E of the *Land Act*, 2012 to afford the Applicant time to remove the structures.



20. The purpose of an order of stay of execution is to preserve the substratum of appeal during the pendency of the appeal so that the appeal is not rendered nugatory. The Court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the Appeal in the event the Appeal is determined in its favour. The Court should not only consider the interest of the Applicant but has to also consider, in all fairness, the interest of the Respondent who will be denied the fruits of their Judgment.
21. It is evident that the 1st Defendant intends to demolish the Applicant's structures and construct 41 apartments valued at Kshs. 220,438,264.68/= which has stalled. This will definitely change the substratum of the suit property thus rendering the appeal nugatory. I am satisfied that the Applicants have adequately demonstrated that they would suffer substantial loss if stay is not granted.
22. An Applicant seeking stay pending appeal is also required to provide security for the due performance of such decree or order as may ultimately be binding on him. Under the provisions of Order 42 rule 6 (1) (2) of the Civil Procedure Rules, a party seeking a stay must offer such security for the due performance of the orders as may ultimately be binding on the Appellant. the three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive.
23. In the instant matter, the Applicant was required to provide the actual security for consideration by the Court as to its sufficiency or an undertaking that it is willing to comply with the conditions to be set by the Court. The purpose and essence of depositing security was discussed in the case of Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates & 2 others (2014) eKLR the Court held that:

“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 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.”
24. The 1st Defendant contends that the Applicant has not offered any security or given any undertaking as to damages that may arise as its property wastes away and the massive financial losses arising from the stalled construction project. The Applicant on the other hand contends in his Supplementary Affidavit that the decree herein is not monetary, hence security is not necessary to safeguard the Respondent's interests.
25. It is trite law that the purpose of deposit of security is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant and this being a land matter such security serves to preserve the subject matter as the parties litigate on the appeal. In balancing the rights of both parties, I am inclined to grant stay in the circumstances but also order the Applicant to deposit security in a joint earning account, the amount of security to be deposited is discretionary upon the Court.

Final orders for Disposal

26. Accordingly, I exercise any discretion and allow the application and grant stay of execution of the Judgment delivered on 24/09/2024 in the following terms: -



- a. The Applicant is hereby ordered to deposit in a fixed joint interest earning account in the names of both counsel for the parties the sum of Kenya Five Hundred Thousand (Kshs. 500,000/=) only as security of costs within 45 days from the date of this ruling.
- b. Failure by the Applicant to deposit security as directed above, the stay will lapse and the Respondents shall be at liberty to proceed with execution.
- c. Costs of this application are awarded to the 1st Defendant/ Respondent.

27. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF JULY 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the Presence of:

Mr. Wachira HB for Mr. Kamere for the Plaintiff

Mr. Kariuki HB for Mr. Gachie for the 1st Defendant

N/A for the 2nd and 3rd Defendant

CA, – Ms. Yvette Njoroge

