

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. APPEAL NO. E002 OF 2024**

**JOHN**

**KASUKI:.....:APPELLANT/APPLICANT**

**VERSUS**

**NICHOLAS MBUVI KIOKO:.....:RESPONDENT**

**RULING**

The application is dated 24<sup>th</sup> October 2025 and is brought under Articles 50(1), 159(2), (a) and (b) of the Constitution of Kenya 2010, Sections 1A, and B, 3, 3A of the Civil Procedure Act, Order 50 rule 1 and Order 42 rule 6 of the Civil Procedure Rules seeking the following orders;

1. That this application be certified as urgent and service of the same be dispensed with at the first instance.
2. That this Honourable Court be pleased to issue orders of stay of proceedings in Kithimani ELC. Case No. E027 of 2023 pending the hearing and determination of this application.
3. That this Honourable Court be pleased to issue orders of stay of proceedings in Kithimani ELC Case No. E027 of 2023 pending the hearing and determination of the Appeal.

4. That costs of this application be provided for.

It is supported by the Affidavit of JOHN KASUKI and the following grounds that the Appellant has filed an appeal against the entire Ruling of Honourable Khapoya S. Benson SPM delivered on 10<sup>th</sup> January, 2024 in Kithimani ELC. No. E027 of 2023. That the prayers sought by the Appellant/Applicant go to the substratum of the case before the trial court being Kithimani ELC. No. E027 of 2023 as to whether the entire suit is properly before the court. That Kithimani ELC. No. E027 of 2023 is scheduled for hearing on 6<sup>th</sup> November, 2024. That Appellant/Applicant stands to suffer real prejudice if the suit before the trial court is allowed to continue in the pendency of the instant Appeal. That the Appeal raises issues of law that touch on the jurisdiction of the trial court. That a similar suit Co-operative Tribunal Case No. E463 of 2023 John Kasuki vs. Muka Mukuu Co-operative Society has already been heard and is scheduled for mention on 21<sup>st</sup> January, 2025 to take a Judgment date. That the Appeal is arguable and has overwhelming chances of success. That the Appellant stands to suffer irreparably if orders of stay of proceedings are not issued pending the hearing and determination of the Appeal as the outcome of the instant Appeal may be overtaken by events. That the Appellant is ready and willing to abide by any orders issued in relation to the application pending the hearing and determination of the Appeal. That it is in the interests of justice to grant the orders sought.

This court has considered the application and the submissions therein. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the Civil Procedure Rules as follows;

*“No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”*

Order 42, rule 6 states:

*“No order for stay of execution shall be made under sub-rule (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.”*

The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

The principles governing the exercise of the court’s jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicant must show that they have an arguable appeal and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of Reliance Bank Ltd (In Liquidation) vs Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR), thus;

*“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-*

- 1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,*
- 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”*

The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in *Chris Munga N. Bichange vs Richard Nyagaka Tongi & 2 Others* eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus;

*“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”*

In the case of Mohamed Salim T/A Choice Butchery vs Nasserpuria Memon Jamat (2013) eKLR, the court stated that;

*“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right .....*”

We are further guided by the court’s decision in Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997, at Page 4 as follows:

*“ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”*

The Respondent stated that the Applicant has not established any substantial loss as the suit property they are possession of the suit property. That the application is premature fatally defective and an abuse of the court process. The Applicant states that a similar suit Co-operative Tribunal Case No. E463 of 2023 John Kasuki vs. Muka Mukuu Co-operative Society has already been heard and is scheduled for

mention on 21<sup>st</sup> January, 2025 to take a Judgment date. That the substratum of the case before the trial court being Kithimani ELC. No. E027 of 2023 as to whether the entire suit is properly before the court.

I find that the applicant is not guilty of laches as Ruling was delivered on 10<sup>th</sup> January, 2024 and this application was filed on 24<sup>th</sup> October 2024. I find that the draft memorandum attached to the application on the grounds of appeal raise an arguable appeal and I find that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicant has fulfilled the above grounds mentioned to enable me grant the stay. I find that the application is merited and I grant prayer 3. Costs of the application to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF OCTOBER 2025.**

**N.A. MATHEKA**

**JUDGE**

ORIGINAL