



REPUBLIC OF KENYA



KENYA LAW
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Mwangi & another v Tasha Enterprises (K) Limited & another (Environment and Land Appeal E008 of 2025) [2025] KEELC 5257 (KLR) (9 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5257 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E008 OF 2025**

JM ONYANGO, J

JULY 9, 2025

BETWEEN

PAUL MACHARIA MWANGI 1ST APPELLANT

FRESHIA WANJIKU MUIBU 2ND APPELLANT

AND

TASHA ENTERPRISES (K) LIMITED 1ST RESPONDENT

ANFIELD AUCTIONEERS 2ND RESPONDENT

RULING

1. The Appellants/Applicants approached this court *vide* a Notice of Motion application dated 3rd February 2025 seeking the following Orders:
 1. Spent.
 2. That the honourable court be pleased to grant an order for stay of execution pending the hearing and determination of this appeal.
 3. That the honourable court does issue any other reliefs it deems just and expedient.
 4. That the costs of this application be provided for.
2. The Application is anchored upon the affidavit of Paul Mwangi Macharia (the 1st Appellant/Applicant), sworn on the same date as the motion. He avers that in 2016, he and the 2nd Applicant (his wife) sought a loan of Kshs 10,000,000 from the 1st Respondent, and in turn, a third-party charge was created against the title deed for land parcel number Ruiru/Ruiru West Block xxx (the suit property) registered under the 2nd Applicant's name. However, he states that the loan was not disbursed as agreed.



3. He depones that in April 2023, the 1st Respondent demanded that they pay the loan of Kshs 6,084,044.12, even though the said amount was never disbursed to them. He explains that as a result, they filed a suit against the Respondents seeking inter alia a permanent injunction against the Respondents, restraining them from interfering with the suit property in any manner. He adds that the trial court dismissed their suit vide the impugned Judgment dated 16th January 2025.
4. He states that the trial court granted them a thirty-day stay of execution, which was set to lapse on the 16th February 2025, allowing the Respondents to proceed with the intended auction of the suit property thereafter. He adds that they are at risk of losing their matrimonial home, which is erected on the suit property, if an order of stay pending appeal is not granted.
5. The application is resisted by the 1st Respondent through a replying affidavit sworn by its director Rajesh Patel on 13th March 2025. He contends that stay orders cannot issue in respect of negative orders; therefore, this application ought to be dismissed with costs. He further contends that the court's jurisdiction to grant an order for stay is fettered by three conditions, namely, establishment of substantial loss, the furnishing of security and that the application must be made without unreasonable delay.
6. He depones that the Applicants have not demonstrated any substantial loss they stand to suffer if the order for stay is not granted and should the 1st Respondent proceed with execution of the judgement entered in its favour. He adds that the Applicants have failed to demonstrate any substantial loss that they stand to suffer which would not be sufficiently compensated by an award of damages should their appeal be successful. He faults the Applicants for failing to present any empirical or documentary evidence to support such contention that the Respondents will proceed with the auction of the suit property if the stay of execution order is not granted.
7. It is his position that the Applicant's claim that the suit property is at the risk of being auctioned does not in itself amount to substantial loss because execution is a lawful process. He adds that in proceeding with the execution process, the Respondent is simply exercising its right, which has been bestowed upon it by the law, and such exercise cannot be stayed unless good reasons are given by the Applicants. He avers that the Applicant has failed to meet the test for grant of stay of execution by failing to provide any form of security for the due performance of the Judgment and decree of the trial court.
8. He asserts that the Applicants' argument that the suit property is their matrimonial home is misplaced. He avers that even if the suit property is their matrimonial home, that fact does not shield the Applicants from the realization of the security. He adds that the Applicants, having offered the suit property as security and having charged the same, made it a commercial property capable of being sold upon default in payment of the loan.
9. In conclusion, he states that it is in the interest of justice and principles of equity that this application be dismissed. His position is that no party will be prejudiced if this application is dismissed.
10. The application is opposed by the 2nd Respondent through a Replying Affidavit sworn by Martin Mwaniki t/a Anfield Auctioneers (the 2nd Respondent) on 26th March 2025. He reiterates the averments made by the 1st Respondent's director in his replying affidavit dated 13th March 2025.
11. The parties were directed to canvass the application by way of written submissions, and they all complied accordingly. The Applicants filed submissions dated 27th March 2025, while the Respondents filed submissions dated 26th March 2025.



Issues for Determination.

12. Having examined the application, the replying affidavits in response to the application and the parties' respective submissions, the only issue that emerges for consideration is whether a stay of execution of judgment/ decree should be granted.
13. The court possesses the discretion to grant a stay of execution of a decree pending appeal under Order 42 Rule 6 of the *Civil Procedure Rules*, but this discretion must be exercised with careful consideration and fairness.
14. Order 42 Rule 6 of the *Civil Procedure Rules*, stipulates 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 Applicants 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 Applicants”.
15. The fulfilment of the above-mentioned conditions is not merely procedural but essential to balancing the interests of both parties. The court must diligently assess the evidence of substantial loss and the timeliness of the application, alongside the provision of security, to ensure that the stay is granted only in deserving cases.
16. The first consideration is to determine whether the Applicants stand to suffer substantial loss in case the stay is not granted. It has been submitted by the Applicants that they stand the risk of losing the suit property, which is their matrimonial home. The Applicants have relied on the decision in the case of *Kukyama Mbuvi v Mutisya Kisangi*, Court of Appeal at Nairobi, Civil Application No. NAI 234 of 1995 to further submit that an application for stay pending appeal is aimed at preserving the subject matter of litigation to avoid a situation where a successful appellant only gets a paper judgment. They have contended that if the suit property is auctioned, the appeal will be rendered nugatory.
17. In response, the Respondents have argued that the Applicants' contention that the suit property is their matrimonial home is misplaced. They have submitted that even if the suit property is a matrimonial home, that fact does not shield the Applicants from the realization of security which they offered and



caused to be charged. They have relied on the decision in the case of *John Nabashon Mwangi v Kenya Finance Bank Limited* [2015] eKLR, where the court held that:

“ Any property, whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured. But where the right of mortgagee’s statutory power of sale has lawfully accrued, it will not be stopped or postponed because the mortgaged property is a matrimonial home.

18. Although the above decision is persuasive, I am of the view that each case should be determined on its merits. In the instant case is it not in doubt that if the suit property is auctioned and transferred to a third party and later on it turns out that the Applicants are successful in their appeal, no amount of damages would be adequate to compensate them for the loss. I find that the Applicants have established the first requirement under Order 42 Rule 6.
19. On whether the application was filed within reasonable time, Judgment at the trial court was delivered on 16th January 2025 essentially dismissing the Applicant’s suit against the Respondents. The effect of the said Judgment was that the Respondents could proceed with the realization of the security (the suit property). However, the court granted the Applicants a 30-day stay of execution which was to lapse on 15th February 2025. This application was filed before the lapse of the said 30 days. This court finds that the application was brought within reasonable time.
20. On the issue of security, the Respondents have pointed out that the Applicants have not offered the same. However, this court takes note that the Applicants have submitted that they are willing to obey any order that may be issued as a condition for granting the stay order. This court is of the opinion that in order for it to grant a stay of execution order to the Applicants, they must provide security for the due performance of the decree in the event this appeal fails.
21. Consequently, the application dated 3rd February 2025 is allowed in the following terms:
 - i. That stay of execution of the judgment and decree in *Ruiru-MCELC No. E227 of 2023* is hereby granted pending hearing and determination of this Appeal.
 - ii. The Appellants shall deposit Kshs 3,000,000 as security in this court within 30 days; failure to which this order shall automatically lapse.
 - iii. That the cost of this application shall be in the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 9TH DAY OF JULY 2025.

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J. M ONYANGO

JUDGE

In the presence of:

Ms Njeri for Mr Mugalo for the Appellant

Ms Owuor for the Respondent

Court Assistant: Hinga

