



REPUBLIC OF KENYA



**Juma v Khayundi (Environment & Land Case E002 of 2021)
[2025] KEELC 1083 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 1083 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE E002 OF 2021
A NYUKURI, J
FEBRUARY 27, 2025**

BETWEEN

MARGARET OYIELA JUMA PLAINTIFF

AND

MOHAMMED OMOLLO KHAYUNDI DEFENDANT

RULING

Introduction

1. Before court is a Notice of Motion dated 6th February 2025 filed by the plaintiff seeking the following orders;
 - a. Spent
 - b. That this honourable court be pleased to stay the execution of the decree herein pending the hearing and determination of an appeal filed in the Court of Appeal.
 - c. That costs of this application be provided for.
2. The application is premised on the grounds on its face and the supporting affidavit sworn by Magrate Oyiela Juma, the plaintiff/applicant. The applicant's case is that judgment herein was delivered on 31st January 2024 and that she lodged an appeal before the Court of Appeal. She stated that the defendant had extracted a decree and was in the process of executing the same. She maintained that her appeal was meritorious and that she will be prejudiced if the decree is executed and her appeal will be rendered nugatory. She attached copies of the notice of appeal and decree.
3. The application is opposed. Mohammed Omollo Khayundi, the defendant/respondent herein filed a replying affidavit sworn on 18th February 2025 opposing the application. He stated that the application was misplaced, frivolous and with no legal basis. He argued that there was no proof that the applicant had filed an appeal before the Court of Appeal and that there is no evidence of imminent execution.



He further stated that the applicant had not shown that she stood to suffer substantial loss if execution proceeds. According to him, judgment having been delivered on 31st January 2024 and the instant application having been filed on 6th February 2025, there was inordinate delay on the part of the applicant in seeking stay of execution. He also stated that the applicant had not provided security and that this matter was determined by this court as being *res judicata* as there had been a similar matter which was dismissed.

4. Parties were directed to file written submissions in support of their respective cases. On record are submissions filed by the applicant dated 20th February 2025 and those of the respondent dated 26th February 2025, both of which this court has duly considered.

Analysis and Determination

5. The court has carefully considered the application, the response thereto and parties' rival submissions. The only issue that arises for this court's determination is whether the applicant has met the threshold for grant of orders of stay of execution pending appeal.
6. Order 42 Rule 6 of the Civil Procedure Rules grants this court the power to order stay of execution pending appeal and provides as follows;
 - 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. Therefore, where an applicant demonstrates that they stand to suffer substantial loss and seeks stay of execution without inordinate delay, the court may grant stay of execution.
8. Execution is a lawful process, consequent to grant of order or decree and a court will not grant stay just because there is imminent execution. The applicant must demonstrate by cogent evidence that if stay of execution is not granted, they stand to suffer substantial loss that would render their appeal nugatory. In the case of *James Wangalwa & Another v. Agnes Naliaka Cheseto* [2012] eKLR, the court discussed the element of substantial loss as follows;

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 Civil Procedure Rules. This is so because execution is a lawful process.



The applicant must establish 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.

9. In the instant case, the applicant contends that if execution of this court's decree is not stayed, her appeal may be rendered nugatory. On the question of whether or not there was inordinate delay in seeking stay, it is clear that the application herein was brought a year after delivery of judgement and in my view, the same is tainted with inordinate delay.
10. I have considered the decree of this court issued on 31st January 2024 which states that the applicant's suit was struck out with costs. It does not have any positive orders as against the applicant. In my view, as the decree has negative orders of striking out the applicant's suit, the same is incapable of being stayed as it has no positive orders for doing any actions as against the applicant. Besides, although the applicant attached a Notice of appeal filed on 13th February 2024, the applicant who ought to have filed the appeal before the Court of Appeal, consisting of Memorandum of appeal and Record of appeal within 60 days, as per Rule 83 of the Court of Appeal Rules 2010, has not demonstrated that she filed the appeal as expected by 13th April 2024 or at all. This means that as of today, there is no appeal before the Court of Appeal, upon which orders of stay of execution may be premised or granted. This is despite the fact that typed proceedings are on record.
11. For the above reasons, I am not convinced that the plaintiff/applicant deserves orders of stay of execution pending appeal. In the premises, I find and hold that the plaintiff's application dated 6th February 2025 lacks merit and I hereby dismiss the same with costs to the defendant/respondent.
12. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY THIS 27TH DAY OF FEBRUARY, 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

No appearance for the plaintiff

No appearance for the defendant

Court Assistant: M. Nguyai

