



REPUBLIC OF KENYA



KENYA LAW
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Matiani t/a Benwill Auctioneers & another v Githaiya & another (Environment and Land Appeal E004 of 2025) [2025] KEELC 5418 (KLR) (16 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5418 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E004 OF 2025**

**A NYUKURI, J
JULY 16, 2025**

BETWEEN

**BENARD ANALO MATIANI T/A BENWILL AUCTIONEERS .. 1ST APPLICANT
JACKTON NEKOSI OTWOMA 2ND APPLICANT**

AND

**PATRICK GITHAIYA 1ST RESPONDENT
ELIZABETH GITONGA 2ND RESPONDENT**

RULING

Introduction

1. Before court is a notice of motion dated 26th May 2025 filed by the appellants seeking orders of stay of execution of the orders issued in Kakamega MC Civil Misc. Application No. E053 of 2025 on 23rd May 2025, pending the hearing and determination of this appeal. They also sought costs.
2. The application is anchored on the affidavit sworn by the 1st applicant dated 26th May 2025. The deponent stated that a ruling dated 23rd May 2025 was issued against him in Kakamega MC Misc. Application No. E053 of 2025 wherein he had been directed to unconditionally release items that had been attached against the 1st respondent in regard to the latter's indebtedness to the 2nd appellant on lawfully issued proclamation. That the lower court had also directed the OCS Kakamega Police Station to ensure compliance with the court orders. They complained that the impugned orders were issued by a court that had no jurisdiction and that the trial court failed to address the preliminary objection raised on jurisdiction. They argued that if stay of execution is not granted, they stand to suffer substantial loss and their appeal rendered nugatory as they may be arrested and their liberty curtailed.
3. The application was opposed. Patrick Githaiya the 1st respondent swore a replying affidavit dated 11th June 2025. He argued that the applicant had not met the threshold for grant of stay of execution



pending appeal as no substantial loss has been demonstrated. He contended that execution is a lawful process and should not be halted. He argued that section 44 of the *Civil Procedure Act* prohibits attachment of tools of trade which were attached by the applicants. That the applicants objected to jurisdiction in the case pending before the Business Premises Rent Tribunal in Case No. E073 of 2025 as well as in Kakamega CMC Misc Application No, E053 OF 2025 leaving him with no choice. That the applicant has released some of the attached items and therefore the application is overtaken by events. He attached a notification of sale in respect of CMC's Misc No. e 053 of 2025 and release certificate.

4. The application was disposed by way of written submissions. On record are submissions filed by the applicant dated 9th June 2025 which this court has duly considered.

Analysis and determination.

5. The court has carefully considered the application, response thereto and filed submissions. The single issue that arise for the court's determination is whether the applicants have met the threshold for grant of orders of stay of execution pending appeal.
6. Order 42 Rule 6 of the *Civil Procedure Rules* provides for the jurisdiction of the court to grant orders of stay of execution pending appeal as follows;

Stay in case of appeal [Order 42, rule 6]

- (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 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.
7. Thus, for an application for stay pending appeal to succeed, the applicant must demonstrate that they stand to suffer substantial loss if stay is not granted; that they have sought for stay without unreasonable delay and show willingness to provide security for the due performance of the decree that may issue against them. Imminent execution cannot in itself be a basis for grant of stay of execution pending appeal, as execution is a lawful process that follows grant of an order, judgment or decree by a court.



8. In the case of *Butt v Rent Restriction Tribunal* [1979]KLR the Court of Appeal enumerated elements to be considered in considering an application for stay pending appeal as follows:

- 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.

9. Execution is a legal process which should not be unjustifiably or injudiciously hampered halted. In the case of *James Wangalwa & Another v. Agnes Naliaka Cheseto* [2012] eKLR, expressed itself thus:

“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.”

10. In the instant matter, the applicants stated that while lawfully attaching the respondents' property, they were ordered to unconditionally release the same and the OCS Kakamega Police Station directed to ensure compliance of the order. That they were apprehensive that they may be arrested and lose their liberty. They insisted that the court that made the impugned orders had no jurisdiction to do so and that if stay is not granted their appeal may be rendered nugatory.

11. I have considered the orders appealed against and it is apparent that the court ordered the appellants herein to release the attached items and directed the Police to ensure compliance of the orders. The record shows that within the impugned order, the lower court stated that it had no jurisdiction to determine the matters before it, as the same touched on rent. It is clear that the attachment by the appellant was in respect of lawful execution. I agree with the appellant that if stay is not granted their appeal shall be rendered nugatory as they have challenged the order directing them to unconditionally release the attached items. In the circumstances, the court is of the view that the applicant is deserving of an orders of stay of execution pending the hearing and determination of this appeal.



12. The upshot is that the application dated 26th May 2025 succeeds and the same is hereby allowed in the following terms;

- a. That this honourable court hereby issues an order of stay of execution of the orders issued in Kakamega Magistrates Court Miscellaneous Application No. E053 of 2025 dated 23rd May 2024 pending hearing and determination of this appeal.
- b. The costs of the application are awarded to the applicants.

13. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 16TH DAY OF JULY, 2025

A. NYUKURI

JUDGE

In the presence of;

Ms. Ihachi for the appellants/applicants

Ms. Muleshe for the respondents

Court Assistant: M. Nguyai

