



**Mborothi & another v Kanyila (Environment and Land Appeal E036 of 2024) [2025] KEELC 183 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 183 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL E036 OF 2024  
LC KOMINGOI, J  
JANUARY 30, 2025**

**BETWEEN**

**JOSPHAT MURIITHI MBOROTHI ..... 1<sup>ST</sup> APPELLANT**

**DORCAS MUTHONI MAINA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SUSAN NGINA KANYILA ..... RESPONDENT**

**RULING**

1. This is the Notice of Motion dated 18<sup>th</sup> September 2024 brought (Pursuant to Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*, Laws of Kenya; Under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Laws of Kenya: Under Sections 16A, 18 and 19 of the *Environment and Land Court Act*, Laws of Kenya: And all other Enabling Provisions of the law)
2. It seeks Orders;
  1. Spent.
  2. Spent
  3. That this Honourable Court be pleased to order a stay of execution of the Judgment and/or consequent orders made on 22<sup>nd</sup> August, 2024 by Hon. P. Achieng in Chief Magistrate Environment and Land Case No. 2 of 2018, Ngong pending the hearing and determination of Appeal Case No.E036 of 2024.
  4. That in the alternative to prayer 2 and 3 above this Honourable Court does an order of Status Quo to be maintained and the Orders of 22<sup>nd</sup> August 2024 issued by Honourable Achieng in ELC 2 OF 2018 - Ngong pending determination of the appeal.
  5. That cost of this Application abide the outcome of the appeal.



3. The grounds are on the face of the application and are set out on paragraphs 1 to 20.
4. The Application is opposed.  
There is a Replying Affidavit sworn by the Susan Ngina Kanyila, the Respondent herein.
5. The Notice of Motion was canvassed by way of written submissions.

#### **The Appellants' Submissions.**

6. They are dated 29<sup>th</sup> October 2024. They raise one issue for determination;  
Whether the Appellants has met the threshold for stay of execution as encapsulated under Order 42 rule 6 of the Civil Procedure Rules.
7. Counsel submitted that he was relying on Sections 1A and 1B of the *Civil Procedure Act* and the case of RWW Vs. EKW (2019) eKLR.
8. He further submitted that the stay is to avert the Appellants from being evicted from the suit property pending the Appeal herein. He has put forward the cases of James Wangalwa & Another Vs. Agnes Naliaka Cheseto (2012) eKLR; Antoine Ndiaye Vs. African Virtual University (2015) eKLR .
9. It is stated that the Appellants will suffer substantial loss if the stay orders are not granted as they risk being evicted from the suit property.
10. Counsel further submitted that the Appellants are willing to furnish security. He has put forward the cases of Gianfranco Manenthi & Another Vs. Africa Merchant Assurance Co. Limited (2019) KEHC 2799 (KLR).
11. It is also submitted that the Application has been made without undue delay.  
He prays that the Application be allowed.

#### **The Respondent's Submissions.**

12. They are dated 11<sup>th</sup> November 2024.  
Counsel submitted that the Appellants/Applicants have not satisfied the conditions set out in Order 42 rule 6 of the Civil Procedure Rules. He has put forward the case of Tassam Logistics Ltd Vs. David Macharia & Another which cited with approval the case of James Wangalwa & Another Vs. Agnes Naliaka Cheseto (2012) eKLR.
13. Counsel further submitted that, granting stay of execution will further delay the Respondent from enjoying the fruits of her Judgement and which will be akin to justice being delayed hence being denied.
14. It is further submitted that the Respondent has had to suffer from the illegal occupation by the 2<sup>nd</sup> Appellant on the suit property for over eight (8) years hence the stay orders if granted will prejudice her.  
He has put forward the case of Kinyunjuri Muguta Vs. Wotuku Muguta (2018) eKLR.
15. Counsel also submitted that the Appellant's have failed to demonstrate substantial loss hence the orders of stay cannot be granted. He prays that the Application be disallowed.
16. I have considered the Notice of Motion, the affidavit in support, the response thereto, the written submissions and the authorities cited. The issues for determination are;



- i. Whether the Appellant's/Applicant's application meets the threshold for grant of orders of stay of execution pending appeal.
  - ii. Who should bear costs of this application?
17. In their submissions, counsel have substantiated the respective positions stated in the clients' respective affidavits. It is now appropriate to consider the facts that have emerged and the legal principles applicable.
18. Order 42 rule 6(1) (2) of the Civil Procedure Rule, 2010 provides that;
- “(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”.
19. The Supreme court in *Gatirau Peter Munya Vs. Dickson Mwenda Kithinji & 2 Others* (2014) eKLR held:
- “.....The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:
- i. the appeal or intended appeal is arguable and not frivolous; and that
  - ii. unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory”.
20. It is the Appellants'/Applicants' case that they stand the risk of being evicted from the suit plot if these orders are not granted. The 2<sup>nd</sup> Appellant states that she has made substantial developments on the suit plot.



The Court of Appeal in *Re Estate of Harish Chandra Hindocha (Deceased)* (2021) eKLR had the following to say:

“.....the position in law is that, an appeal would be rendered nugatory if the consequential effects for the failure to grant the relief sought would be either irreversible or highly prejudicial so as to render of no consequent the intended appeal or appeal if ultimately successful....on this prerequisite, we find that in the circumstances of the rival position as laid before us, declining the relief sought would pave the way for the respondent to execute the judgement and decree granted in his favour as deemed fit, which may result either in an irreversible consequence or one that would likely be reversed after considerable hardship or expense and would therefore be highly prejudicial to the applicant....”

21. I am satisfied that the Appellants’/Applicants’ have demonstrated substantial loss. I also rely on the case of *James Wangalwa & Another Vs. Agnes Naliaka Cheseto* (2012) eKLR .
22. I also noted that the Notice of Motion dated 18<sup>th</sup> September 2024 has been brought undue delay.
23. In conclusion I find that the Appellants’/Applicants’ application meets the threshold for grant of orders of stay of execution pending appeal.
24. Accordingly, I grant the following orders;
  - a. That pending the hearing and determination of the Appeal herein, an order of Stay of Execution of the Judgement delivered by Hon. P. Achieng (CM) on the 22<sup>nd</sup> August 2024, decree and all consequential orders are hereby set aside on Condition that the 2<sup>nd</sup> Appellant/Applicant do deposit Kshs.500,000/= in court as security for costs within forty five (45) days from the date of this ruling.  
  
In Default the orders of stay of execution shall automatically lapse.
  - b. That costs by this Application be borne by the 2<sup>nd</sup> Appellant/Applicant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 30<sup>TH</sup> JANUARY 2025.**

**L. KOMINGOI**

**JUDGE.**

In The Presence Of:

Mr. Haggai for Ms. Githogori for the Appellants’/Applicants’

N/A for the Respondent.

Court Assistant – Mutisya.

