



REPUBLIC OF KENYA



**Soar v Ali (Environment & Land Case E001 of 2022)
[2025] KEELC 1016 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 1016 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E001 OF 2022
LL NAIKUNI, J
FEBRUARY 28, 2025**

BETWEEN

KULDIP SINGH SOAR PLAINTIFF

AND

SAIDA ABDALLA ALI DEFENDANT

RULING

I. Introduction

1. This Honorable Court was tasked to make a determination on the filed Notice of Motion application dated 18th September, 2024 by Kuldip Singh Soar, the Defendant/Applicant herein. It was brought under the dint of Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya), Order 42 Rule 6 of the Civil Procedure Rules (2010) and all other enabling provisions of Law.
2. Upon service of the application to the Plaintiff/Respondent, she responded through a replying affidavit sworn on 4th October, 2024.

II. The Defendant/Applicant's case

3. The Applicant sought for the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That this Honourable Court be pleased to Order a stay of execution in this matter pending the hearing and determination of the Applicant's appeal;
 - d. That costs of this application be in the cause.



4. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 12 paragraphed Supporting Affidavit of – RUKIA ABDALLA ALI, duly attorney of the Applicant herein sworn and dated the same day with the application. The Applicant averred that:
- a. The Applicant was the owner of the house on a portion of the land known as Subdivision Number 4961 (Original Number 15/2/12) Section I Mainland North (hereinafter “the Suit Premises”).
 - b. The Honourable Court 16th July, 2024 delivered a Judgment which ordered inter alia that the Applicant vacated the Suit Property within 90 days.
 - c. The Applicant being dissatisfied with the said Judgment intends to appeal against the said decision of the Honourable Mr. L.L Naikuni and has duly filed a Notice of Appeal. Annexed in the affidavit and marked as “RA - 2” was a true copy of the Applicant’s Notice of Appeal dated 22nd July, 2024.
 - d. The Applicant’s Advocates on record have applied for a typed copy of the Proceedings and a certified copy of the Judgment and Decree delivered on the 16th July, 2024 to enable the Applicant to lodge her Record of Appeal which were yet to be received. Annexed in the affidavit and marked as “RA - 3” was a true copy of the Applicant’s Advocates letter to the Deputy Registrar Mombasa Law Courts dated 22nd July, 2024 applying for the same.
 - e. The Applicant had an arguable Appeal that raised fundamental and critical issues of law and fact and unless the order for stay sought herein was granted the Applicant’s Appeal will be gravely prejudiced and rendered nugatory. Annexed in the affidavit and marked as “RA - 4” was a true copy of the draft Memorandum of Appeal that the Applicant intended to lodge and only once she received the typed Proceedings and a certified copy of the Judgment and Decree will the Applicant be in a position to lodge her Record of Appeal.
 - f. If the orders sought by the Applicant were not granted and the Respondent proceeds execute the Judgment, the Applicant was at risk of being evicted from the suit property which is a house that has been in the ownership of her family for more than 40 years and should therefore suffer substantial loss should her intended appeal be successful as she will have lost the suit property.
 - g. The Applicant was willing to undertake to only use the said property in the ordinary course of business and should not dispose the said property as a security to this Honourable Court for granting stay of execution.
 - h. The Respondent should suffer no prejudice if the stay was granted as he could be awarded damages and the suit property would still be available in the unlikely event that the Applicant’s appeal was unsuccessful.
 - i. She therefore believed that it would serve the interests of justice that the Applicant’s application be allowed by this Honourable Court.

III. The Plaintiff/ Respondent response

5. The Plaintiff/ Respondent, responded to the application through a 12 Paragraphed Replying Affidavit sworn on 4th October, 2024 by the Plaintiff himself where he averred that:-
- a. Judgment in this matter was passed in his favour on the 16th July, 2024 (Hereinafter referred to as “The Judgment”). In the Judgement the court:-



- a. directed that vacant possession of the property comprised in Subdivision Number 4961 Section I Mainland North (“hereinafter referred to as “The Suit Premises”) be delivered to him (“the Plaintiff”) by the Defendant;
 - b. Ordered the Defendant to make payment of the rental arrears in the sum of Kenya Shillings Three Twenty Four Thousand (Kshs. 324,000/-) together with interest thereon at court rates from the date of filing suit until the full payment.
 - c. Awarded mesne profits at the rate of a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000/-) per month from the date of filing suit until the date of delivery of vacant possession of the Suit Premises to the Plaintiff.
 - d. Awarded costs of the suit to the Plaintiff.
- b. As has been stated during the hearing, he occupied part of the Suit Premises for storage of building material. While the Applicant/Defendant was yet to hand over the vacant possession of the Swahili House on the Suit Premises to him pursuant to the Judgement, during his routine visit to the Suit Premises in the course of his work on 30 September 2024, he noted that all the doors of the Swahili House had been left open. On further inspection, he noted that the said house was vacant, had been abandoned and left unsecured.
 - c. In a bid to secure the Swahili House and the Suit Premises, he purchased a padlock and secured the Swahili House and the Suit Premises. Annexed in the affidavit marked as “KSS 1 to 10” were photographs of the Swahili House, the Suit Premises and the padlock used to secure the Premises.
 - d. In view of the fact that the Suit Premises and the Swahili House thereon have already been abandoned by the Applicant/Defendant’s, her supposed apprehension of forceful eviction was baseless.
 - e. The present application has been made is vexatious, has been made in bad faith, and was an abuse of the process of Court.
 - f. The Applicant/Defendant had not provided any evidence to support her allegation of grave and irreparable loss in the event that the execution should proceed.
 - g. In any event:-
 - i. He was a director and shareholder of Coast Building and General Contractors Limited which was a construction company currently undertaking business projects worth over Kenya Shillings Fourty Five Million (Kshs. 45,000,000/-). Attached herewith marked a “KSS - 11” was a copy of the certificate of incorporation, “KSS - 12” was print out of the CR - 12 of the said Company and a list of projects currently being undertaken by the company.
 - ii. He was also the registered Proprietor of the following properties:10.2.1. Subdivision 4960 Sec I Mainland North;10.2.2. Subdivision 4957 Sec I Mainland North;10.2.3. Subdivision 4959 Sec I Mainland North;
Attached in the affidavit marked “KSS 13, 14 & 15” were copies of the titles of the aforementioned properties; and therefore had the meant to adequately compensate the Applicant/Defendant financially in the event that the intended appeal should be successful.



- h. He was therefore opposed to the said application for stay and urged the court to dismiss the same with costs in his favour.
- i. In the event that the Court was inclined to grant the stay, he prayed:
 - a. that the sum of Kenya Shillings One Million Three Seventy One Thousand Two Hundred (Kshs. 1,371,200/-) set out hereunder (in accordance with the Judgment) be deposited by the Applicant/Defendant in an interest earning bank account to be opened and held jointly in the names of the Advocates of the parties to this matter, pending the hearing and determination of the appeal:
 - a. Rental Arrears in the sum of Kenya Shillings Three Twenty Four Thousand Four Hundred (Kshs. 324,000/-).
 - b. Interest thereon at the rate of 12% P. A from 13th January 2022 to date, a sum of Ninety Seven Thousand Two Hundred (Kshs. 97,200/-).
 - c. Mesne Profits at the rate of Kenya Shillings Twenty Thousand (Kshs. 20,000/-) per month from January 2022 to date a sum of Kenya Shillings Six Hundred Thousand (Kshs.600,000/-).
 - d. Costs of the suit of a sum of Kenya Shillings Three Hundred and Fifty Thousand (Kshs. 350,000/-)

IV. Submissions

- 6. On 5th November, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 18th September, 2024 be disposed of by way of written submissions. Unfortunately, by the time of penning down the Ruling, the Honourable Court had not accessed the submissions either filed nor from the Court CTS portal. Subsequently, the Honourable Court proceeded to deliver the Ruling on its merit on 28th February, 2025 accordingly.

V. Analysis & Determination.

- 7. I have carefully read and considered the pleadings herein by the 1st Defendant/Applicant, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
- 8. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
 - a. Whether the Notice of Motion application dated 18th September, 2024 seeking to stay execution of the of the decree of this Honourable Court issued on the 16th July, 2024 by this Honourable Court pending the hearing and determination of the Appeal is merited?
 - b. Whether the parties herein were entitled to the reliefs sought.
 - c. Who will bear the Costs of Notice of Motion application dated 18th September, 2024.

Issue No. a). Whether the Notice of Motion application dated 18th September, 2024 seeking to stay execution of the of the decree of this Honourable Court issued on the 16th July, 2024 by this Honourable Court pending the hearing and determination of the Appeal is merited

- 9. Under this Sub – title, the main gist of the matter is on whether or not to grant Stay of Execution from a delivered Judgement or Decree of the Court. The law concerning stay of execution pending Appeal



is found in the provision of Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, 2010 which stipulates 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 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. It is trite law that stay of execution pending appeal is a discretionary power bestowed upon this court by the law. In the initial stages of building Jurisprudence around this legal aspect, the Court of Appeal in the case of “Butt –Versus- Rent Restriction Tribunal {1982} KLR 417” gave guidance on how a court should exercise the said discretion and held that:

- “ 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- 2. 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 that appeal Court reverse the Judge’s discretion.
- 3. 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.
- 4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
- 5. 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 for costs as ordered will cause the order for stay of execution to lapse.”



11. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in the provision of Sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act*, cap. 21 or in the interpretation of any of its provisions.
12. The provision of Section 1A (2) of the *Civil Procedure Act* provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under the provision of Section 1B some of the aims of the said objectives are:- “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
13. There are three conditions for granting 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.
14. I find issues for determination arising therein namely:
 - i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of judgment pending Appeal.
 - ii. What orders this Court should make
15. The purpose of stay of execution is to preserve the substratum of the case. In the case of “Consolidated Marine – Versus - 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”.
16. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.
17. As for the applicant having to suffer substantial loss, in the case of “Kenya Shell Limited – Versus - Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018” the Court of Appeal pronounced itself to the effect that:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”



18. The Court of Appeal in the case of “Mukuma – Versus - Abuoga (1988) KLR 645” where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

19. The Applicant has a burden to show the substantial loss they are likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Applicant to the Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. {See the case of “Absalom Dora –Versus -Turbo Transporters (2013) (eKLR)”}.

20. As F. Gikonyo J stated in the case of:- “Geoffery Muriungi & another – Versus - John Rukunga M’imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased) [2016] eKLR” and which wisdom I am persuaded with: -

“.....the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal...”.

21. Having said as much I shall not examine whether the Applicant is entitled to the orders sought.

Issue No. b). Whether the parties herein were entitled to the reliefs sought

22. Under this sub heading, the Honourable Court now wishes to apply the above legal principles to the instant case. From the proceedings, the Applicant herein filed an application dated 18th September, 2024 seeking orders to stay the Judgment in this matter delivered by this Honourable Court on 16th July, 2024. According to the applicant, the Honourable Court delivered a judgment against all the People squatting on the suit property herein. Among the orders issued by the Court included an order to vacate the suit property within Ninety (90) days from the date of the delivery of the judgment on or before the 28th February, 2024. The Defendant was aggrieved and proceeded to file an Appeal evidenced by the Notice of Appeal dated 22nd July, 2024.

23. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under Order 42 Rule 6. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicant unless stay of execution is granted; and thirdly such security as the court orders for the due performance of such decree or order as may ultimately be binding on them has been given by the Applicant.

24. Regarding the pre-requisite conditions evolving from the law is on substantial loss occurring to the Appellants. The court has already deliberated on this aspect and taken into consideration of it from the case of:- “Kenya Shell Limited (Supra)”. From the surrounding facts and inferences of the instant case, I am strongly persuaded that indeed, the Applicant has proved that it will suffer substantially if the orders for stay of the execution are not granted as prayed. For that reason, the application should succeed.



25. On the second issue to determine is where the application for stay of execution was made without inordinate delay. From the record, the judgment being appealed against was delivered on 16th July, 2024 and the application herein was filed on 18th September, 2024, the Notice of appeal on 22nd July, 2024. This application was filed after about 2 months after the judgment. Clearly, in this Honourable Court's assessment, the application was made a long while after the judgment was delivered. Indeed, the application was not filed expeditiously and with undue delay.
26. On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. Has made no provisions for security in his application.
27. This provision of the law notwithstanding from the face value, this court is not bound by the type of security offered by an applicant. It can make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.
28. In saying so I seek refuge from the case of "Aron C. Sharma – Versus - Ashana Raikundalia T/A Rairundalia & Co. Advocates" 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.”

29. Therefore, in the interest of justice and fairness, it behooved the Applicant herein to furnish security as stipulated by the law. Stay of execution is exactly what it states. It is an order of the court barring a Decree Holder from enjoying the fruits of his Judgment pending the determination of some issue in contention. It matters not whether the issue in contention is the amount awarded in the Judgment Debt, or liability or legality of the extracted warrants as in this case. Where a party seeks to stay execution, the Court must be guided by the parameters set out in the provision of Order 42 Rule 6 of the Rules.
30. The Court observed in the case of:- "Gianfranco Manenthi & Another – Versus - Africa Merchant Assurance Company Limited [2019] eKLR", thus:-

“..... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the



appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree. (Underlining mine for emphasis)

31. As already demonstrated in the case of “James Wangalwa & Another – Versus - Agnes Naliaka Cheseto (Supra)” the three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. It is my finding that the Applicant herein, though they brought this Application without undue delay and adequately demonstrated the substantial loss that they would suffer as stipulated by sub-rule 2b.
32. In this particular case, the Court awarded the Plaintiff a sum of Kenya Shillings One Million Three Seventy One Thousand Two Hundred (Kshs. 1,371,200/-) shall be the security the Defendant is expected to have as security.
33. Resultantly, I am persuaded to grant the order for stay of execution but strictly on condition that the Applicants shall furnish security being a reasonable sum equivalent to the outstanding amounts in contention being a sum of Kenya Shillings One Million, three Hundred and seventy-one, two hundred shillings. (Kshs. 1,371, 200/-).

Issue No. c). Who will bear the Costs of Notice of Motion application dated 18th September, 2024.

34. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh (2014) eKLR” and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, (2014) eKLR”.
35. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR”, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In this case, this Honourable Court has reserved its discretion in not awarding costs.

VI. Conclusion & Disposition

36. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to the Preponderance of Probabilities and balance of convenience. Ultimately, in view of the foregoing detailed and expansive analysis to the application, this court arrives at the following decision and makes the following orders:-
 - a. That the Notice of Motion application dated 18th September, 2024 be and is hereby found to have merit and hence allowed subject to the fulfilment of the Pre – Conditions stated herein.



- b. That this Honourable Court do hereby issue an order to stay the execution of its decree arising from the Judgment of this Honorable delivered on 16th July, 2024 pending the hearing and determination of the Intended appeal in the Court of Appeal.
- c. That an order be and is hereby made directing the Defendants/Applicants to deposit a sum of Kenya Shillings One Million, three Hundred and seventy-one, two hundred shillings (1,371,200) as security deposit for the due performance of the decree from the Judgement of this Honourable Court in a Joint Escrow bank account of a reputable Commercial bank to be held in the names of the Law firms of Messrs. Kasamani and Co. Advocates and the Messrs. Idris Ahmed and Co. Advocates Within the Next Thirty (30) days from the delivery of this Ruling pending the hearing and determination of the appeal.
- d. That failure to adhere with the condition under Clause (c) herein above of this Ruling the Notice of Motion application dated 18th September, 2024 shall automatically stand dismissed thereof and execution of the Decree shall ensue procedurally as provided for by law
- e. That there shall be no orders as to costs.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 28TH DAY OF FEBRUARY, 2025.

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**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant;
- b. M/s Kasamani Advocate for the Plaintiff/Respondent.
- c. Mr. Ahmed Advocates for the Defendant/Applicant.

