



**Katam & 2 others v Maiyo & another (Environment & Land Case  
361 of 2013) [2024] KEELC 6285 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6285 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 361 OF 2013  
JM ONYANGO, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**ENOCK CHIRCHIR KATAM ..... 1<sup>ST</sup> PLAINTIFF  
MARK KIPYEGO KATAM ..... 2<sup>ND</sup> PLAINTIFF  
MUSA ARUSEI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**WILLIAM MAIYO ..... 1<sup>ST</sup> DEFENDANT  
PIUS CHERONO KENGO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of two applications. The first application is a Notice of Motion dated 20<sup>th</sup> June, 2024 filed by the 2<sup>nd</sup> Defendant/Applicant which seeks the following orders:
  - a. Spent
  - b. That this Honourable Court be pleased to order stay of execution of the judgment given on 29<sup>th</sup> May, 2024 pending hearing and determination of this Application inter partes.
  - c. That this Honourable Court be pleased to order stay of execution of the judgment given on 29<sup>th</sup> May, 2024 pending hearing and determination of the intended Appeal.
  - d. That cost of this application be provided for.
2. The Application is premised on the grounds set out on the face of it and is supported by an Affidavit of even date sworn by Pius Cheroni Kengo the 2<sup>nd</sup> Defendant/Applicant herein. He deponed that he was aggrieved by the entire Judgment of this court delivered on 29<sup>th</sup> May, 2024 and had filed a Notice of Appeal thereto. He deponed that he would suffer irreparable loss if the orders sought are not



granted, and further that the Appeal would also be rendered nugatory unless a stay was issued. The 2<sup>nd</sup> Defendant deponed that the Application was filed promptly with no unreasonable delay and indicated his willingness to abide by any orders as to security that the court may grant.

3. The Application was opposed vide a Replying Affidavit sworn on 17<sup>th</sup> July, 2024 by Enock Chirchir Katam, the 1<sup>st</sup> Plaintiff/Respondent who had authority to plead on behalf of the other Plaintiffs. He deponed that the court determined that the Plaintiffs are the lawful owners of the parcels of land known as Uasin Gishu/470, 471 and 472 (the suit properties herein) and Defendants were declared trespassers thereon, among other reliefs. He deponed that the 2<sup>nd</sup> Defendant sued in his own individual capacity and not as the legal representative of his father's estate even though he claimed encroachment into his father's parcel of land No. Uasin Gishu/Illula/86. He deponed that there is no proof that the 2<sup>nd</sup> Defendant has been in occupation of the suit property for 40 years as alleged in the Motion, the same was not raised in the suit and is false. Further, that the court-ordered surveyor confirmed that the 2<sup>nd</sup> Defendant had encroached onto the 1<sup>st</sup> Plaintiff's land, thus the averment that his appeal had high chances of success is inconceivable.
4. The 1<sup>st</sup> Plaintiff deponed that they ought to enjoy the fruits of the judgment yet the current application is aimed at watering down the same. He pointed out that the 2<sup>nd</sup> Defendant is a trespasser who is asking the court to allow him continue maintaining an illegality. He deponed that the suit has been pending in court for over 18 years and the Appeal would further add to that time. That the Plaintiffs had suffered irreparable damage as a result of the Defendant's illegal actions on the land. He called on the Court's protection citing his advanced age as well as that of his co-Plaintiffs. He deponed that the 2<sup>nd</sup> Defendant had not exhibited the Memorandum of Appeal to enable the court determine whether the grounds of the Appeal demonstrate sufficient cause to allow the instant application.
5. The 1<sup>st</sup> Plaintiff further deponed that the Court's jurisdiction to grant a stay is fettered by the requirements set out at Order 42 Rule 6 of the Civil Procedure Rules. That the 2<sup>nd</sup> Defendant had not demonstrated the kind of loss he would suffer nor provided security for the due performance of the decree. In addition, that the 2<sup>nd</sup> Defendant had not established how his intended appeal would be rendered nugatory if this application is disallowed. Further, that the fact of execution does not amount to substantial loss or irreparable harm. He asked that the Application be dismissed as no good or sufficient reason has been proffered in its favour. He urged that should the court decide to allow the Application, it should order the 2<sup>nd</sup> Defendant to provide sufficient security and proposed the sum of KShs.1,000,000/- in that regard.
6. The second Application is a Notice of Motion dated the 28<sup>th</sup> June, 2024 brought by the 1<sup>st</sup> Defendant/Applicant and seeks the following orders:
  - i. Spent
  - ii. This Honourable Court be pleased to grant a stay of execution of the decree/judgment emanating from the judgment delivered on 29<sup>th</sup> May, 2024 and nay subsequent orders pending hearing and determination of this application inter partes.
  - iii. This Honourable Court be pleased to grant stay of execution of the judgment delivered on 29<sup>th</sup> May, 2024 pending hearing and determination of the intended Appeal.
  - iv. Costs of the Application be in the cause.
7. It was also premised on the grounds set out on the face of it and supported by an Affidavit of even date sworn by William Maiyo, the 1<sup>st</sup> Defendant/Applicant herein. He registered dissatisfaction with the judgement of this court delivered on 24<sup>th</sup> May, 2024 and indicated that he had also lodged an Appeal



against the same. He deponed that if the stay is not granted, he would be exposed to eviction which will occasion him unnecessary costs, irreparable damage/loss and further render his appeal nugatory. He deponed that he has already applied for and paid for a certified copy of the proceedings. Further, that he and his family have been in occupation of the suit land for more than 35 years and stand to suffer irreparable loss if evicted. He indicated his willingness to abide by any conditions that the court may impose for the due performance of the decree pending hearing and determination of the intended Appeal. That the court had discretion to, and it is in the interest of justice to grant the orders sought.

8. The Application was once again opposed by a Replying Affidavit sworn on 17<sup>th</sup> July, 2024 by Enock Chirchir Katam, the 1<sup>st</sup> Plaintiff/Respondent, with the authority of his co-Plaintiffs. He deponed that they were in possession of the suit property until March, 2006 when they were evicted by the Defendants there with the help of hired goons and has continued to deprive them the enjoyment of their land. Aside from this averment, the Plaintiff reiterated the averments in his earlier Affidavit as summarised above asking that this application also be dismissed.

## Submissions

### 2<sup>nd</sup> Defendant's Submissions

9. When the matter came up on 22<sup>nd</sup> July, 2024 the court consolidated the two applications and directed that they be disposed of by way of written submissions. Counsel for the 2<sup>nd</sup> Defendant filed his submissions dated 24<sup>th</sup> July, 2024 submitting that the Application is governed by Order 42. He cited Rule 6(2) thereof which requires that the court must be satisfied substantial loss will occur if stay is not granted, that there must be provision of security for due performance of the decree and that the Application was made timeously. Counsel argued that the strength or otherwise of the Appeal is not one of the considerations at Order 42 Rule 6(2).
10. Counsel submitted that the Application was brought without undue delay only 19 days after delivery of the Judgment. Counsel submitted that substantial loss can be envisaged where the subject matter of appeal may be destroyed. Counsel appreciated that a successful litigant is entitled to enjoy the fruits if his judgment, but argued that the balance lies in preserving the subject of the Appeal as the enjoyment of the judgment should not obliterate the subject matter of the litigation. He submitted that in exercising its discretion, the court must take into account the various competing interests in the case. Counsel relied on *Reliance Bank v Norlake Investment Ltd (2002) and Kenya Shell v Kibiru (1986) KLR 410*.
11. Counsel also cited *George Kiprono Kili v Christopher Kili (Eldoret ELC No. 1001 of 2012)* where the court granted stay upon deposit of security for loss of use. Counsel submitted that the Defendants need to enjoy the use of the land pending hearing and determination of the Appeal. That to preserve the character of the land however, the Defendants should not make any additional structures thereto. On security, Counsel added that the Plaintiffs hold the titles to the suit lands and should continue to hold them until the Appeal is fully heard.

### 1<sup>st</sup> Defendant's Submissions

12. The 1<sup>st</sup> Defendant's submissions are dated 30<sup>th</sup> July, 2024 and Counsel also cited Order 42 Rule 6(2) of the [Civil Procedure Rules](#) on the conditions to be met in an application for stay pending appeal. Counsel argued that the Application was made one month after judgment, thus it was brought within reasonable time. Counsel submitted that the 1<sup>st</sup> Defendant will suffer substantial loss as he and his family stand to be evicted from land they have occupied since 1983, he relied on [John Kimeli Lelei v Christopher Kisoro Chuma \(2022\) eKLR](#).



13. Counsel submitted that the 1<sup>st</sup> Defendant had undertaken to deposit KShs.500,000/- in court or any other figure or condition that the court may impose. Counsel argued that KShs.1,000,000/- proposed by the Plaintiffs is on the higher side owing to the 1<sup>st</sup> Defendant's old age and lack of employment. He argued that the 1<sup>st</sup> Defendant had thus established the limbs for grant of the grant of stay and concluded that the Application is meritorious and ought to be allowed. Counsel relied on *Jilani Mongo Madzayo v John Nyagaka Osoro* (2022) eKLR, ELC No. 930 of 2012; *Lorna Jebiwott Kipagat v Rhoda Masit & 6 Others, RWW v EKW* (2019) eKLR, *Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* (2014) eKLR and *Eldoret Express Company Limited v Tawai Limited & Another* (2017) eKLR.

### Plaintiffs' Submissions

14. The Plaintiffs filed two sets of submissions with respect to the two applications, both dated 6<sup>th</sup> August, 2024. With respect to the 2<sup>nd</sup> Defendant's Application dated 20<sup>th</sup> June, 2024 Counsel cited Order 42 Rule 6 for the conditions for grant of stay pending Appeal, admitting that the Application was filed without delay. Counsel submitted that the 2<sup>nd</sup> Defendant had shown no proof of impending substantial loss if the stay order is not granted. Counsel argued that the 2<sup>nd</sup> Defendant had admitted in his Defence that the 1<sup>st</sup> Plaintiff was the owner of Uasin Gishu/Illula/108 which gave rise to the suit properties herein. Further, that the evidence revealed that the Defendants had encroached on the suit property, thus, the 1<sup>st</sup> Plaintiff rightly deserved judgment in his favour for there can be no wrong without redress.
15. Counsel also pointed out that although the 2<sup>nd</sup> Defendant had stated in his Affidavit that he would abide by any order as to costs, in his submissions, the 2<sup>nd</sup> Defendant's Advocate had submitted that on costs, the Plaintiffs should only be allowed to hold on to the title until the Appeal is heard. Counsel argued that this is an unreasonable statement, concluding that the 2<sup>nd</sup> Defendant had failed to show substantial loss and furnish security. He prayed that the Application be disallowed, and should the court opt to allow it instead allow it, then the court should order the 2<sup>nd</sup> Defendant to furnish KShs.2,000,000/- as security.
16. With regards to the 1<sup>st</sup> Defendant's Application dated 28<sup>th</sup> June, 2024. Counsel admitted that this Application was also filed timeously. Counsel cited the case of *Jeremiah Meeme & Another v Peter Muriungu Arimi* (2015) eKLR for the principle that a court needs to balance the Respondent's right to enjoy the fruits of his judgment and the Applicant's right of Appeal. Counsel submitted that the conditions for grant of stay pending appeal set out at Order 42 Rule 6 must be fulfilled in unison and not solitarily (*Peninah Nzisa Ngomo v Trans-National Bank Limited* (2012) eKLR).
17. On substantial loss, Counsel submitted that even the fact that execution has been levied and completed, does not constitute substantial loss and the Applicant must show that execution will create a state of affairs that will negatively affect the successful party in the appeal. He relied on *James Wangalwa & Another v Agnes Naliaka Cheseto* Misc. Appn. No. 42 of 2011 (2012) eKLR, *Selestica Limited v Gold Rock Development Ltd* (2015) eKLR, *Silverstain v Chesoni* (2002)1 KLR 867 and *Mukunga v Abuoga*. Counsel submitted that he who alleges must prove, yet the 1<sup>st</sup> Defendant had alleged substantial loss but completely failed to demonstrate the substantial loss he will suffer if the stay is not granted. Counsel reiterated that the Plaintiffs had been forcefully evicted from the suit lands in 2006 and the 1<sup>st</sup> Defendant had perjured in his allegation that he had occupied the suit property for 35 years. Counsel submitted that it is in fact the Plaintiffs who had suffered substantial loss without compensation, and will continue to do so unless they are allowed to enjoy the fruits of the judgment.



18. On the issue of security, Counsel submitted that the 1<sup>st</sup> Defendant had failed to satisfy the condition regarding security. Counsel argued that the court's hands are not tied on the issue of security and it has the discretion to fix the figure at more than KShs.500,000/-. Further that the contention that the Plaintiffs' proposal of KShs.1,000,000/- is on the higher side considering the 1<sup>st</sup> Defendant's age and unemployment is self-defeating. Counsel submitted, without prejudice to his earlier submissions, that if at all the stay would be granted, the Court order the 1<sup>st</sup> Defendant to furnish KShs.2,000,000/- as security. Counsel also submitted that the 1<sup>st</sup> Defendant had not demonstrated how his appeal would be rendered nugatory if the stay is not granted (*Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* (2013) eKLR).
19. Counsel further submitted that the 1<sup>st</sup> Defendant had not established that the Plaintiffs are not capable of compensating him if he were to succeed in his appeal, but that from the weight of evidence, the 1<sup>st</sup> Defendant's intended appeal has no chance of success. Counsel concluded that the 1<sup>st</sup> Defendant had only met one out of the three conditions for grant of stay thus he is undeserving of the orders sought. He added that the 1<sup>st</sup> Defendant would not be rendered homeless as he has another piece of land at Kapsamich area. He submitted that it is not in the interest of justice to grant the orders sought and asked the court to dismiss the Application.

### **Analysis and Determination**

20. Having considered the two Applications, the responses filed in opposition thereto, the submissions and the authorities relied upon, the main issue for determination is whether the court should grant the order of stay of execution.
21. It is a fundamental principle that every party aggrieved with a decision of a Court has a natural and undoubted right to seek the intervention of the Court of Appeal, which right should not be unnecessarily hindered. Thus the purpose of stay of execution, is to preserve the subject matter of the appeal to ensure this right is not hindered and so that the appeal, if successful, is not rendered nugatory.
22. At the same time, a successful party is prima facie entitled to the fruits of his judgement. The court is 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 enjoying the fruits of his judgment. Although the power of a court to grant stay of execution is discretionary, Order 42 Rule 6 of the *Civil Procedure Rules* govern the grant stay of execution pending appeal and provides as follows: -
  - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.”

23. Time without number, courts have discussed the issue of stay of execution and there are numerous authorities to guide this Court on the same. In *Kuko & another v Ali & another; Robinson (Interested Party)* (Civil Application E023 of 2023) [2024] KECA 305 (KLR) the Court of Appeal held that:

- “ 8. The principles applicable in the exercise of this courts unfettered discretion under Rule 5(2) (b) to grant an order of stay of proceedings are now well settled. Firstly, the applicant has to satisfy that it has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice, that it is an appeal that is not frivolous and or idle. Secondly, an applicant has to demonstrate that unless an order of stay of proceedings is granted the appeal or intended appeal would be rendered nugatory. See the case of Multimedia University & Another v. Professor Gitile N. Naituli [2014] eKLR.”

24. From the above-cited legislation and authority, it is clear that the conditions for grant of an order for stay of execution pending appeal are that:

- a. Establish that there is an arguable appeal
- b. The court is satisfied that substantial loss may result unless the order is made
- c. The application has been made without unreasonable delay; and
- d. Such security as the court orders for the due performance of such decree or order

25. The parties are in agreement that the application was made without undue delay. The judgment herein was delivered on 29<sup>th</sup> May, 2024. The first application herein was filed on 20<sup>th</sup> June, 2024 whereas the second one was filed on 28<sup>th</sup> June, 2024. Both applications were made under one month from the date of the judgment. There is no doubt that the two applications were made without delay. What remains is for the Defendants to establish that they have met the three remaining conditions set out above.

26. To start off, the Defendants have to establish that their respective appeals are arguable. Order 42 Rule 6(1) provides that “the Court Appealed from may for sufficient cause order stay of execution of such decree or order”. This is because an order of stay pending appeal has the effect of depriving a successful party the enjoyment of the fruits of his judgment. For this reason, the court in granting stay has to carry out a balancing act between the rights of the Plaintiffs who are the decree holders and the judgment debtors. The court ought to determine whether there is a sufficient cause for deriving the respondent his right of enjoying the judgment. An arguable appeal is sufficient cause for denying the decree holders their right to enjoy the fruits of their judgment until the intended Appeal is heard and finally determined. An arguable appeal has been defined as one that is deserving of the court’s consideration and not one that must necessarily succeed. See the case of *Kuko & another v Ali & another (supra)*, where the court of Appeal explained further that:-

- “ 20. It follows therefore that, to succeed in an application for a stay of execution, the applicants must show that their intended appeal is arguable. Once this has been established, the applicants must also demonstrate that if their appeal were to be successful, it would be rendered nugatory absent stay. This principle was



demonstrated in the case of *Trust Bank Limited & Another v Investech Bank Limited & 3 Others* [2000] eKLR.

21. In the case of *Dennis Mogambi Mang'are v Attorney General & 3 Others* [2012] eKLR, this Court held that:

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”

22. On whether or not the applicants have established a valid basis for an arguable appeal, the applicants merely stated that they have an arguable appeal with high chances of success. They did not expound on the issues they intend to raise in their appeal which they stated had already been filed. The respondents stated that the applicants were challenging a 30% share of the estate in question. To our minds, no single issue has been raised by the applicants in this application to show that they have an arguable appeal.”

27. Where the Defendants have raised arguable grounds of appeal, then this court would be inclined to grant stay. This would be aimed at preserving the subject matter of appeal to ensure that the intended appeal is not rendered nugatory. The 2<sup>nd</sup> Defendant’s counsel argued that the success of the appeal is not a condition for grant of stay under order 42 Rule 6. However, it goes without saying that only an appeal with high chances of success can be argued to be rendered nugatory if the order of stay is not granted. Both the Defendants argued that their appeals have high chances of success. But as correctly pointed out by the Plaintiffs, the Defendants did not exhibit their individual memoranda of appeal to assist the court in determining whether they raise any arguable points of law or fact or that they have high chances of success. As a result, they failed to establish that they had satisfied this condition.

28. Secondly, the Defendants also contended that they stand to suffer irreparable loss if the order of stay pending appeal is not granted because they will be exposed to eviction from the suit lands by the Plaintiffs. It is the Plaintiffs’ case however, that the Defendants have both not demonstrated the substantial loss they stand to suffer. I have perused both Defendants’ supporting affidavits and note that aside from the impending eviction, the Defendants have not demonstrated how they stand to suffer substantial loss if the orders sought herein are not granted. In *Samvir Trustee Limited v Guardian Bank Limited* (2007) eKLR, the court held that:-

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

29. In addition, it is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The Defendants ought to have shown how the execution itself shall irreparably affect them or will alter the status quo to his detriment therefore rendering the appeal nugatory. In *Tabro Transporters Ltd v Absalom Dova Lumbasi* [2012] eKLR the Court posited:

“(34) In law, the fact that the process of execution is likely to be put in motion, by itself, is not a ground for granting stay of execution. The Applicant must show that substantial loss will occur if the execution is not stayed. But what does substantial loss entail? This court in the case of Bungoma HC Misc.



Application No. 42 of 2011 James Wangalwa & Another v Agnes Naliaka  
Cheseto stated that:-

The applicant must establish other 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. This is what substantial loss would entail...”

30. Moreover, under section 26 of the [Land Registration Act](#), the Certificate of title is prima facie proof that the person indicated therein is the registered proprietor of the land. In the 2<sup>nd</sup> Defendant’s submissions, it was submitted that the Plaintiffs do hold titles to the suit lands. The fact that the Plaintiffs are the registered title holders is thus not contested, meaning that execution herein, being the eviction of the Defendants from the land will serve to put the registered owners in possession of the land. The allegation that they will be evicted from land that they have occupied for 35 to 40 years, as the case may be, is not sufficient ground to deny a registered owner use and enjoyment of his land.
31. In the instant application, the Defendants have not established any set of facts or circumstances that are so unique as to show that they will suffer substantial loss if the orders sought are not granted. Furthermore, there has been no allegation that the Plaintiffs intend to dispose of the land before the appeal is heard and determined, nor any proof produced in that regard. Even if that were the case, the Defendants did not claim that the Plaintiffs will not be financially able to compensate them or make good any losses they might suffer if their appeal succeeds. It is therefore my considered view that the Defendants have not demonstrated the substantial loss they stand to suffer that would warrant the grant of the order of stay.
32. The last condition to be met is the payment of security for the due performance of the decree. The purpose of security was explained in the case of [Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others](#) (2014) eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the [Civil Procedure Rules](#) acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”
33. The Court in [Focin Motorcycle Co. Limited v Ann Wambui Wangui & another](#) [2018] eKLR, stated that:-

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”
34. The issue of security is discretionary and it is upon the court to determine the amount and mode of payment of thereof. Although the 2<sup>nd</sup> Defendant expressed willingness to abide by any order as regards security for costs. It was even submitted on his behalf that one of the factors a court needs to consider is whether the applicant can provide security for the loss of use that will be suffered by the Respondent



while the appeal is pending determination. Counsel for the 2<sup>nd</sup> Defendant further submitted that his client should be allowed to remain in exclusive possession, use and occupation of the suit property for the duration of the Appeal.

35. And despite expressing willingness in his Affidavit that he would abide by any order as to costs, in his submissions, the 2<sup>nd</sup> Defendant's Advocate submitted that on costs, the Plaintiffs should only be allowed to hold on to the titles until the Appeal is heard. This directly contradicts the alleged willingness to abide by any order for security. If anything it is an indication that the 2<sup>nd</sup> Defendant is in fact not willing to furnish security, yet he wants to be allowed to continue occupying the suit property at the expense of the Plaintiffs who are the Decree Holders.
36. On the part of the 1<sup>st</sup> Defendant, it was submitted that the KShs.1,000,000/- security proposed by the Plaintiffs was on the higher side owing to the fact that he was old and unemployed, instead, he undertook to deposit KShs.500,000/-. The said amount, in my view is not sufficient to cover the loss of use of the property for the time the Plaintiffs will be kept away from the land that this court already determined belonged to them. This court cannot lose sight of the fact that the Plaintiffs have already been denied possession, use and occupation of the suit property since the year 2006, when this matter was first filed in the High Court, a period of 18 years to date.
37. For the avoidance of doubt, it is the court that has discretion to determine the amount of security to be furnished. However, the fact that the 1<sup>st</sup> Defendant would place a limit with regards to the amount of security he wishes to pay calls into doubt his ability to comply with any order as to security that the court may make. Ideally, the expression of willingness to abide by an order for costs is meant to show good faith on the part of the Applicant. And although this court is not convinced that the 1<sup>st</sup> Defendant's alleged willingness to do so is in fact made in good faith, the court notes however that the same has been made.
38. Nevertheless, it is trite law that to succeed in an application for stay pending appeal, one must satisfy all the conditions for grant of stay. The court in *Trust Bank Limited v Ajay Shah & 3 Others* (2012) eKLR explained that: -

“The conditions set out in Order 42 Rule 6(2) (a) and (b) are cumulative. All the three must be satisfied before a stay can be granted. The Applicant only satisfied one condition and failed to satisfy the others. For the foregoing reasons, I find that the Plaintiff's Notice of Motion dated 24<sup>th</sup> April, 2012 it without merit.”

39. Although the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their Applications without undue delay and claimed to be willing to comply with any order on security, the fact remains that they failed to establish that there is an arguable appeal or that substantial loss may result unless the order for stay is made. In the end therefore, it is clear that neither the 1<sup>st</sup> nor the 2<sup>nd</sup> Defendant have not satisfied all the conditions for the grant of the order of stay pending appeal. For this reason, they have not demonstrated that they are entitled to the order sought in the two applications dated 20<sup>th</sup> June, 2024 and 28<sup>th</sup> June, 2024. Both Applications are therefore dismissed with costs to the Plaintiffs.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2024.**

.....  
**J.M ONYANGO**  
**JUDGE**

**In the presence of;**



1. Dr. Chebii for the 2<sup>nd</sup> Defendant and holding brief for Mr. Kimani for the 1<sup>st</sup> Defendant
2. Mr. R.M Wafula for the Plaintiff

Court Assistant: Brian

