



REPUBLIC OF KENYA



**KENYA LAW**  
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**Schmidt & 2 others v Kerubo & another (Environment and Land Appeal E011 of 2025) [2025] KEELC 6174 (KLR) (24 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6174 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT AND LAND APPEAL E011 OF 2025**  
**SM KIBUNJA, J**  
**SEPTEMBER 24, 2025**

**BETWEEN**

**DOLOPHINE OJEMA SCHMIDT** ..... **1<sup>ST</sup> APPELLANT**  
**PAMELA OGINGA** ..... **2<sup>ND</sup> APPELLANT**  
**NELLY WAMBUI** ..... **3<sup>RD</sup> APPELLANT**

**AND**

**ROSEMARY KERUBO** ..... **1<sup>ST</sup> RESPONDENT**  
**EZEKIEL M. KIMINZA T/A AUTOLAND AUCTIONEERS ..** **2<sup>ND</sup> RESPONDENT**

**RULING**

**[Notice of Motion Dated 18th March 2025]**

1. The notice of motion dated the 18<sup>th</sup> March 2025 was filed by the appellants and seeks for the following prayers:
  1. “Spent.
  2. Spent.
  3. That pending the hearing and determination of Mombasa Environment and Land Appeal No. E011 of 2025; *Dolophine Ojema Schmidt & 2 Others v Rosemary Kerubo & Another*, there be a stay of execution of the judgment delivered on 3rd February 2025 and any resultant decree.
  4. That costs of this application be in the appeal.”

The application is based on the seven (7) grounds on its face and supported by the affidavit of Dolophine Ojema Schmidt, the 1st appellant, sworn on 18<sup>th</sup> March 2025, inter alia deposing that their suit was dismissed with costs and the respondents’ counterclaim allowed through



the judgement delivered on 3<sup>rd</sup> February 2025, by Hon. J.B Kalo, Chief Magistrate; that the 1<sup>st</sup> appellant is aggrieved by the said judgement and filed a memorandum of appeal dated 3<sup>rd</sup> March 2025; that the 1<sup>st</sup> appellant is apprehensive that the 1st respondent will proceed with execution before the appeal is heard, unless the application is allowed; that should execution occur, she will suffer substantial loss as she will be evicted and will not be able to receive rental income; that she is doubtful that the 1st respondent would be able to refund the decretal sum if it is paid to her, in the event the appeal succeeds; that she is ready to give security.

2. The respondents opposes the application through the replying affidavit of Rosemary Kerubo, the 1st respondent, sworn on 28th March 2025 inter alia deposing that the appellants' appeal has a limited chance of success since the appellants were not able to explain how they acquired title or possession of plot 2021/I/MN; that she is the successful litigant and deserves the order of eviction; that she continues to suffer irreparable injury as she is not able to receive rent from the tenants and is not able to develop the suit property.
3. The court heard counsel for the parties on the 2<sup>nd</sup> April 2025 and directed submissions be filed and exchanged within the timelines given. The learned counsel for the appellants and respondents thereafter filed their submissions dated the 16th May 2025 and 21st May 2025 respectively, which the court has considered.
4. The issues for the court's determinations are as follows:
  - a. Whether the appellants have met the threshold for stay of execution order to be issued at this interlocutory stage.
  - b. Who bears the costs of the suit?
5. After careful consideration of the grounds on the notice of motion, the affidavit evidence, rival submissions by the counsel, the court has come to the following determinations:
  - a. The relief of stay of execution pending appeal has been discussed ad nauseam across all the hierarchies of superior courts here and elsewhere. In the case of *Congress Rental South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenya Ltd & Another (Garnishee)* (2019) eKLR the Court stated that:

“The purpose of an application for stay pending Appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising his right of Appeal are safeguarded. Therefore, this should be clearly demonstrated, that there is indeed reason to preserve the subject matter upon which failure to do that would render the Appeal nugatory. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

Order 42 Rule 6 (2) of the *Civil Procedure Rules* provides the conditions to be considered by the court as follows:

- 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.”



On the conditions above, the 1st respondent has admitted that the application was filed without inordinate delay and there is no need to give it any further consideration.

- b. The counsel for the appellants has submitted that the decree is partially a money and a non-monetary decree. On the monetary decree, counsel argued that the 1st appellant is not sure of the respondents means or assets of refunding the decretal amount if paid or executed before the appeal is determined. On the non-monetary part of the decree, counsel submitted that being dispossessed without being given an opportunity to prosecute the appeal first would amount to substantial loss. In counter arguments, counsel for the respondents submitted that there is no evidence of imminent eviction demonstrated by the appellants. In considering the rival submissions on this issue, it is important to note that there is no requirement in law that judgment debtors in land matters ought to produce evidence of imminent eviction before stay of execution is granted. Further, execution of a decree is a process of law with several steps, and it is possible the respondents have not reached the last stage of execution, which is issuing eviction notices. The fact that no notices of eviction have been issued does not mean an applicant cannot move the court for stay of execution orders. Having given due considerations to the facts presented so far, the court is satisfied that the appellants will likely suffer substantial loss if the stay of execution prayer pending hearing and determination of the appeal is not granted.
  - c. On security, counsel for the appellants argued that the suit property is enough security, and further that it is the court's discretion to order the same. Counsel for the respondent doubted the appellant's ability to offer security, as they have no known attachable assets. The court admits that security is a discretion of this court and will craft appropriate order on security that is fair and just for both sides.
  - d. Under section 27 of the *Civil Procedure Act*, chapter 21 of Laws of Kenya, costs follow the events unless where for good cause the court directs otherwise. In this instance, I find it fair and just for costs to abide the outcome of the appeal.
6. From the foregoing conclusions on the notice of motion dated the 18<sup>th</sup> March 2025, the court finds merit in the application and orders as follows:
- a. That pending the hearing and determination of the appeal, there be a stay of execution of the judgment delivered on 3rd February 2025, and any resultant decree thereof, on condition the appellants deposits Kshs.500,000/- as security for the due performance of the decree, in an interest earning bank account in the joint names of the parties' counsel, or with the court in thirty (30) days from today.
  - b. That should the appellants fail to comply with the condition in (a) above, the stay order to lapse automatically.
  - c. The costs in the application to abide the outcome of the appeal.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 24<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:

Appellants : M/s Murage



Respondents : Mr Omwenga

Shitemi-court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

