



REPUBLIC OF KENYA



Mahinda & 4 others v Wainaina & 4 others (Environment and Land Appeal E041 of 2024) [2025] KEELC 780 (KLR) (25 February 2025) (Ruling)

Neutral citation: [2025] KEELC 780 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E041 OF 2024
MAO ODENY, J
FEBRUARY 25, 2025**

BETWEEN

**MWANGI CHARLES MAHINDA 1ST APPELLANT
NDUNGU NDUATI 2ND APPELLANT
JOHNSTONE KIYURU NJOROGE 3RD APPELLANT
FRANCIS MACHARIA MWANGI 4TH APPELLANT
KASARANI NO 4 MATHARE DANCERS 5TH APPELLANT**

AND

**JOHN KARANU WAINAINA 1ST RESPONDENT
RUFFUS KIARIE CHEGE 2ND RESPONDENT
JACKSON KARANJA MWANGI 3RD RESPONDENT
ANNAH WANJIRU NJANE 4TH RESPONDENT
MURUNGU ETHA COOPERATIVE SOCIETY LIMITED 5TH RESPONDENT**

RULING

1. This ruling is in respect of a Notice of Motion dated 9th August, 2024 by the 1st Appellant/Applicant seeking the following orders:
 - a. Spent
 - b. Spent
 - c. That there be a stay of execution of the Decree herein pending the hearing and determination of Nakuru ELC Appeal No E041.



- d. That such orders be made as are just and expedient.
 - e. That the costs of this application be in cause.
2. The application was supported by the annexed affidavit of Mwangi Charles Mahinda (the 1st Appellant/Applicant) sworn on 9th August, 2024 where he deponed that he is a senior citizen aged over 70 years old and if the Respondents are allowed to proceed with execution, his appeal shall be rendered nugatory. Further, that he is likely to lose over Ksh 4,000,000/= unjustly and unfairly. He also stated that he is willing to deposit his title deed annexed as Exhibit-MCM4 as security in due performance of the decree.
 3. The 2nd Respondent, Ruffus Kiarie Chege, filed a Relying Affidavit sworn on 3rd December, 2024 and deponed that he has the authority from other Respondents to swear the affidavit. It was his case that the application is an abuse of court process with the intention to delay the course of justice and further that the application was filed after they began the execution process.
 4. The 2nd Respondent deponed that there is inordinate delay in filing the application for stay of execution as the consent judgment was entered in 2018 and it has taken the Appellant six years to settle the decree and or file the instant appeal.

1st Appellant/applicant's Submissions

5. Counsel for the 1st Appellant filed submissions dated 10th December, 2024 and identified the following issues for determination:
 - a. Whether the application has been made without unreasonable delay?
 - b. Whether the intended appeal has high chances of success?
 - c. Whether the applicant will suffer prejudice and or the appeal will be rendered nugatory if stay is not granted?
6. On the first issue, counsel submitted that the ruling, which the appeal has been preferred, was delivered on 31st July, 2024 and the application herein was filed on 15th August, 2024 hence the application was filed without undue delay.
7. On the second issue, counsel submitted that the Appellant/Applicant has filed the Memorandum of Appeal, which raises issues that the trial Court did not consider and further that the Respondent has not contested the application.
8. On the third issue, counsel submitted that the Appellant/Applicant has attached medical documentation to show his state of health being unsuitable to be held in custody. Counsel submitted that the Applicant/Appellant might lose financially if the stay order is not granted.
9. Counsel relied on the cases of Pius Mutua Mbuvi vs Lawrence Mutuku Katundu (Suing as the Legal Representative of the Estate of Jacib Katundu) Machakos High Court Civil Appeal No E267 of 2024, Suleiman vs Amboseli Resort Limited [2004] 2KLR 589, Attorney General vs Halal Meat Produces Limited Civil Application No Nairobi 270 of 2008, Kenya Shell Ltd vs Kibiru & Another, Mumuna vs Abuoga (1988) KLR 645 and Nduhiu Gitahi vs Warugongo (1988) KLR 621; IKAR 100 (1988-92) 2KAR 100 and urged the court to allow the application.



Respondents' Submissions

10. Counsel for the Respondents filed submissions dated 4th December, 2024 and identified the issue for determination as whether the Applicant has met the prerequisite for grant of stay of execution pending appeal and relied on Order 42 Rule 6 of the Civil Procedure Rules.
11. On substantial loss, counsel submitted that allowing the application will cause the Respondent substantial injustice as they will be kept from enjoying the fruits of his judgment and invariably for an indefinite period of time. Counsel relied on the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR.
12. Mr. Mongeri submitted that judgment was delivered on 27th June, 2022 and the applicant filed the instant application on 14th March, 2024 and it has taken the Applicant approximately one year nine (9) months between the date of delivery of judgment and the filing of this application. Counsel submitted that the Applicant has not offered any reasons for the delay in filing the application and relied on the case of Ndungu vs Mutua (Civil Appeal E047 of 2024) [2024] KEHC 6276 (KLR).
13. Counsel submitted that the Applicants have not offered and/or furnished security as envisaged under Order 42 Rule 6 of the Civil Procedure Rules and relied on the cases of King'ang'i & 2 others vs King'ang'i & 3 others (Environment and Land Appeal E012 of 2023) [2024] KEELC 3329 (KLR), Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co Advocates & 2 others [2014] eKLR and Gianfranco Maneenthi & another vs Africa Merchant Assurance Company Ltd [2019] eKLR and urged the court to dismiss the application with costs to the Respondents.

Analysis And Determination

14. The issue for determination is whether this court should grant an order of stay of execution of the ruling dated 31st July, 2024 in MC ELC/151/18 pending the hearing and determination of this appeal.
15. The principles to be applied in applications for stay of execution pending appeal are well settled as provided for under Order 42 Rule 6 of the Civil Procedure Rules and were restated in the case of Butt v Rent Restriction Tribunal [1979] what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:
 - 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.

16. In the case of *Loice Khachendi Onyango v Alex Inyangu & another* [2017] eKLR the court held as follows:

“The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether sufficient cause has been shown, the Court should be guided by the three pre-requisites provided under Order 42 Rule 6 of the Civil Procedure Rules. Firstly, the Application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicants 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 him has been given by the Applicant...”

17. On whether the application was filed without unreasonable delay, a perusal of the court record shows that the ruling that is subject to this appeal was delivered on 31st July 2024 while the application under consideration is dated 9th August, 2024. The Application was filed expeditiously without undue delay.

18. The second issue that the court ought to determine is whether the Appellant stands to suffer substantial loss unless the order of stay is granted. The Applicant has deponed in the supporting affidavit that if the Respondents are allowed to proceed with execution, his appeal shall be rendered nugatory, that he is a senior citizen and of poor health. He further stated that he stands to lose over Ksh 4,000,000/= and cited the case of *Samvir Trustees Ltd. –vs- Guardian Bank Ltd. (Nairobi (Milimani) HCCC No. 795 of 1997*, where the court held that:

“... For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss ...”

19. On the issue of security for the due performance of the decree, the Appellant has offered to deposit his title deed as security. In the case of *Arun C. Sharma -vs.- Ashana Raikundalia & Co. Advocates & Others* [2014] eKLR, the court held that the purpose of security is not to punish the judgment debtor but for the due performance of the decree which is binding on the Applicant.
20. Grant or refusal to grant orders of stay of execution are discretionary but the discretion must be exercised judiciously and in the interest of justice. The Applicant has met the ingredients of stay of execution by filing the application without undue delay, indicating the substantial loss that he will suffer if the order is not granted and an offer to deposit his title deed in court for the due performance of the decree.
21. The court therefore finds that in balancing the rights of the Applicant and the Respondents, it would be in the interest of justice to grant a stay of execution on condition that the Appellant fast- tracks the Appeal to be ready for hearing within 60 days, failure to which the order lapses.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 25TH DAY OF FEBRUARY 2025.

M. A. ODENY



JUDGE

