



REPUBLIC OF KENYA



Omuse & 8 others v Sauti Savings & Credit Co-operative Society Limited & 9 others (Environment and Land Case E106 of 2021) [2025] KEELC 5936 (KLR) (12 August 2025) (Ruling)

Neutral citation: [2025] KEELC 5936 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E106 OF 2021**

**CG MBOGO, J
AUGUST 12, 2025**

BETWEEN

VINCENT EKEYA OMUSE 1ST PLAINTIFF
ALFRED ONYANGO ATIENO 2ND PLAINTIFF
ODEDE REZIN OCHIENG 3RD PLAINTIFF
DENNIS OLUOCH OCHIENG 4TH PLAINTIFF
JAMES OCHIENG AGENGO 5TH PLAINTIFF
ONESMUS KIMUYU KIMEU 6TH PLAINTIFF
MICHAEL OMWANDA AJWANG 7TH PLAINTIFF
PETER WESONGA OUNA 8TH PLAINTIFF
KHADIJA ALI 9TH PLAINTIFF

AND

SAUTI SAVINGS & CREDIT CO-OPERATIVE SOCIETY
LIMITED 1ST DEFENDANT
DAVID ELLY NDWIGAH 2ND DEFENDANT
STELLAMARIS MUTHAMA 3RD DEFENDANT
FRANCIS NGILA 4TH DEFENDANT
JOHN WAMBUGU 5TH DEFENDANT
MUREITHI WAMAE 6TH DEFENDANT
GERALD OMBEWA 7TH DEFENDANT
JOHNSON MUTUNGI 8TH DEFENDANT



WINSTON ADELI 9TH DEFENDANT

MILTON OMONDI 10TH DEFENDANT

RULING

1. Before this court for determination are the notices of motion dated 19th March, 2025 and 20th March, 2025 respectively. The notice of motion dated 19th March, 2025 is filed by 1st defendant, and it is expressed to be brought under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the *Civil Procedure Act* seeking the following orders: -
 1. Spent.
 2. Spent.
 3. Execution of and all proceedings to enforce the judgment and decree given in this matter on 31st January, 2025 by the Honourable Mr. Justice Oguttu Mboya be stayed pending the hearing and final determination of the 1st defendant's appeal to the Court of Appeal against the said judgment and decree.
 4. The costs of this application be made to abide the result of the said appeal.
2. The application is premised on the grounds inter alia that being dissatisfied with the judgment delivered on 31st January, 2025 the 1st defendant intends to appeal against the said decision having already filed the notice of appeal in respect of the intended appeal.
3. The application is supported by the affidavit of the 2nd defendant sworn on even date. The 2nd defendant deposed that the court entered judgment against the 1st defendant in favour of the plaintiffs in the sum of KShs. 4,300,000/- per plot from the date of filing of the suit until payment in full which stands in excess of KShs. 81,700,000/-. Further, that having filed and served the notice of appeal they have applied for typed proceedings for the purpose of filing the appeal.
4. The 2nd defendant deposed that the intended appeal is arguable and has very good chances of succeeding. Further, it was deposed that the amount payable under the judgment is colossal and would cause great hardship to the 1st defendant if it is forced to pay the same prior to the determination of the intended appeal which has the effect of crippling its business and operations thereby destroying the livelihoods of its employees.
5. The 2nd defendant further deposed that the plaintiffs would not be in any position to refund the decretal sum in the likely event that the intended appeal succeeds, and that the stay sought is necessary in the interest of justice to preserve the substratum of their appeal. It was further deposed that the appeal will be rendered nugatory if stay is not granted, and further the plaintiffs will suffer no prejudice that cannot be compensated by an award of costs if stay is granted. He deposed that it took them sometime to obtain a copy of the judgment despite numerous follow ups until 28th February, 2025.
6. The application was opposed vide the replying affidavit of the 1st plaintiff sworn on 14th April, 2025. The 1st plaintiff deposed that the application is an abuse of the court process as it is frivolous and vexatious. He deposed that since judgment was delivered, it is imperative that the defendants settle the judgment and the monies held in the joint accounts on behalf of the plaintiffs be released forthwith. The 1st plaintiff further deposed that the defendants have not demonstrated the existence of an arguable appeal that has been filed and the substantial loss to be incurred if the order is not made.



7. The 1st plaintiff deposed that the 1st and 2nd defendants have not provided any appropriate security for the entire decretal sum, and they are apprehensive that they shall not recover the same, if the intended appeal fails. Further, that the court issued 30 days stay on 31st January, 2025 which lapsed prior to the filing of this application hence this court is functus officio on the issue of stay of execution. That if the order is granted, they will suffer extreme loss as they have pursued their titles and interest on the suit for more than ten years.
8. The plaintiffs filed the notice of motion dated 20th March, 2025 which is expressed to be brought under Order 51 Rule 1 of the Civil Procedure Rules, and Section 3A of the [Civil Procedure Act](#) seeking the following orders: -
 1. Spent.
 2. That the law firm of Wesonga Wamalwa & Kariuki Associates Advocates and the law firm of Abdulrahman, Saad and Associates Advocates be and are hereby released from the professional undertaking contained in the Consent dated 14th June, 2023.
 3. That the honourable court hereby directs that the amount of KShs. 11,400,000/- plus interest accrued thereon held at NCBA Bank Account No. 6923890018 Account Name: Wesonga Wamalwa & Kariuki Associates and Abdulrahman, Saad and Associates Advocates be released to the plaintiffs' advocates herein, Wesonga Wamalwa & Kariuki Associates Advocates (for the 1st-8th plaintiffs) and Abdulrahman, Saad and Associates Advocates (for the 9th Plaintiff) to distribute proportionally to the 1st to 9th plaintiffs.
 4. That the honourable court hereby directs that the amount of KShs. 28,500,000/- plus interest accrued thereon held at DTB Bank Account No. 0052100001, Account Name: Wesonga Wamalwa & Kariuki Associates and Abdulrahman, Saad and Associates Advocates and Desai, Sarvia and Pallan Advocates be released to the plaintiffs' advocates herein, Wesonga Wamalwa & Kariuki Associates, Advocates (for the 1st to 8th plaintiffs) and Abdulrahman, Saad and Associates Advocates (for the 9th plaintiff) to distribute proportionally to the 1st to 9th plaintiffs.
 5. That an order that costs of and occasioned by this motion be paid by the said defendants.
9. The application is premised on the grounds inter alia that pursuant to the judgment delivered on 31st January, 2025, the defendants were directed to pay the plaintiffs a sum of Kshs. 4, 200,000/- per plot for the 19 plots.
10. The application was supported by the affidavit of Keith Wesonga, the learned counsel on record for the 1st to 8th plaintiffs. The learned counsel deposed that on 14th June, 2023, the parties recorded a consent in court to wit the defendants paid the plaintiffs KShs. 900,000/- per plot and deposited a sum of KShs. 2,100,000/- in two joint accounts held in the names of the advocates for the parties. Further, he deposed that it is imperative that Kshs. 11,400,000/- held at NCBA Account number 6923890018 and KShs. 28,500,000/- held at DTB Bank Account No. 0052100001 be released to the plaintiffs' advocates to enable proportional distribution to the plaintiffs. The learned counsel deposed that it is imperative that the defendants settle the judgment fully and the monies held in the account to be released forthwith.
11. The 2nd defendant filed his response to the application vide his replying affidavit sworn on 6th May, 2025. The 2nd defendant deposed that the monies held in the account should not be released because the 1st defendant intends to appeal against the said judgment, and has applied for stay of execution pending the said appeal. Further, he deposed that the plaintiffs stand to suffer no prejudice if the monies in the joint account continue earning interest. The 2nd defendant deposed that the monies payable under



- the judgment is colossal and it would cause great prejudice if it is forced to pay the same prior to the determination of the intended appeal. It was further deposed that should the monies be released, they will not be guaranteed recovery of the decretal sum as the plaintiffs' financial capability is unknown hence the success of the appeal will be a pyrrhic victory.
12. The 2nd defendant went on to depose that the monies in the joint bank accounts will act as security for execution of the trial court's judgment pending the outcome of the appeal, and that should the court allow the release of the monies held in the accounts, they will suffer irreparable loss and the appeal will be rendered nugatory. He deposed that the plaintiffs will not suffer prejudice as they have been paid KShs. 900,000/- per plot and deposits held in the accounts.
 13. Both applications were canvassed by way of written submissions. With regard to the notice of motion dated 19th March, 2025, the 1st defendant filed its written submissions dated 11th June, 2025 where it raised one issue for determination which is whether the honourable court should grant stay of execution of the judgment/decreed dated 31st January, 2025 pending appeal.
 14. On this issue, the 1st defendant submitted that if this court does not grant the stay pending the appeal, the plaintiffs will proceed to execute the judgment which will cause serious irreparable loss. Further, that the decretal sum stands in excess of KShs. 81,700,000/- and being a sacco, the money belongs to its members many of which cannot to have their money lost. The 1st defendant relied on the cases of James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR, Tropical Suppliers Ltd & Others v International Credit Bank Ltd (in liquidation) [2004] EA 331 and National Industrial Credit Bank Ltd v Aquinas Francis Wasike & anor [2006] eKLR.
 15. The 1st defendant further submitted that no prejudice will be suffered by the plaintiffs since it has paid each plaintiff Kshs. 900,000/- per plot and further remitted Kshs. 11,400,000/- and 28,500,000/- in interest earning accounts as security for part payment of the amount payable under judgment. Reliance was placed in the case of Gianfranco Manethi & anor v Africa Merchant Assurance Co. Ltd [2019] eKLR.
 16. In conclusion, the 1st defendant submitted that it received the judgment on 28th February, 2025 and that the instant application was filed 19 days after receipt of the said judgment which is less than a month's time. It was submitted that the 1st defendant has met the three conditions for grant of stay of execution pending the appeal.
 17. The plaintiffs filed their written submissions dated 13th June, 2025. While relying on the case of Raila Odinga & 2 others v IEBC and 3 others [2013] eKLR, the plaintiffs submitted that this court is functus officio on the issue of stay of execution as the court granted 30 days stay which have lapsed and this court does not have the jurisdiction to deal with the same. Further, they submitted that they have suffered under the defendants for more than 30 years and it has taken too long for the defendants to do right and having obtained judgment, the defendants seek to frustrate them by a frivolous application for stay. To buttress on this issue, the plaintiffs relied on the case of Machira t/a Machira & Co. Advocates v East Africa Standard (No.2) (2002) KLR 63.
 18. The plaintiffs further submitted that the defendants have not demonstrated the substantial loss that would be suffered vis a vis the loss they have suffered. While relying on the case of Andrew Kuria Njuguna v Rose Kuria (Nairobi Civil Case 224 of 2001) unreported, the plaintiffs submitted that mere financial burden occasioned by a judgment does not constitute substantial loss for purposes of grant of an order of stay.
 19. The plaintiffs submitted that the application has been made more than 45 days since judgment was delivered and 30 days after the lapse of the orders of stay granted by the court.



20. With regard to their application, the plaintiffs submitted that there is a judgment sum that has not been paid to date and it is still owing, and further that there is no appeal in the court of appeal as it is still an intended appeal. They submitted that the amounts in the joint accounts were placed as security for such an eventuality as judgment being entered in favour of the plaintiffs and there is no valid reason as to why the said sums should not be utilized to settle the judgment.
21. The 1st defendant filed its written submissions dated 18th June 2025 with regard to the notice of motion dated 20th March, 2025 where it raised one issue for determination which is whether the court should order for the release of funds held in the joint account between the parties' advocates. The 1st defendant submitted that it filed a notice of appeal dated 10th February, 2025 and it is clear that their intention is to challenge the judgment delivered by this court. Further, it was submitted that releasing the funds would render the appeal nugatory, and that it is in the interest of justice that the status quo be maintained.
22. The 1st defendant further submitted that this court has the jurisdiction to determine the application for stay of execution pending the appeal of its own judgment, and that the doctrine of *functus officio* only applies to the merits of the final judgment and not to post judgment incidental or consequential applications.
23. It is not in dispute that judgment was delivered in this matter on 31st January, 2025. Being dissatisfied with the same, the 1st defendant intends to appeal against the said decision, and in doing so, it has filed an application seeking stay of execution pending the appeal before the appellate court. On the other hand, the same judgment was found in favour of the plaintiffs, and to that extent, the plaintiffs seek a release of monies held in two joint accounts by their advocates on record for proportional distribution to the plaintiffs.
24. Having carefully analysed and considered both applications, the responses, and the written submissions filed by the plaintiffs and the 1st defendant, in my view, the issues for determination are whether stay of execution ought to issue pending appeal, and whether the plaintiffs are justified to a release of the monies held in the two joint accounts.
25. Order 42 Rule 6 of the Civil Procedure Rules provides as follows:

“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 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.”



26. There are three conditions for grant of stay order pending appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which:-
- i. The court is satisfied that substantial loss may result to the applicant unless stay of execution is ordered;
 - ii. The application is brought without undue delay and
 - iii. 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.
27. The purpose of stay of execution is to preserve the substratum of the case. In the case of Consolidated Marine. vs. Nampijja & Another, Civil App.No.93 of 1989 (Nairobi), the court held that:-
- “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
28. The decision of whether or not to grant stay of execution is discretionary, and in considering such an application as this, the court ought to balance the interest of the parties such that there is fairness in terms of the right of a dissatisfied party to file an appeal and the right of a successful party to enjoy the fruits of their judgment. As stated earlier, judgment was delivered on 31st January, 2025, and being dissatisfied with the said decision, the 1st defendant is keen on appealing against the said decision. However, and in arguing its application, the 1st defendant contended that the sum awarded is colossal and if forced to pay the same before the appeal is determined, its business will be crippled and its employees will have no source of livelihood. In support of its application, the 1st defendant attached a copy of the judgment, the notice of appeal, the memorandum of appeal, and the letters requesting for a copy of the judgment.
29. On whether substantial loss would occur, there is no evidence of a decree that has been drawn or any demonstration that an execution process is underway or has been initiated by the plaintiffs. What is evident on record is presumption of a likely action set to take place in realization of the judgment as it is with the normal process of execution following a judgment. In other words, the 1st defendant has already predetermined a process that is yet to take place. Without evidence of a decree, this court would be restrained to grant stay of execution pending appeal where no decree has been drawn. In my view, the 1st defendant has not shown the need to grant the orders of stay at this stage.
30. Having found that the orders of stay cannot issue, the second issue deals with the request of release of the monies held in the two accounts for distribution to the plaintiffs. Without the evidence of a decree to justify a claim of stay if any, I find no reason whatsoever to stop the plaintiffs from accessing the said monies. The plaintiffs are thus entitled to a release of the monies held in the joint accounts.
31. From the above, it is my finding that the 1st defendant has not demonstrated an execution process that is underway to enable the orders of stay of execution pending appeal. The notice of motion dated 19th March, 2025 lacks merit and it is hereby dismissed. On the other hand, the plaintiffs are entitled to the sums deposited in the two accounts held by the respective law firms. As such, I find merit in the notice of motion dated 20th March, 2025 and it is hereby allowed in the following terms:-
- i. The law firm of Wesonga Wamalwa & Kariuki Associates Advocates and the law firm of Abdulrahman, Saad and Associates Advocates are hereby released from the professional undertaking contained in the Consent dated 14th June, 2023.



- ii. The amount of KShs. 11,400,000/- plus interest accrued thereon held at NCBA Bank Account No. 6923890018 Account Name: Wesonga Wamalwa & Kariuki Associates and Abdulrahman, Saad and Associates Advocates is hereby released to the plaintiffs' advocates herein, Wesonga Wamalwa & Kariuki Associates Advocates (for the 1st to 8th plaintiffs) and Abdulrahman, Saad and Associates Advocates (for the 9th Plaintiff) to distribute proportionally to the 1st to 9th plaintiffs.
- iii. The amount of KShs. 28,500,000/- plus interest accrued thereon held at DTB Bank Account No. 0052100001, Account Name: Wesonga Wamalwa & Kariuki Associates and Abdulrahman, Saad and Associates Advocates and Desai, Sarvia and Pallan Advocates is hereby released to the plaintiffs' advocates herein, Wesonga Wamalwa & Kariuki Associates, Advocates (for the 1st to 8th plaintiffs) and Abdulrahman, Saad and Associates Advocates (for the 9th plaintiff) to distribute proportionally to the 1st to 9th plaintiffs.
- iv. The plaintiffs are entitled to costs of the two applications.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 12TH DAY OF AUGUST, 2025.

HON. MBOGO C.G.

JUDGE

12/08/2025.

In the presence of:*

Mr. Benson Agunga - Court assistant

Mr. Mohamed for the 9th Plaintiff/Respondent

Mr Wesonga for the 1st to 8th Plaintiffs/Respondents

Ms. Muutu holding brief for Mr. Sarvia for the Defendants/Applicants

7 | Page RULING ELCC NO. E106 OF 2021 DELIVERED VIRTUALLY ON 12TH AUGUST, 2025.

