



Co-operative Bank Housing Co-operative Society v Ruchugo (Miscellaneous Civil Application E612 of 2024) [2025] KEHC 11568 (KLR) (Civ) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11568 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E612 OF 2024**

JN MULWA, J

JULY 31, 2025

BETWEEN

CO-OPERATIVE BANK HOUSING CO-OPERATIVE SOCIETY APPLICANT

AND

JULIAH KAGURI RUCHUGO RESPONDENT

RULING

1. Co-operative Bank Housing Co-operative Society (hereafter the Applicant) by its motion dated 21/06/2024 filed against Julia Kaguri Ruchugo (hereafter the Respondent) and brought pursuant to Section 3A of the Civil Procedure Act (CPA) and Order 42 Rule 6 of the Civil Procedure Rules (CPR) seeks orders, inter alia: -
 - a. Spent
 - b. Spent.
 - c. That pending hearing and determination of the Applicant's intended appeal there be stay of execution of the judgment delivered on 30/05/2024, the decree and certificate of costs issued on 05/06/2024 by the Co-operative Tribunal (hereafter the Tribunal) in Nairobi CTC No E715 of 2022.
 - d. That the costs of the motion be provided for.
2. The motion is supported by an affidavit sworn by John Kimutai Ngeno dated 21/06/2024 whose gist is that the Tribunal on 30/05/2024 rendered judgment in Nairobi CTC No E715 of 2022, which was not read in full during delivery. That being aggrieved and dissatisfied by the said judgment and resultant decree of the Tribunal the Applicant intends to appeal to this honorable Court.



3. He goes on to depose that the Applicant has made unfruitful efforts to obtain a certified copy of the judgment, meanwhile it has since been informed that the judgment is awaiting the Chairperson's signature, thus the delay was occasioned by the Tribunal not convening in Nairobi. That there is need to allow the motion to enable the Applicant to get a certified copy of the judgment as it is necessary to acquaint itself on its substance thereafter make an informed decision on what grounds to raise on appeal.
4. The Applicant expresses apprehension that the Respondent will proceed with execution, which is likely to prejudice the Applicant and render the intended appeal nugatory. That there has been no delay in filing the motion whereas the Applicant is ready and willing to abide by any conditions as to security which the Court may deem fit to impose. In conclusion, he states that it is in the interest of justice that the motion is allowed.
5. Julia Kaguri Ruchugo, opposes the motion by way of a replying affidavit dated 08/07/2024 on grounds that the Applicant has yet to file an appeal within the stipulated thirty (30) day period after the Tribunal's judgment; That there being no appeal filed before this Court, no orders of stay of execution of the decision of Tribunal pending appeal can be issued.
6. Further the Respondent deposes that the Applicant has not demonstrated to have an arguable appeal with a chance of success adding that the motion is intended to deny her the fruits of successful litigation therefore the Court ought to dismiss the Applicant's motion with costs.

Issues for determination

- a. Whether an order of stay of execution of the judgment of the Tribunal delivered on 30/05/2024 should be granted pending hearing and determination of the Applicant's intended appeal?
- b. Who ought to bear the costs of the motion?

Whether an order of stay of execution of the judgment of the Tribunal delivered on 30/05/2024 should be granted pending hearing and determination of the Applicants intended appeal?

7. In presenting the instant motion, the Applicant has relied on Section 3A of the [CPA](#) which specifically reserves "the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court", which was judiciously addressed by the Court of Appeal in [Rose Njoki King'au & another v Shaba Trustees Limited & another](#) [2018] eKLR and requires no restatement. Alongside the above, the Applicant has equally cited the provision of Order 42 Rule 6 of the [CPR](#) which 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 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 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”.
8. It is settled that in order to succeed in an application for stay of execution pending appeal, an applicant must demonstrate that substantial loss may result unless the order of stay is issued; that the motion seeking stay pending appeal has been brought without undue delay; and must give security for the due performance of any decree or order that may ultimately be found to be binding on the applicant. Meanwhile, the cornerstone consideration in a motion to stay execution is whether the Applicant has demonstrated the likelihood of suffering substantial loss if stay is denied.
9. However, it is evident on a plain reading of Order 42 Rule 6(1) of the CPR, that an order to stay execution pending hearing and determination of an appeal presupposes the existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this Court’s appellate jurisdiction under Order 42 Rule 6 (1) of the CPR. The Respondent in opposition to the motion has exceptionally taken issue with the fact that there being no appeal this Court cannot exercise its discretion judicially on the premise of an intended appeal. The Applicant offered no retort to the said contestation.
10. Before this Court is a miscellaneous application filed by the Applicant on 21/06/2024 seeking stay of execution of the decision of the Tribunal delivered on 30/05/2024 pending hearing and determination of an intended appeal. No appeal has been filed or evinced to have been filed before this Court as at writing of this ruling. That said, this Court has observed time without number that the invocation of the jurisdiction of this Court under Order 42 Rule 6 (1) or 6 (6) of the CPR must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the CPR). Thus, where a party specifically seeks stay of execution pending hearing and determination of an appeal not yet filed, the Court may be acting in vacuum by considering the Applicant’s prayer for stay of execution pending a non-existent appeal or an appeal that may never be filed.
11. The Court of Appeal in Abubaker Mohamed Al-Amin v Firdaus Siwa Somo [2018] KECA 202 (KLR) while addressing itself in part on the issue laconically observed:-
- 30.However, the learned Judge was correct in holding that in the absence of the appeal there was nothing upon which the stay orders sought under Order 42 of the Civil Procedure Rules could be anchored. Towards that end, we concur and adopt the observations made by Meoli, J. in Rosalindi Wanjiku Macharia v James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased)) [2017] eKLR
 - 31. The prayer for stay of execution could only be canvassed after the appeal had been filed pursuant to the leave granted by the court.
12. Earlier, the Court of Appeal in the case of Equity Bank Limited v West Link Mbo Limited [2013] KECA 320 (KLR) while commenting on Rule 5 (2) (b) of the Court of Appeal Rules, whose wording is substantially similar to Order 42 Rule 6 (1) of the CPR, and or Order 42 Rule 6 (6) of the CPR, left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also Balozi Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga [2012] eKLR).



13. Order 42 Rule 1 of the CPR provides that an appeal to the High Court shall be in the form of a memorandum of appeal. In this case, as rightly argued by the Respondent, an appeal is yet to be filed and therefore, there is no basis upon which this Court could exercise its appellate jurisdiction under the said provision in a miscellaneous matter.
14. If the Applicant desired to seek an order to stay execution, it ought to have first filed the memorandum of appeal in a proper appeal and the relevant application.
15. The Court is not equally convinced by the Applicant's argument that failure to acquaint itself with the substance of the impugned judgment may hinder it from filing an appeal within time. I gathered from the Applicant's affidavit material that it was in attendance when the impugned judgment was delivered and being aggrieved with final orders an intended appeal has been preferred. Even, if the Applicant was not acquainted with the full context of the judgment, it could have filed a memorandum of appeal for purposes of compliance with Section 79G of the CPA and latter avail itself to the provision of Order 42 Rule 3 of the CPR, on amendment of the memorandum of appeal, upon receipt of a certified copy of the impugned judgment.
16. It may be more prudent for a party who also seeks stay of execution pending appeal or intended appeal to have filed the memorandum of appeal in advance, upon which the stay orders may be anchored.
17. In the circumstances, the prayer seeking stay of execution of the judgment of the Tribunal delivered on 30/05/2024 pending hearing and determination of the Applicant's intended appeal has no legal anchor and cannot be entertained in the motion before the court.
18. Consequently, the Applicant's motion dated 21/6/2024 is struck out with costs for being incompetent.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF JULY, 2025

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JANET MULWA.

JUDGE

