



Kaleli v Bomu Headlam (Sued as the administrator of the Estate of Headlam S Mnene (Deceased) and on his own behalf) & 5 others (Environment & Land Case 1 of 2023) [2025] KEELC 717 (KLR) (Environment and Land) (21 February 2025) (Ruling)

Neutral citation: [2025] KEELC 717 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE 1 OF 2023
EK WABWOTO, J
FEBRUARY 21, 2025**

BETWEEN

BENJAMIN KALELI PLAINTIFF

AND

**BOMU HEADLAM (SUED AS THE ADMINISTRATOR OF THE
ESTATE OF HEADLAM S MNENE (DECEASED) AND ON HIS OWN
BEHALF) 1ST DEFENDANT
ISAAC RENY S MRUTU 2ND DEFENDANT
REMES MRUTU 3RD DEFENDANT
NAOMI MRUTU 4TH DEFENDANT
SHABAN KITENGE MATIAKI 5TH DEFENDANT
THE ATTORNEY GENERAL 6TH DEFENDANT**

RULING

1. This court delivered its judgment on 15th November 2024 wherein the court entered judgment in favour of the Plaintiff as was prayed for in the plaint. The 1st to 5th Defendants/Applicants were aggrieved by the said judgment and subsequently filed a Notice of Appeal on 22nd November 2024.
2. The Applicants have now filed the application dated 3rd December 2024 seeking for stay of execution against the judgment of this court pending the hearing and determination of their appeal.
3. The application is premised on the grounds on its face. The said application was opposed by the Plaintiff/Respondent vide a Replying Affidavit sworn on 14th January 2025 by Benjamin Kaleli.



4. The application was canvassed by way of written submissions pursuant to the directions issued by this court. The Applicants filed written submissions dated 5th February 2025 while the Respondent filed written submissions dated 11th February 2025.
5. The Applicants submitted that they have filed an appeal being Civil Appeal E004 of 2025 which raises arguable grounds. It was also submitted that the application seeking stay has been filed timeously just 18 days after the court delivered its judgment. It was also submitted that they are willing to provide security of costs or comply with any other order that the court may deem fit to grant.
6. While placing reliance on the provisions of Order 42 Rule (6) of the Civil Procedure Rules, 2010 and the cases of *Machira & Company Advocates =Versus= East Africa Standard (No. 2) (2002) KLR 63*, *National Industrial Credit Bank Ltd =Versus= Aquinas Francis Wasike & Another (2006) eKLR* among others they urged the court to grant the prayers sought in their application.
7. The Respondent submitted that the Respondents have a polluted hand that sees to touch the pure fountains of justice and the court should not allow it.
8. It was further submitted that the Respondents have sought to alter the cause of action that was determined by this court. It was argued that despite ordering that the status quo of the property be maintained pending hearing and determination of this matter, the Defendants, led by the 1st Defendant, continued to cultivate the land every season and never obeyed court's orders. At the time of the survey, the Defendants had planted fresh bananas and mango trees in the said land and some were due for harvesting. The Defendants have been in possession of the land for a long period of time illegally and unlawfully. Since 2004, the Defendants have been illegally and unlawfully benefiting from the land with exclusion of the Plaintiff and as such it is the Plaintiff/Respondent who has suffered substantial loss. It was also submitted that the Respondent is more than 70 years old and has not taken possession of the suit property.
9. It was also argued that right to appeal does not alter this court's judgment and as it is, it is the Respondent who is the owner of the subject property and any continued use of the property means nothing but illegal use of the same.
10. It was submitted that the denial of the Respondent of his right to land for more than 2 years is a special circumstance the court should consider. Even though the right of appeal exists, staying the judgment delays justice to the Respondent which amount to denying justice and that the preferred appeal is a waste of courts time.
11. On the issue of security, it was submitted that the present land be valued to determine the amount of security to be provided should the court be inclined to grant the stay.
12. Having considered the application and written submissions filed by the parties, the only issue for determination is whether this court should proceed to grant the stay of execution pending the hearing and determination of the appeal.
13. The issue of whether to grant stay pending appeal is a matter of discretion. This discretion is fettered by four conditions. First, an applicant must demonstrate that there is just cause to grant stay. Second, the Applicant has to demonstrate that he or she will suffer substantial loss should stay not be granted. Third, there has to be security provided for the due performance of the decree as may ultimately be binding upon the Applicant. Fourth, the application has to be brought without unreasonable delay.
14. The principles are further outlined under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, which provides:



- (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 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.
15. A stay of execution under order 42 of the Civil Procedure Rules is an interim order to suspend the rights of one party who is aggrieved with the judgment of the trial; court or tribunal and wishes to exercise his or her right of appeal. Its main objective is to protect the substratum of the suit by delaying the execution process like attachment until the determination of the appeal. Being a discretionally remedy the applicant must demonstrate that he or she has approached the court of equity with clean hands as succinctly stated in the case of *Jajbhay v Cassim* 1939 AD 537-551 the court held on this maxim that: “All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice.”
16. The general principle of law is that the successful litigant in possession of a valid court judgement is entitled to the fruits of judgement unless there exist exceptional circumstances to deny him or her that right.
17. In considering an application for stay of execution I am guided by the case of *Butt vs Rent Restriction Tribunal Civil App No. NAI 6 of 1979* (Madan, Miller and Porter JJA) where the following guidelines were given:

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.

The general principal 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. 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. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”
18. The first limb of consideration is whether the application was filed without unreasonable delay. Judgment was delivered on 15th November, 2024 and the Applicants filed their notice of motion under certificate of urgency on 3rd December 2024. There was no delay in the filing of this instant application.



19. In the case of Kenya Women Microfinance Ltd v Martha Wangari Kamau [2020] eKLR the Court cited the case of Samvir Trustee Limited v Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997 which held that;

Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...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...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

20. From the cited decision, it is clear that for the Court to grant stay of execution, the Applicants needs to satisfy the Court that they will suffer substantial loss.
21. The Applicants should not only state that they are likely to suffer substantial loss but must also prove that they will suffer loss. The Applicants bears the burden of proving that by refusal to grant stay of execution they stand to suffer substantial loss.
22. The mere filing of a Notice of Appeal does not automatically warrant the issuance of orders of stay of execution of the decree. In the present situation, the Applicants have annexed a notice and draft memorandum of appeal which they intend to file.
23. The Applicants contended inter alia that the Court directed them move out from the suit property within a period of 30 days from the date of judgment failure of which eviction to issue. They submitted that they have a justifiable cause to prefer an appeal to have that issue determined.
24. Back to the issue on whether the Applicants will suffer substantial loss if stay of execution is not granted, the Applicants submitted that if the Respondent is allowed to execute the judgement then the appeal will be rendered nugatory. I note that if the Respondent were to execute the decree, it will



indeed render the appeal nugatory as they would have been removed from the suit property. This is a case for grant of stay of execution pending appeal.

25. The Applicants have submitted on their willingness to offer security for costs and even deposed that they are willing to comply with whatever terms of security that the court would direct.
26. In view of the foregoing and considering the need to balance the interests of all the parties herein, the following orders shall be issued;
 - i. An order staying the execution of the judgment and decree delivered on 15th November 2024 is hereby granted pending the hearing and determination of the Appeal on condition that the applicants do deposit a sum of Kshs. 500,000/= as security in a joint interest earning account of both Advocates within 30 days from today.
 - ii. Failure to comply with Order (i) above the stay so granted shall automatically lapse.
 - iii. Each party to bear own costs of this application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 21ST DAY OF FEBRUARY 2025.

E. K. WABWOTO

JUDGE

In the presence of:-

N/A for Plaintiff/Respondent.

Mr. Juma h/b for Mr. Chacha for 1st to 5th Defendants/Applicants.

Court Assistants: Mary Ngoira and Noah Chao.

