

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND COURT AT KAKAMEGA**  
**ELC APPEAL NO. E022 OF 2022**

**DR. IDD W. JUMA.....APPELLANT/APPLICANT**

**VERSUS**

**MICHAEL PATRICK INGANGA & 4 OTHERS...**  
**RESPONDENTS**

**AND**

**MUSTAFA A. JUMA & 6 OTHERS.....INTERESTED**  
**PARTIES**

**RULING**

**Introduction**

1. Before court is a notice of motion dated 28<sup>th</sup> November 2024 filed by the respondents seeking stay of execution of the judgment delivered herein on 20<sup>th</sup> June 2024 pending the hearing and determination of his intended appeal to the Court of Appeal.

2. The application is anchored on the affidavit sworn by the 1<sup>st</sup> respondent dated 28<sup>th</sup> November 2024. The applicants' case is that they filed Notice of appeal against the judgment entered against them in this matter on 20<sup>th</sup> June 2024. That they applied for certified proceedings vide a letter dated 24<sup>th</sup> September 2024. That they have a *prima facie* arguable appeal with high chances of success. That the respondent is threatening to evict them from the suit property before their appeal is heard and that they stand to suffer extreme prejudice if "the application is not heard and determined expeditiously at the Court of Appeal". That they are ready to comply with any terms that may be given by court. They annexed the notice of appeal and letter dated 24<sup>th</sup> September 2024 seeking supply of proceedings.

3. The application was opposed. Idd W. Juma, the appellant, filed a replying affidavit dated 19<sup>th</sup> March 2025. He stated that the application was an abuse of the court process, an afterthought and meant to delay justice. That judgment was delivered way back on 20<sup>th</sup> June 2024 and that the applicants never sought stay of execution when

the appellant filed a claim for eviction in Mumias ELC Case No. 114 of 2024.

4. That as the annexed notice of appeal is not endorsed by the Deputy Registrar, it is not clear when it was filed. That the notice was served on the appellant's counsel on 17<sup>th</sup> January 2025 through email which is out of the prescribed period and contrary to Rule 79 (1) of the Court of Appeal Rules. That he served the eviction proceedings on 11<sup>th</sup> December 2024 while the respondents served their notice of appeal on 17<sup>th</sup> January 2025, that the application is intended to stay the eviction proceedings which have already commenced.
5. That the applicants have not given reasons why they have not lodged the appeal yet. That it is now over 9 months since the judgment was delivered. That as of now, no appeal against the judgment is pending.
6. The application was disposed by way of written submissions. Both parties filed submissions in support of their respective positions; both of which this court has duly considered.

**Analysis and determination.**

7. The court has carefully considered the application, response thereto and parties' rival submissions. The sole issue for the court's determination is whether the applicants have met the threshold for grant of orders of stay of execution pending appeal to the Court of Appeal.
8. Order 42 Rule 6 of the Civil Procedure Rules provides for the jurisdiction of the court to grant orders of stay of execution pending appeal as follows;

**Stay in case of appeal [Order 42, rule 6]**

- (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.**

**(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.**

9. Essentially, imminent execution cannot in itself be a basis for grant of stay of execution pending appeal, as execution is a lawful process that follows grant of an order, judgment or decree by a court. Therefore, for an applicant to succeed in seeking stay pending appeal, they must demonstrate that they stand to suffer substantial loss if stay is not granted; that they have sought for stay without unreasonable delay and show willingness to

provide security for the due performance of the decree that may be binding on them.

10. The Court of Appeal enunciated principles to be considered in determining whether to grant or refuse stay of execution pending appeal in **Butt vs Rent Restriction Tribunal [1979]KLR** as follows:

**“a.The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.**

**b.Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.**

**c.Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**

**d.Finally, the Court in exercising its discretion whether to grant or refuse an application for**

**stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.**

11. In **Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation) [2004] 2 EA 331** the court discussed the element of substantial loss as follows;

**“Substantial loss does not represent 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.”**

12. In the instant matter, the applicants stated that they have an arguable appeal and that the appellant has threatened to execute against them. Having considered the reasons for the application, the applicant stated that they stand to suffer extreme prejudice if execution proceeds. The nature of that extreme prejudice was

neither elaborated nor demonstrated and I do not find any material placed before me that demonstrates imminent substantial loss on the part of the applicants. No party has any entitlement to an order of stay merely because they face imminent eviction. As to whether the intended appeal raised arguable grounds, this court having heard the matter on merit and pronounced itself on the parties' rights conclusively, has nothing to comment in regard to the arguability of the appeal. That would be a matter for the Court of Appeal and not this court.

13. The judgement herein was delivered on 20<sup>th</sup> June 2024, while the instant application was filed on 27<sup>th</sup> November 2024. That is five months after delivery of judgment. In my view, that delay in seeking stay of execution was an inordinate delay, which the applicants have not accounted for.

14. The judgment herein was delivered, wherein the court allowed the appeal and substituted the trial court's order that had allowed the respondent's claim of adverse possession and substituted it with an order dismissing

the respondent's claim. In essence, this court made a negative order of dismissal and did not order any of the parties herein to do anything. It is trite that a negative order is incapable of being stayed.

**15.** Ultimately, I find and hold that the application dated 28<sup>th</sup> November 2024 lacks merit and the same is hereby dismissed with costs to the appellant.

**16.** It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA  
IN OPEN COURT/VIRTUALLY THROUGH  
MICROSOFT TEAMS VIDEO CONFERENCING  
PLATFORM THIS 29<sup>TH</sup> DAY OF OCTOBER, 2025**

**A. NYUKURI  
JUDGE**

**In the presence of;**

No appearance for the Respondents/applicants

No appearance for the appellant/respondent

Court Assistant: Delphine