



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ngugi v Mbugua & another (Environment and Land Appeal  
E085 of 2025) [2025] KEELC 5927 (KLR) (6 August 2025) (Ruling)**

Neutral citation: [2025] KEELC 5927 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E085 OF 2025**

**JG KEMEI, J  
AUGUST 6, 2025**

**BETWEEN**

**SAMUEL KIHARA NGUGI ..... APPELLANT**

**AND**

**JANE MBUGUA ..... 1<sup>ST</sup> RESPONDENT**

**EMBAKASI RANCHING COMPANY LTD ..... 2<sup>ND</sup> RESPONDENT**

*(In respect of Appellant's Application dated 13/5/2025)*

**RULING**

1. What is coming up for determination is the Appellants' application dated 13/5/2025 expressed to be brought under the provisions of Order 50 Rule 6, Order 42 Rule 6 of the Civil Procedure Rules, Section 79G and Section 1A and 3A of the Civil Procedure Act. The Appellant substantively prays for the following orders;
  - a. stay of execution of the Judgment and the Decree of the trial Court pending the hearing and determination of this Appeal.
  - b. an inhibition order inhibiting the registration of any dealings in respect to Plot No. P2930 currently described as Plot No. C451 situated on Nairobi/block 136/ 12272 within Embakasi Ranching Scheme ("the suit property")
  - c. That costs of this application be in the cause.
2. The application is premised on the grounds on the face of it and further supported by the Affidavit of Samuel Kihara Ngugi Kiragu, the Appellant herein, sworn on 13/5/2025. The deponent avers that pursuant to the Judgment and Decree issued on 17/4/2025 in MCELC No.359 of 2021 in favour



of the Respondent against him. That being aggrieved by the said decision, he has lodged an appeal pursuant to the Memorandum of Appeal filed therein.

3. The deponent avers that the trial Court had granted him a 30 days' stay of execution which was about to lapse. He states that the Respondent was in the process of extracting a Decree and levy execution against him. He contends that the suit property is at the imminent risk of disposal, transfer or encumbrance and that if execution proceeds, he stands to be deprived off his interests in the property without being granted a chance to be heard hence occasioning him irretrievable loss as reclaiming it will be practically impossible.
4. He argues that unless the orders sought herein are granted, he stands to suffer substantial loss and irreparable prejudice as execution may proceed thereby rendering the appeal nugatory. He therefore urges the Court to grant the orders sought.

### **The Replying Affidavit**

5. The application is opposed by the Respondent, Jane Wahu Mbugua, vide the Replying Affidavit sworn on 19/5/2025. The Respondent contends that the application is devoid of any merit as there are no reasonable grounds provided by the Applicant to warrant issuance of the orders sought. She avers that the mere filing of an appeal before an appellate Court is not sufficient to grant stay orders. The deponent states that contrary to the assertions that the suit property is at the risk of disposal and transfer, no evidence has been furnished by the Applicant to prove the said allegations.
6. The deponent further contends that the Appellant has all along known that the suit property was transferred to her at the filing of the suit at the trial Court. It is for that reason that she sought orders of trespass against the Appellant as stated at Paragraphs 15 and 16 of the Plaint dated 28/9/2021. That indeed the trial Court's Judgment confirms that she was the legal owner of the suit property and that the law permits her to use the land as she deems fit. She maintains that she never sold the suit property to the Appellant herein.
7. The Respondent further argues that from the Judgment delivered on 17/4/2025, there were no negative orders issued against the Applicant herein to warrant the filing of the instant application. She asserts that the orders issued in the Judgment only re-affirmed her ownership of the suit property. She states that execution is a legal process and in the absence of any negative orders, nothing stops her from recovering the costs of the suit subject to the lapse of 30-day stay of execution which has already lapsed.
8. She contends that the intended appeal lacks merit and is merely aimed at delaying her from enjoying the fruits of the Judgment. She urges the Court to dismiss the application with costs.

### **The written Submissions**

9. On 23/6/2025, the Court directed parties to file and serve their responses to the applications as well as written submissions within 14 days. None of the parties filed responses to the other party's application. They however filed their respective submissions. The Appellants' submissions are dated 26/6/2025 whereas the Respondent's submissions are dated 10/6/2025.
10. The Court has had occasion to read through the submissions by parties and considered them in its determination.

### **Analysis and Determination**

11. The Court has read and considered the Application, the Affidavits and the annexures thereto as well as the rival submissions and the issues that fall for determination are as follows;



- a. Whether the prayer for stay of execution pending hearing and determination of the Appeal is merited.
- b. Whether the Court should exercise its discretion and grant the orders of inhibition sought herein.
- c. Who should bear the costs of the application.

### **Stay of execution pending hearing and determination of the Appeal**

12. It is trite that no appeal can operate as stay hence an application for stay shall be made to Court by the desiring parties. The principles upon which stay of execution pending appeal may be allowed are now well settled from the authorities of this Court and from the superior Courts. Generally, stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules which provide as follows:

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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, an 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 of stay of execution shall be made under Sub-rule (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 undue 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.”

13. In considering an application for stay of execution, I am guided by the case of Butt –vs- Rent Restriction Tribunal (1982) KLR 417 where the Court of Appeal gave the following guidelines: -

“The power of the Court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings. The Court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

14. The grant of an order of stay of execution is a discretionary one. In the case of RWW –vs- EKW (2019) eKLR the Court held that: -

“...the purpose of an application for stay of execution pending an appeal is to preserve the subject in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory. However, in



doing so the Court should weigh the right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of damages.”

15. On the first condition of proving that substantial loss may result unless an order of stay is granted, the Applicant should not only state that he is likely to suffer substantial loss, he must prove that he will suffer substantial loss if stay orders are not granted.
16. 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.”
17. The Applicant contends that he stands to suffer irreparably if the Respondent levies execution against him as the 1<sup>st</sup> Respondent is in the process of extracting a decree and levy execution against him. He contends that the suit property is at the imminent risk of disposal, transfer or encumbrance and that if execution proceeds, he stands to be deprived off his interests in the property without being granted a chance to be heard hence occasioning him irretrievable loss as reclaiming it will be practically impossible.
18. The Respondent argues that the Applicant has not demonstrated the substantial loss he stands to suffer. That contrary to the assertion that the suit property is at the risk of disposal and transfer, no evidence has been furnished by the Applicant to prove the said allegations. She argued that the Appellant has all along known that the suit property was transferred to her at the filing of the suit at the trial Court and that the Judgment delivered on 17/4/2025 only re-affirmed her ownership thereof. The Respondent argues that there are no negative orders issued against the Applicant herein to warrant the filing of the instant application. She states that execution is a legal process and cannot be the basis of stay orders.
19. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. It is clear from the Judgment of the trial Court that the suit property had already been transferred to the Respondent. The Appellant’s apprehension that the suit is likely to be transferred hence depriving him of his proprietary rights has not been substantiated. Substantial loss is the irreparable loss that the Applicant is likely to suffer but not the apprehension of the future occurrences that is likely to happen. It is thus my considered view that the Applicant has not demonstrated any substantial loss he stands to suffer.
20. As to whether the application has been made without unreasonable delay, Judgment was delivered on 17/4/2025 and the Applicant filed an application for stay of execution on 13/5/2025. It has taken the Applicant twenty-six (26) days between the Judgment of the trial Court and the time when he filed the instant application. It is therefore my considered view that a delay of twenty-six (26) days is not inordinate. As such, the application was filed timeously. In any event, the Applicant was enjoying stay orders granted by the Learned Magistrate which have since lapsed.



21. On the third condition of Security of costs, 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.”

22. As already demonstrated in James Wangalwa & Another –vs- Agnes Naliaka Cheseto (supra) the three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive.
23. In the instant case, the Applicant has not offered any security or shown his willingness to avail any security as may be directed by the Court. The Appellant has not met this condition as well.
24. The Applicant also argued that the appeal lodged herein through his Memorandum of Appeal is likely to be rendered nugatory if the orders sought are not granted. The onus is on the Applicant to demonstrate that the Appeal will be rendered nugatory. The Court of Appeal in Nairobi Civil 211 of 2016 Shah Munge & Partners Ltd v National Social Security Fund Board of Trustees & 3 Others [2018] eKLR when considering whether to allow an application for injunction and stay pending appeal looked at the definition of “nugatory” as was defined in Reliance Bank Ltd –vs- Norlake Investments Ltd [2002] 1 EA 227 at page 232 The Court opined that nugatory has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling, essentially one which is of little or no legal consequence.
25. As to whether the Appeal will be rendered nugatory this varies from case to case and it depends on what is to be stayed. In the instant case, the issue at hand is land. The Applicant is by law mandated to demonstrate how the Appeal will be rendered nugatory. From the Memorandum of Appeal filed herein, this Court cannot determine whether the Appeal will be a success or not. That being the case, the Applicant has failed to demonstrate how his Appeal will be rendered nugatory should it succeed.
26. Grant of stay of execution is at the discretion of the Court having regard to all the circumstances and the applicable law, it is my finding that the Applicant has not met the requisite principles for grant of Stay Orders.
27. Orders of Inhibition
- The Applicant also sought an order of inhibition order inhibiting the registration of any dealings in respect to the suit property.
28. Section 68(1) of the *Land Registration Act*, 2012 provides as follows:

“The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time or until the occurrence of a particular event, or generally until further order, the registration of any dealing with any land, lease or charge.”



29. In the case of Dorcas Muthoni & 2 Others –vs- Michael Ileri Ngari (2016) eKLR the Court observed as follows:

“An order of inhibition issued under section 68 of the Land Registration Act is similar to an order of prohibitory injunction which bars the owner of the property under dispute from registering any transaction over the said property until further orders or until the suit in which the property is a subject is disposed off. The Court issuing such an order must be satisfied that the Applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending trial.”

30. Similarly, in the case of Japhet Kaimenyi M’Ndatho –vs- M’Ndatho M’Mbwiria (2012) eKLR the conditions necessary for the grant of an order of inhibition were stated as follows:

- a. That the suit property is at risk of being disposed of or alienated or transferred to the detriment of the Applicant, unless preservative orders of inhibition are issued.
- b. That the refusal to grant orders of inhibition would render the Applicant’s suit nugatory.
- c. That the Applicant has an arguable case.

31. Inhibitive and/or Prohibitive orders are issued whenever the suit property is in danger of disposition or alienation before the issues in the suit are resolved. A party also seeks prohibitive orders when he/she feels that his/her rights have been infringed.

32. Whereas the Appellant submitted that the order was necessary for the purpose of preserving the suit property and that she had satisfied the requirements for the grant of such order, the Respondent contended otherwise. The Appellant submitted that the Respondent having confirmed that she may use the suit property as she wishes by virtue of the Lower Court’s orders. As noted earlier, the Respondent maintains that her ownership of the suit property was only re-affirmed by the Court. That the suit property had already been transferred to her even before the commencement of the suit.

33. Weighing the above scenario and bearing in mind the right of the Applicant to his appeal and that of the Respondent to enjoy the fruits of her judgement, the commendable order should aim at the preservation of the property pending the hearing of the appeal on its merits.

34. Final Orders for Disposal

- a. The Notice of Motion dated 13/5/2025 is partially allowed only in terms of prayer b. That is to say, an inhibition order inhibiting the registration of any dealings in respect to Plot No. P2930 currently described as Plot No. C451 situated on Nairobi/block 136/ 12272 within Embakasi Ranching Scheme (“the suit property”) be and is hereby granted pending the hearing and determination of the instant appeal.
- b. The costs of the application shall abide the outcome of the appeal.

35. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 6<sup>TH</sup> DAY OF AUGUST, 2025 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**

**JUDGE**



Delivered Online in the Presence of:

1. Ms. Omamo HB for Mr Wamwea for the Applicant
2. NA for the 1st and 2nd Respondents
3. CA- Ms. Yvette Njoroge

