



REPUBLIC OF KENYA



Mukusya & another v Kaunda alias Teresia Kanini Kaunda (Environment and Land Appeal E076 of 2024) [2025] KEELC 6013 (KLR) (16 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6013 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E076 OF 2024**

**AY KOROSS, J
SEPTEMBER 16, 2025**

BETWEEN

JONATHAN KAUNDA KYENGO MUKUSYA 1ST APPELLANT

DANIEL MUTINDA MATHEKA 2ND APPELLANT

AND

**RODAH MUNINI KAUNDA ALIAS TERESIA KANINI
KAUNDA RESPONDENT**

RULING

1. Being dissatisfied with a judgment delivered by the lower court on 13/12/2024 in CM ELC Civil Case No. E086 of 2023, the appellants contemporaneously with a memorandum of appeal lodged the present motion that is the subject of this ruling dated 17/12/2024 expressed to have been moved within the provisions of Article 259 (c) & (d) of *the Constitution*, Sections 1A, 1B, 3A and 66 of the *Civil Procedure Act* and Orders 42 Rule 6 and 51 Rule 1 of the Civil Procedure Rules.
2. Another motion was filed by the respondent on 4/03/2025, reserved for ruling today, but events have overtaken the same, as this ruling is being rendered today. Reverting to the motion dated 17/12/2024, the appellants have sought the following reliefs from this court: -
 - a. Spent.
 - b. Spent.
 - c. That there be a stay of execution of the judgment and decree delivered on 13/12/2024 in Machakos Chief Magistrates ELC Civil Case No. E086 of 2023 pending the hearing of the intended appeal.
 - d. Costs of the motion be in the cause.



3. The motion is supported by the grounds therein as well as the affidavit sworn on 17/12/2024 by the 2nd appellant. In a nutshell, they stated: a) they were aggrieved by the lower court's decision that rendered judgment in the respondent's favour and have lodged an appeal before this court, b) the execution process has commenced, a notice to evict has been served, and a draft decree has been filed; and
4. C) if execution proceeds, they will suffer irreparable harm as the 2nd appellant will be denied access to the suit property and lose his only source of income, d) it is necessary to preserve the suit property, and finally, e) they were willing to furnish security, the motion is filed without unreasonable delay, and they have an arguable appeal with high chances of success.
5. The motion is opposed vide replying affidavit sworn by the respondent on 8/02/2025. In short, she asserted: a) the impugned judgment is positive as it rendered judgment in her favour whereby the court found the purported unilateral sale of the matrimonial property to the 2nd appellant without her consent was irregular, unlawful and a nullity and it vacated the sale and ordered the 2nd appellant to leave the suit property or be evicted in lieu of voluntary vacation; and
6. B) the legal threshold to warrant the grant of stay pending appeal has not been met as the appellants have not demonstrated any substantial loss that will be suffered if the stay is not granted, c) security should be paid in the following manner: Ksh. 12,400,000/- being the value of the suit property and monthly rental payments from 2/12/2022, calculated at Kshs. 100,000/- per month and lastly, d) the court should not exercise its discretion in the appellants' favour.
7. In rejoinder, the 2nd appellant filed a further affidavit, which he deposed on 23/01/2025 and, unfortunately, took a cue from the respondent and travelled beyond the substance of the matter before this court and dwelt on the merits of the appeal, which this court finds premature. The only relevant ground therein is that he ran a hardware store on the suit property and did not earn Kshs. 100,000/- from his business.
8. The court directed the parties to canvass the motion by filing written submissions. In compliance, the law firm of Ms. M M Kimuli & Co. Advocates for the respondent filed its dated 4/03/2025. Unfortunately, the appellants filed their submissions out of time and did not seek an extension of time. On that basis, their submissions dated 19/03/2025 are hereby expunged from the record.
9. This court has carefully considered the motion, its grounds, affidavits, and articulate submissions by the respondent, and the singular issue for determination is whether the appellants have met the threshold to warrant a stay of execution pending appeal.
10. As highlighted above, the instant motion has been brought within the auspices of Order 42 Rule 6 of the Civil Procedure Rules and the long-standing principles therein are that an applicant in this case, the appellants, have to demonstrate that the motion is brought without undue delay, demonstrate to the court's satisfaction that substantial loss may result to them unless stay of execution is ordered and award such security as the court orders for the due performance of such decree or order as may ultimately be binding on them has been given by them.
11. Furthermore, since this is the court to which an appeal has been preferred, the other additional principles it has to consider are that the applicants have demonstrated that the appeal or intended appeal is arguable; and that, unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. When entertaining motions such as this, this court exercises judicious discretion and, in doing so, it is guided by the aforementioned tests.
12. Concerning the criterion of delay, it is undeniable that the appellant filed the motion promptly, as it was filed on 17/12/2025, which was just 4 days from when the impugned judgment was rendered.



13. As regards the respective criteria of substantial loss and the appeal being rendered nugatory, the long cited Ugandan decision of *Tropical Commodities Suppliers Ltd and Others vs. International Credit Bank Limited (in liquidation)* (2004) E.A. LR 331 outlined what amounts to substantial loss in paragraph 16 onwards of its decision by stating: -

“...Hence, the question needs to be asked as to what in law constitutes “substantial loss”. In my view, substantial loss need not be determined by a mathematical formula whose computation yields any particular amount. Indeed, *Jowitt’s Dictionary of English Law* (2nd Edn.) vol. 2, p.1713, carefully defines the analogous concept of “substantial damages” as: “damages which represent actual loss, whether great or small, as opposed to nominal damages. “[emphasis added]

17. In similar vein, *Black’s Law Dictionary* (6th Edn.) at p.1428, defines the word “substantial” as, inter alia:

“of real worth and importance, not seeming or imaginary or illusive - *Seglem v Skelly Oil Co.*, 145 Kan. 216 P.2d 553, 554. Something worthwhile as distinguished from something without value or merely nominal — *In Re Krause’s Estate*, 173 Wash. 1, 21 P. 2d 268.”

The conclusion is inescapable. Substantial loss does not represent any particular amount or size. It cannot be quantified by any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without value or a loss that is merely nominal.”

14. Relating to the criterion of appeal being rendered nugatory, the decision of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] KECA 378 (KLR) weighed in on this test and stated as follows:-

x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

15. In this case, the 2nd appellant stated that he would suffer substantial loss as he ran a hardware shop on the suit property, and if the stay of execution is not granted, he would suffer loss. The respondent has not disputed the fact that the 2nd appellant operates from plot no. 133 Masii Market (suit property), and that was his only source of income, but he maintained that the 2nd appellant could operate his business from elsewhere.

16. Having considered this counterargument, it is not lost to this court that relocation of business is a costly affair and may lead to a distortion of business operations, thus causing substantial loss. This court is persuaded that the 2nd appellant has satisfied this court that he will stand to suffer substantial loss if the stay orders are not granted and the eviction is carried out. It also finds that the appeal may also be rendered nugatory.

17. Turning to the criterion of security, the appellants merely asserted they were willing to pay security, while the respondent has submitted that, since no proposal has been proffered, the court should find that this threshold has not been met.

18. Having considered this test, this court finds that the mere fact that the appellants have not presented a particular sum does not divest this court of jurisdiction to exercise its discretion in considering the amount of security that the appellants shall tender. The respondent has proposed a sum to this court;



nevertheless, it is this court's humble view that the proposed sum is excessive and destroys the key essence of security for costs as outlined in *Tropical Commodities Suppliers Ltd (Supra)* at paragraph 21 in the following manner: -

“Accordingly, in the instant case, for the application to succeed the Applicants must be willing to give security for costs — rather than security for the entire decretal amount as pressed by the Respondent's learned counsel. In my view that requirement is eminently more just. Insistence on a policy or practice that mandates security for the entire decretal amount is likely to stifle possible appeals.”

19. Closer home, the decision of *RWW v EKW [2019] KEHC 6523 (KLR)*, explicated the spirit of stay pending appeal thus: -

“8. The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

20. Consequently, and being guided by these 2 decisions, it is the considered view of this court that the proposed sum of kshs. 12, 400,000/- is extremely high, and the payment of monthly rental sums is not tenable in the circumstances of this appeal, where the 2nd appellant is contending to be a purchaser for value and not a tenant. Having considered the circumstances of this case, this court hereby exercises its discretion and finds the sum of kshs. 300,000/= is sufficient for security for costs.

21. On the last criterion of arguability of the appeal and as affirmed in the decision of *APA Homes (K) Limited v Omar & another [2025] KECA 1035 (KLR)*, the principle thereat is that an arguable appeal is not one which must necessarily be successful but one worthy of consideration by the court. Having considered the grounds of appeal, which question the impeachment of title and are compounded by the fact that the 2nd appellant contends he was an innocent purchaser for value and that the suit property was not a matrimonial property, this court finds the appellants have presented an arguable appeal that is not frivolous.

22. The upshot is that this court finds merit in the notice of motion dated 17/12/2024 and allows it. Costs shall abide by the outcome of the appeal. In the end, this court hereby issues the following disposal orders: -

- a. That stay of the execution of the judgment rendered on 13/12/2024 in *Machakos CM ELC Civil Case No. E086 of 2023* is granted subject to the appellants depositing Kshs. 300,000/= in an interest-earning joint account in the names of the advocates for the parties on record within 45 days from the date hereof, in default of which the respondent shall be at liberty to execute the decree of the trial court.
- b. That the appellants shall file and serve the record of appeal within 45 days from the date hereof.
- c. That the appeal is hereby admitted and the lower court record is to be called for.
- d. That costs shall abide by the outcome of the appeal.
- e. That a mention date shall be issued before the deputy registrar.



Orders accordingly.

DELIVERED AND DATED AT MACHAKOS THIS 16TH DAY OF SEPTEMBER, 2025.

HON. A. Y. KOROSS

JUDGE

16.09.2025

Ruling delivered virtually through Microsoft Teams video Conferencing Platform

In the presence of;

M/s Muimi holding brief for Mr Atancha for the applicant.

Mr Morris Kimuli for the respondent.

Ms Kanja- Court Assistant.

