



**Moses v Mathiu & 4 others (Environment and Land Appeal
E015 of 2025) [2025] KEELC 3292 (KLR) (28 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 3292 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E015 OF 2025**

**JO MBOYA, J
MARCH 28, 2025**

BETWEEN

PURITY KARAMBU MOSES APPELLANT

AND

PATRICK MUNGATHIA MATHIU 1ST RESPONDENT

TIMES U SACCO LTD 2ND RESPONDENT

VIEWLINE AUCTIONEERS 3RD RESPONDENT

THE LAND REGISTRAR, TIGANIA WEST 4TH RESPONDENT

THE HON ATTORNEY GENERAL 5TH RESPONDENT

RULING

1. Vide Notice of Motion Application dated 11th march 2025; brought pursuant to the provisions of sections 1A, 3A and 63 (e) and the *Civil Procedure Act*, Order 22 Rule 34, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and Article 29 of *the constitution* of Kenya 2010; the Applicant has sought the following reliefs;
 - i. This Application is certified urgent and the same be heard exparte in the first instance and on priority basis thereafter.
 - ii. This Honourable court be pleased to issue an order of stay of execution of the order contained in the ruling of the Hon. E.M Ayuka, P.M in Tigania MCELC No. E116 of 2022, dated and delivered on 13.2.2025 committing the applicant/appellant to civil jail and all other consequential orders pending the hearing and determination of this application inter-partes.
 - iii. This Honourable court be pleased to issue an order of stay of execution of the order contained in the ruling of the Hon. E.M Ayuka P.M in Tigania MCELC No. E116 of 2022 dated and



delivered on 13.2.2025 committing the applicant/appellant to civil jail pending the hearing and determination of this application.

- iv. Pending the hearing and determination of the appeal filed herein, this honourable court be pleased to issue an order of stay of execution of the order of the Honourable Ezra Masira Ayuka, P.M committing the applicant/appellant to civil jail as contained in the ruling dated and delivered on 13.2.2025 in Tigania MCELC No. E116 of 2022.
 - v. Costs of this Application be provided for.
2. The instant application is premised on the various grounds which have been highlighted in the body thereof. Furthermore, the application is supported by the supporting affidavit sworn by the applicant on even date and a supplementary affidavit sworn on 26th March 2025; and to which the deponent has annexed a copy of the order granting leave to appeal.
 3. The 2nd and 3rd Respondents filed a Replying affidavit sworn by one Catherine Ndumba Nkanata and which was sworn on 20th March 2025. Suffice it to state that the deponent has annexed a copy of the judgment that was rendered by the court on the 28th February 2024 and wherein the court entered judgment against the applicant herein.
 4. The 1st, 4th and 5th Respondents did not file any response to the application. In any event, learned counsel for the 1st, 4th and 5th Respondents intimated to the court that same shall not be opposing the application.
 5. The application came up for hearing on the 27th of March 2025, whereupon the advocates for the parties covenanted to canvass and dispose of the application by way of oral submissions. To this end, the court issued directions and the application was thereafter canvassed on even date.
 6. Learned counsel for the applicants adopted the grounds contained in the body of the application and thereafter reiterated the averments in the supporting affidavit. Furthermore, learned counsel for the applicant ventured forward and highlighted three [3] salient issues, namely; that the applicant has established and proven sufficient cause; that the applicant shall be disposed to suffer substantial loss unless the orders sought are granted and that the applicant is ready and willing to provide security as the court may deem reasonable and expedient.
 7. Regarding the first issue, learned counsel for the applicant has submitted that the 2nd and 3rd respondents took out a notice to show cause against the applicant and which notice to show cause was heard and disposed of by the trial court. In addition, it was submitted that the trial court proceeded to and ordered that the applicant does liquidate the decretal sum by way of monthly instalments of Kshs.50,000/= Only; and in default the applicant to stand committed to civil jail in execution of the judgment and decree of the court.
 8. Nevertheless, learned counsel for the applicant has submitted that the applicant is an E.C.D teacher and thus same does not have the financial capacity to raise the sum of Kshs.50,000/= monthly, either in the manner ordered or otherwise. In any event, counsel submitted that the learned trial magistrate did not consider and address his mind to the requisite conditions that must be established before an order for committal can issue and or be granted. To this end, learned counsel cited and referenced the provisions of section 38 of the *Civil Procedure Act*.
 9. Arising from the foregoing, it was contended that the applicant herein felt aggrieved and has since filed an appeal before this court. For coherence, learned counsel referenced the memorandum of appeal dated 11th March 2025 and which counsel contended raises arguable grounds worthy of being investigated by the Court on appeal.



10. In the premises, learned counsel for the applicant invited the court to find and hold that the applicant has established and demonstrated the existence of sufficient cause and or basis in accordance with the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules 2010.
11. Secondly, learned counsel for the applicant has submitted that the committal orders are likely to take effect upon default by the applicant to pay the amounts that were ordered and or decreed by the court. It was contended that in the event of the orders taking effect, the applicant would stand committed to civil jail and thus same shall be deprived of her freedom and liberty.
12. Moreover, it was submitted that that the loss of freedom and the consequential liberty, shall occasion irreversible, irreparable and substantial loss to the applicant, which cannot be compensated in monetary terms.
13. Thirdly, learned counsel for the applicant has submitted that the applicant is ready and willing to offer and provide security for the due performance of the decree that may ultimately arise. In this regard, Learned Counsel referenced paragraph 14 of the supporting affidavit which highlights the applicant's readiness and willingness to provide security, as the court may deem appropriate.
14. Based on the foregoing, learned counsel for the applicant has submitted that the applicant has therefore satisfied the requisite conditions under the provisions of Order 42 Rule 6[2] of the Civil Procedure Rules and same is therefore entitled to the discretion of the court.
15. The 2nd and 3rd Respondents adopted and relied on the contents of the replying affidavit sworn on the 20th of March 2025, together with the annexure thereto and thereafter highlighted two [2] salient issues for consideration by the court. The issues highlighted by the respondents are namely; the applicant has not demonstrated the existence of sufficient cause to warrant the grant of stay; and that the applicant is merely intent on abusing the due process of the court.
16. Regarding the first issue, namely; the applicant has not established sufficient cause to warrant the grant of stay of execution, learned counsel has submitted that the appeal which has been filed does not relate to and or challenge the judgment of the court which found the applicant liable in favour of the 2nd respondent. Furthermore, it was submitted that the decretal sum currently stands in the sum of Kshs.1,047,006.40/= only and which amount continues to accrue interest at court rates.
17. To the extent that no appeal has been mounted against the judgment, learned counsel for the 2nd and 3rd Respondents has submitted that the judgment and decree shall remain in existence and same must be satisfied in accordance with the law. Further and in any event, it was submitted that the judgment under reference is a lawful judgment and the 2nd Respondent is entitled to benefit from the fruits attendant to the same judgment.
18. In the absence of an appeal against the judgment of the court, learned counsel for the 1st and 2nd Respondents has submitted that the applicant herein is merely skirting around the issue and hence it cannot be stated that the applicant has established sufficient cause.
19. Secondly, learned counsel for the respondent has submitted that committal to civil jail is one of the lawful means and or mechanisms provided for under the law. In this regard, it was posited that the committal of the applicant to civil jail is therefore a lawful process sanctioned under the law.
20. Finally, it was submitted that impecuniosity is not a basis to warrant the grant of an order of stay. In this regard, the court was called upon to decline the application by the applicant. Nevertheless, learned counsel added that in the event that the court is inclined to grant the orders of stay, then



the court should decree payment of half the decretal sum by the applicant pending the hearing and determination of the appeal.

21. Having reviewed the application and the response thereto and upon taking into account the oral submissions ventilated on behalf of the respective parties, I come to the conclusion that the determination of this application turns on three [3] key issues, namely; whether the applicant has established and demonstrated sufficient cause; whether the applicant is likely to suffer substantial loss unless the order sought are granted; and what security if any, ought to be granted.
22. Regarding the question of whether the applicant has established and demonstrated sufficient cause, it is imperative to state that the applicant herein has since filed a memorandum of appeal dated 11th March 2025 and wherein same [applicant] has raised various issues of law including the contention that the learned trial magistrate did not correctly appraise or appreciate the statutory conditions to be taken into account prior to and before an order for committal to civil jail can issue.
23. Additionally, the applicant has also raised the ground underpinned by the provisions of Article 29 of *the Constitution* 2010 pertaining to and concerning human dignity. To this end, the applicant shall seek to persuade the court that the committal to civil jail in execution of the decree is contrary to and violates the provisions of Article 29 of *the Constitution*.
24. My reading of the grounds contained in the body of the memorandum of appeal drives me to the conclusion that the grounds enumerated therein espouse and exhibit prima facie arguable grounds. For good measure, an arguable ground of appeal must only raise and canvass a bona-fide triable issue. Suffice it to state that it is immaterial whether that bona-fide triable issue shall succeed or otherwise.
25. In any event, the determination of whether the issue raised shall be successful or otherwise is the preserve of the court which shall hear the appeal. [see Stanley Kangethe Kinyanjui V Tony Ketter & 5 others [2013] eKLR.
26. On the basis of the memorandum of appeal which has since been filed and which I have found espouses bona fide and arguable grounds, I am persuaded that the applicant herein has established sufficient cause in accordance with the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules 2010.
27. For ease of appreciation, the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules [supra] states as hereunder;
 - (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.[Emphasis supplied].
28. Next is the issue of whether the applicant shall suffer substantial loss unless the order[s] sought are granted. To start with, substantial loss is the cornerstone or the key pillar upon which the grant of an order of stay of execution pending appeal is predicated. In this regard, there is no gainsaying that any applicant desirous to partake of an order of stay of execution pending appeal must therefore demonstrate the likelihood of substantial loss arising.



29. In the case of Kenya Shell Ltd vs Benjamin Karuga Kibiru and another (1986) eKLR, the court of appeal [per Platt, Ag. J.A] stated and observed as hereunder;

It is usually a good rule to see if order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.

30. The question of substantial loss and the role that same plays while engaging with an application for stay of execution pending appeal was also highlighted in the case of James Wangalwa vs Agnes Naliaka Cheseto (2012) eKLR, where the learned judge stated as hereunder;

11. No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

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, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

31. With the foregoing in mind, I am now disposed to revert to the instant matter and to discern whether the applicant has demonstrated that same is likely to suffer substantial loss unless the orders sought are granted. Instructively, the applicant herein was ordered to liquidate the decretal sum vide monthly installment of Kshs.50,000/= and in default same was to stand committed to civil jail in execution of the decree.
32. The applicant contends that same is not able to raise or generate the monies that were decreed by the trial court and hence same is now exposed to committal to civil jail. In this regard, the applicant posits that same is on the verge of being committed to civil jail and that there is the imminent likelihood of loss of freedom and liberty.
33. Moreover, the applicant has also contended that in the event of such committal, the loss of freedom and liberty shall not be reversible and or redeemable. To this end, the applicant contends that the loss to be suffered in the event of committal shall indeed be substantial.
34. Other than the foregoing, the applicant has also contended that in the event of committal to civil jail, same shall also be disposed to lose her job, which is stated to be her only source of livelihood/living. In this respect, it has equally been posited that the loss of employment will occasion substantial loss.



35. Having taken into account the averments contained in the supporting affidavit and having evaluated the submissions on record, I come to the conclusion that the applicant shall indeed be exposed to suffer substantial loss, including loss of freedom and liberty. Furthermore, the loss of employment will also subject the applicant to substantial loss, taking into account the high rate of unemployment obtaining in the country.
36. Next is the issue of security for the due performance of the decree. It is imperative to underscore that where a court of law is convinced that an order of stay of execution pending the hearing and determination of an appeal ought to issue, the court is obligated to decree provision of such security for the due performance of the decree that may ultimately arise and or ensue.
37. In respect of the instant matter, it is worthy to recall and reiterate that the decree of the lower court has neither been challenged nor appealed against. Besides, it is common ground that the applicant was found liable to and in favour of the 2nd respondent. Furthermore, it is conceded that the decretal sum currently stands in the sum of Kshs.1,047,006.40/= only and that same continues to accrue interest at court rates [14% p.a].
38. Whereas the applicant is pursuing her undoubted rights of appeal, it is not lost on this court that the 2nd respondent has a judgment and a valid decree issued by a court of competent jurisdiction. In any event, it has not been contested that the decree remains owing, due and payable.
39. In the circumstances, it is imperative to underscore that whereas the court is minded to grant stay so as to allow the applicant to canvass and ventilate her appeal in pursuit of her rights of access to justice [Article 48 of *the Constitution*], the court must also endeavor to protect the rights of the decree holder. In this regard, it behooves the court to undertake a delicate balance between the rights of the applicant to pursue her appeal on one hand and the rights of the 2nd respondent to appropriate the judgment which has already accrued.
40. Moreover, provision of security is intended to safeguard the rights of the decree holder and to ensure that upon the determination of the appeal, the decree holder is not exposed to inconvenience, prejudice and grave injustice.
41. The importance of provision of security for the due performance of the decree was highlighted in the case of *Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014 eKLR, where the court stated thus;

I presume that since the Applicants are saying they have filed an appeal, the security they are proposing is pursuant to Order 42 Rule 6 of the Civil Procedure Rules. 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. The alternative security being offered presents several problems. The first one security is owned by another person. This is a civil suit where the Applicants are judgment debtors. But, the Applicants seem to have borrowed from the criminal procedures where a person stands surety for the attendance of another in court. Civil process is quite different because, in a 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. When one imagines, if it becomes necessary, the steps required to be taken for such security being offered to be realized by the decree-holder, it becomes absolutely clear that mere affidavit by the owner does not convert the said property into any



legally binding security for the due performance of such decree or order as may ultimately be binding on the Applicant. I, therefore, hold that the security offered is not suitable for purposes of Order 42 rule 6 of the CPR. The Court should always remember that both the Applicants and the Respondent have rights. The Applicant has a right to his appeal and the prospects that it shall not be reduced to pious aspiration or a barren result if they pay out the decretal sum to a person who may not make a refund. The Respondent, on the other hand, has a right to the fruits of its judgment which should not be taken away; and where the right is postponed, it can only be upon adequate security for the due performance of such decree or order as may ultimately be binding on the Applicant.

There is no legally binding assignment of the proprietary rights in the proposed security which the court may consider adequate to secure the due performance of such decree or order as may ultimately be binding on the Applicant.

42. My understanding of the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules that underpin provision of security and the reasoning of the learned judge in the decision [supra], is to the effect that the security to be provided must be tangible, real and capable of satisfying the decree that may ultimately arise and or ensue. For good measure, the security must not be just anything. In addition, security must be calculated in a manner that balances the rights of both the applicants and the respondents in equal measure.
43. Bearing the foregoing in mind, I am minded to and do hereby decree that the applicant herein shall provide security by paying the sum of Kshs.500,000/= to the 2nd respondent within a period of 60 days from the date hereof, taking into account that the judgment which was rendered by the subordinate court has neither been appealed against nor reviewed.
44. In arriving at the quantum to be provided on account of security for the due performance of the decree, I have taken into account and been guided by the decision in the case of *Gitahi & another vs Warugongo (1988) eKLR* where the Court of Appeal stated as hereunder;

It will be observed that the facts in *Rosengren's* case are very similar to those in this case, namely that a stay of execution pending appeal is the substance in both cases. In both judgments has been given. There is therefore no ground upon which to distinguish *Rosengren's* case. The aim is to make sure, in an even-handed manner, that the appeal will not be prejudiced and that the decretal sum is available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates.

Indeed in this case, there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it.

Final Disposition:

45. For the reasons which have been highlighted in the body of the ruling, I come to the conclusion that the applicant has established and satisfied the requisite ingredients to warrant of the order sought.
46. In this regard, the application is indeed is meritorious and same is hereby allowed on the following terms:
 - i. There be and is hereby granted an order of stay of execution of the decree and consequential orders, in particular the orders emanating from the ruling rendered on the 13th of February 2025 pending the hearing and determination of the Appeal.



- ii. The Applicant shall provide security for the due performance of the decree that may ultimately arise by paying unto the 2nd Respondent the sum of Kshs.500,000/= only within 60 days from the date hereof.
- iii. In default to pay the monies in terms of clause [ii] hereof, the order of stay shall lapse automatically and without further reference to the court.
- iv. In the event of such default, the 2nd Respondent shall be at liberty to proceed with execution and in this regard the applicant shall stand committed to civil jail in accordance with the ruling rendered on the 13th February 2025.
- v. The Applicant shall pay the costs of the application to the 2nd Respondent only.
- vi. The cost of the Application are hereby assessed at Kshs.12,000/= only.

47. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 28TH DAY OF MARCH 2025.

OGUTTU MBOYA

JUDGE.

In the presence of

Mutuma- Court Assistant.

Mr. Akwalu for the Appellant/ Applicant.

Mr. Mutuma for the 2nd & 3rd Respondents.

Miss Wairimu holding brief for Miss Miranda for the 4th & 5th Respondents.

