



REPUBLIC OF KENYA



KENYA LAW
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**Kiruthu v Mutea (Environment and Land Appeal E003 of 2024)
[2024] KEELC 5606 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5606 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E003 OF 2024**

CK NZILI, J

JULY 31, 2024

BETWEEN

MARY WAKARIMA KIRUTHU APPLICANT

AND

RAEL GATABIRA MUTEA RESPONDENT

RULING

1. The court is asked to stay the execution of a judgment or decree made by the lower court on 30.1.2024, pending the hearing and determination of this appeal. The grounds are set out on the face of the application and in a supporting affidavit by Mary Wakarima Kiruthu sworn on 13.6.2024. The applicant avers that if a stay is not granted, her portion measuring 5 by 7 feet comprising of a toilet and a shower room for the hotel she has been running, shall be demolished.
2. The application is opposed through a replying affidavit sworn by Rael Gatabira Mutea. It is averred that after the judgment was delivered, the applicant was granted a three-month stay of execution to organize and vacate or enter into a lease agreement with her over the suit land.
3. The respondent avers that in the affidavit dated 24.4.2013, the applicant confirmed that she had leased the suit premises to Stephen Munene M'Rintari and later to Meru Nissan Sacco. Again, the respondent avers that it was unimaginable that the said tenants would operate their respective businesses from a toilet. The respondent avers that after the judgment, the applicant came up with the idea of installing a toilet on the suit premises to disguise the same as a toilet/restroom.
4. Additionally, the respondent avers that after she bought Plot No. 9 from Samuel Kiome Rimbere and plot No. 10 was sold to the applicant, she later confirmed that the toilet on Plot No. 10 (a) was removed going by her witness statement at the lower court. The respondent averred that the applicant obtained a stay of execution at the lower court dated 2.2.2024, where she stated in paragraphs 6 & 7 of the



- affidavit that she was waiting for the matter to conclude, to convert the suit premises into a toilet, which application was dismissed on 11.6.2024.
5. Similarly, the respondent avers that the said ruling has not been appealed against or set aside and, therefore, it would be unfair and unjust to entertain the instant application, especially when the applicant has been collecting rent since 2013, from the tenants.
 6. A party seeking a stay of execution pending appeal has to surmount the following hurdles. First, the application has to be filed without unreasonable delay; second, the party must demonstrate substantial loss. Third, the party must offer security for the due realization of the decree should the appeal not succeed, and lastly, the party must show that it is in the interest of justice to grant the orders sought.
 7. The law has not set what amounts to minimum and maximum delay. It all depends on the circumstances of each case. See *Kenya Railways Corporation vs Harjot Singh Dhanjal* (2021) eKLR. In this application, the judgment appealed against was delivered on 30.1.2024. The memorandum of appeal was attached as an annexure marked MW 4. The date that it was filed on the e-portal is unclear. The application for stay was filed on 13.6.2024.
 8. A delay of five months has not been explained. The applicant has not explained why she waited for five months to apply for a stay. See *Andrew Kiplagat Chemaringo vs Paul K. Kibet* (2018) eKLR. Substantial loss is the cornerstone of the stay of execution. It is what ought to be stopped from happening; otherwise, the substratum of appeal would be rendered nugatory. It has to be proved through cogent and tangible evidence. It is not enough to state that the execution process is imminent. See *James Wangalwa vs Agnes Naliaka Cheseto* (2012) eKLR.
 9. The applicant avers that if execution occurs, her hotel business will become inhabitable for lack of a toilet area, as required under the *Public Health Act*. She says that she has enough evidence of ownership of the suit premises, including that of a physical planner. Evidential material has not been attached to substantiate the averments that the suit land is part and parcel of the hotel business owned by the applicant.
 10. The respondent has attacked the allegations on the basis that the suit premises are already rented out to third parties and that the applicant has been enjoying rental income since 2013, to the prejudice of the respondent. The respondent has also averred that the alleged toilet was removed and was only constructed if at all it is in existence after the judgment so as to frustrate the execution process.
 11. The only attempt to illustrate substantial loss is through photographs whose authenticity and probative value in the absence of details of when, where and who took them and for what premises is lacking. There was no certificate of electronic evidence attached to the said annexures. The purpose of a stay is to balance two competing rights of successful litigants who should not be deprived of their right to enjoy the fruits of their judgment without just cause and the one who is appealing to avoid the appeal being rendered nugatory. See *Kenya Shell Ltd vs Kobiur & another* (1986) KLR 2100.
 12. It is the applicant who should prove how, in the absence of a stay, the appeal would be rendered nugatory. See *NIC Ltd vs. Aquinas Francis Wasike & another* (2006) eKLR. The respondent has expressed fears that there was a similar application dismissed on 11.6.2024. The trial court had made a finding that the applicant was economical with the truth by stating that there was no tenant that the place was for public use contrary to the assertions by the respondent that there was a running business. Before this court, the applicant has changed her tune while seeking similar orders of stay. The applicant has offered a paltry sum of Kshs.10,000/= as security for the due realization of the decree should the appeal not be successful.



13. In written submissions dated 17.7.2024, the applicant has urged the court to be persuaded by [Cyrus Ngari Githua vs Sakayo Ongati and others](#) ELC E020 of 2020 (20204) KEELC 1687 KLR (20th March 2024) (Ruling) and [Karia vs Kesha](#) ELC E006 of 2023 (2024) KEELC 1184 (KLR) 6th March 2024 (ruling).
14. On the preliminary objection, the respondent has submitted that the application offends Section 7 of the [Civil Procedure Act](#) and is res judicata since the applicant had filed a similar application for a stay at the trial court, which was heard and determined. The said application was dismissed and instead of the applicant filing an appeal, she decided to file another application for stay of execution in this court. Submitting that the application as filed is not only res judicata but also an abuse of the court process. The appellant relied on [Uburu Highway Development Limited vs Central Bank of Kenya](#) (1996) eKLR.
15. The ingredients of a preliminary objection are well settled in the [Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd](#) (1969) EA 696 to mean: -

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which, if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the court, a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.
16. It is trite law that a preliminary objection raises pure points of law, which are argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised where such facts have to be ascertained from elsewhere or if the court has to exercise its discretion. It must stem from the pleadings and raise a pure point of law and not on disputed facts or be based on factual information as held in [Oraro vs Mbaja](#) (2005) 1KLR 141.
17. The grounds in the preliminary objection are that the court is divested of jurisdiction, and the application is res judicata. On jurisdiction, the respondent alleges that the applicant filed a similar application as Meru CMCELC No. E019 of 2017, which was heard and determined. Looking at the application dated 2.2.2024, the applicant was seeking a stay of execution of the judgment in light of the appeal herein.
18. Res judicata is anchored in Section 7 of the Civil Procedure Rules, which states:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”
19. Order 42 Rule 6(1) of the *Civil Procedure Rules* allows the applicant to file a second application for stay even if refused by the court appealed from. See [Peter Maina vs Francis Monyo Kimere](#) (2017) eKLR and [Girbux Singh Suiri and another vs Royal Credit Ltd](#) Civil Appeal NAI 281 of 1995.
20. Whereas the court agrees with the principles alluded to in the cited case law by the applicant, the facts in the cited law are different from the instant application. It is not in dispute that the applicant has been renting out the suit premises to third parties since 2013. She has not disclosed any other substantial loss or damage other than rental income, which, in any event, is quantifiable and may be refunded if the appeal eventually succeeds. In my view and given the circumstances, the applicant has failed to meet all the requisite conditions of stay. It is not in the interest of justice to grant the orders sought.



**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 31st DAY OF JULY, 2024**

In presence of

C.A Kananu/Mukami

Kauria for respondent

Kaume for the applicant

Applicant

HON. C K NZILI

JUDGE

