

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL NO E185 OF 2025

**MERCY MUMBI
KAMAU.....APPELLANT/APPLICANT**

VERSUS

**JOSIM INSTANTANEOUS
CONSORTIUM
LIMITED.....RESPONDENT**

Coram: Before Justice R. Nyakundi
M/s Owaga & Associates LLP Advocates
M/s Aloo Romanus & Co. Advocates

RULING

1. What is pending before this Honourable Court is a Notice of Motion Application dated 8th August 2025 brought pursuant to Order 42 Rule 6 of the Civil Procedure Rules, sections 1A, 1B & 3A of the Civil Procedure Act in which the Applicant is seeking the following orders: -
 - a. Spent
 - b. That there be a stay of execution of the Judgement and Decree issued on 25th July 2025 in Eldoret Small Claims Court Claim No. E460 of 2025 pending the hearing and determination of this appeal.
 - c. That costs of this application be provided for.
2. The application is made on the following grounds;
 - a. That the Applicant has lodged an appeal against the judgement and decree which raises trial issues and has a high chances of success.
 - b. That unless stay is granted, the Applicant stands to suffer irreparable harm, including possible loss of her title deed, despite not being the principal debtor.

- c. That the proposed Third party has already acknowledged and intimated their intention to partially pay the debt and the court failed to consider this in rendering judgement.
 - d. That the Honourable Magistrate introduced and relied upon unpleaded issues which formed the basis of her judgment, rendering the decision irregular and unfair.
 - e. That the Respondent will not suffer any prejudice if stay is granted.
 - f. That the application has been made without unreasonable delay.
3. The application is grounded by the annexed affidavit sworn by the Applicant herein who avers as follows: -
- a. *That judgment in Eldoret Small Claims Court Claim No. E460 of 2025 was delivered on 25th July 2025 and I have lodged an appeal against the said judgement.*
 - b. *That unless the appeal is heard and determined, I risk execution against my property, including the possible loss of my title deed which I had only provided as security.*
 - c. *That the intended application for stay of execution pending appeal is extremely urgent as the Respondent may proceed with execution at any time, thereby rendering my appeal nugatory.*
 - d. *That I was a guarantor only, not the principal debtor and the Third Party was ready to admit the debt however the court denied me the opportunity to bring them on board and or to have them testify in this matter.*
 - e. *That my application for stay raises serious and arguable grounds, including denial of a fair hearing, introduction of unpleaded matters and lack of documentary proof of payment by the Respondent to the hospital.*
 - f. *That the court is currently on the August recess and I therefore seek leave for my application for stay pending appeal to be placed before the duty Judge for urgent hearing.*

- g. That unless this Honourable Court grants leave for the matter to be heard during recess, I will suffer substantial loss and irreparable harm.*
4. The Application is opposed vide a Replying Affidavit dated 14th October 2025 sworn by Isaiah Sifuna Walubengo who deponed as follows: -
- a. That I have read the application dated 8th August 2025 and wish to oppose the same as below;*
 - b. That the said application is malicious, vexatious and aimed at delaying justice and enjoyment of the fruits of our judgements*
 - c. That the Applicant had the opportunity to ventilate their case but chose not to and only realized the seriousness during execution and decided to appeal.*
 - d. That what is of concern is that if the Respondent truly alleges that the third party is willing to settle the amount then they should just settle it instead of appealing the said decision.*
 - e. That I have been informed by my advocates on record whose information I believe to be true that the applicant has not demonstrated any requirements for issuance of stay of execution hence the application should be dismissed.*

Analysis and Determination

5. I have read and considered the application herein, the grounds and annexed affidavit in support of the same and also the replying affidavit in opposition of the application. There is one sole issue manifest for determination by this Honourable Court;

Whether the Application for stay of execution pending appeal is merited?

6. The overriding objective provisions in sections 1A, 1B & 3A of the Civil Procedure Act permit the Court to manage proceedings to secure just, proportionate and expeditious outcomes and to prevent abuse of process.

In exercising the discretion, the Court weighs the risk of irreparable prejudice to the applicant if execution is allowed against the potential prejudice to the respondent and the public interest in the enforcement of final judgments. The power of the court to stay the execution of the judgement /decree pending the determination of the appeal, is guided by Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules which provides 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 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.”

7. From the reading of the above provision, stay of execution pending appeal is a discretionary power bestowed upon this court by law. In **Butt Vs Rent Restriction Tribunal (1982) KLR 417**, the Court of Appeal gave

guidance on how a court should exercise the said discretion and held that:

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- a. *The power of the court to grant or refuse an application for a stay of execution is discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*
 - b. *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 that appeal court reserve the judge's decision.*
 - c. *A Judge should not refuse a stay if there are good grounds for it granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.*
 - d. *The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances in this case were that there was a larger amount of rent in dispute and the appellant had an undoubted right of appeal.*
 - e. *The court in exercising its power 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 for costs as ordered will cause the order for stay of execution to lapse.*
8. The Applicant was required to satisfy the following conditions to the court to justify the grant of an order for stay of execution pending appeal, that is establish sufficient cause; demonstrate that he will suffer substantial loss unless a stay is granted; offer security and apply for the stay order without unreasonable delay. There is no dispute and the record has confirmed that the judgement in Eldoret Small Claims Court Claim No. E460 of 2025 was delivered on 25th July 2025, while the application was filed on 11th August 2025. I therefore find there was no unreasonable delay in filing the instant application.

9. On substantial loss, the Applicant avers and the Respondent does not deny that the Applicant provided a title deed as security and that execution may lead to sale and irreversible loss of the property. In the case of **China City Construction Company Limited & another versus Karisa (Suing as the Administrator and Legal Representative of the Estate of the Late Didlora Mwaka Mwangala) (Civil Appeal 105 of 2023) [2024] KEHC 3323 (KLR)**, the court had this to say on substantial loss;

*“On substantial loss, it was the Appellant’s allegation that the decretal amount is substantial, if paid to the Respondent and the appeal succeeds, they may not be able to recover the same. On this principle, Platt, Ag. JA (as he then was) in **Kenya Shell Limited v Kibiru [1986] KLR 410**, at page 416 expressed himself as follows:*

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.

On his part Gachuhi, Ag.JA (as he then was) at 417 held:

“It is not sufficient by merely stating that the sum of Kshs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of

appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

10. If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant’s business e.g. appeal or intended appeal. From my reading of the annexed affidavit in support of the application, the loss of registered land or title that cannot readily be undone is the archetypal form of irreparable harm which justifies a stay pending appeal. The Applicant therefore has established a credible risk of substantial and irreparable loss if execution proceeds.
11. Moreover, I take note that the Applicant advances arguable grounds being that she was only a guarantor, that a third party admitted partial liability, that unpleaded matters were relied upon by the trial magistrate i.e. denial of fair hearing. While the Court is not required at this interlocutory stage to finally determine merits, there is sufficient indication that the appeal raises triable issues which, if successful, could render execution nugatory. This factor thus supports grant of a stay pending appeal in my considered view.
12. Order 42 Rule 6 of the Civil Procedure Rules 2010 requires that the applicant give such security as the Court orders for due performance of any decree which may ultimately be binding. The Applicant in this case has deponed that she cannot readily provide conventional security, being a guarantor rather than the principal debtor. The Court must however ensure the respondent is not left remediless. Where applicants cannot provide cash security, courts often accept alternatives such as bank

guarantee or a deposit of a reasonable fraction of the decretal sum. The appropriate form and quantum of security must be proportionate to the decree and to both parties' circumstances. The Applicant has not proposed specific security in the affidavit, but has offered undertakings and urgency.

13. In view of the foregoing and taking into consideration the discussed legal principles, this Honourable Court grants the following orders: -

- a. *That a stay of execution of the Judgement and Decree issued on 25th July 2025 in Eldoret Small Claims Court Claim No. E460 of 2025 be and is hereby granted pending the hearing and determination of this appeal.*
- b. *That the Applicant shall deposit the entire decretal sum into an escrow account in the names of the Advocates for the parties or into court as security. The interim order (s) number 5 on the issue of security dated 11th August 2025 given by Hon. Justice P.J. Otieno during the vacation shall apply.*
- c. *That the amended Memorandum of Appeal on record dated 24th September 2025 shall be deemed as duly filed.*
- d. *The Applicant is hereby directed to file her record of appeal and serve it within 30 days from the date of this ruling.*
- e. *The Applicant shall file and serve the written submissions for the main appeal within 30 days from the date of this ruling.*
- f. *The judgement date for the main appeal has been scheduled to **24th November 2025.***
- g. *That the Lower court record shall be availed forthwith.*
- h. *The costs of this application shall abide the outcome of the appeal.*
- i. *It is so ordered.*

**DATED, SIGNED AND DELIVERED VIA CTS AT ELDORET THIS 23RD
OCTOBER 2025**

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R. NYAKUNDI
JUDGE