

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**(FAMILY DIVISION)**  
**HCFA NO. E028 OF 2025**

**HUDAA NASEER NASIB.....APPLICANT**

**VERSUS**

**WAHIDA FARAJALLA SAID &**

**ABDULKARIM NASIR NASIB.....RESPONDENTS**

**RULING**

1. The application before me is a notice of motion dated 30<sup>th</sup> April 2025, vide which the appellant/applicant seeks to stay the execution of the ruling delivered on 15<sup>th</sup> April 2025, the decree issued on the same date, and all consequential orders pending the hearing and determination of the appeal.
2. The respondents opposed the application. The 2<sup>nd</sup> respondent, in a replying affidavit sworn on 20<sup>th</sup> May 2025, stated that the application was unmeritorious and should be dismissed on the ground that the ruling of 15<sup>th</sup> April 2025 gives effect to the judgment dated 20<sup>th</sup> July 2023. The said judgment, it was urged, had not been appealed against. He further stated that setting aside the orders of 15<sup>th</sup> April 2025 does not serve any useful purpose, *“other than to retain the current status quo of her occupying exclusively the ground floor to the detriment of other beneficiaries who deserve the rent therefrom.”*

3. The application was canvassed by way of written submissions. The applicant's submissions are dated 19th June 2025. Those of the 2nd respondent are dated 26<sup>th</sup> May 2025.
4. I have considered the affidavits of the parties and the oral and written submissions. The sole issue for the court's consideration is whether to issue a stay pending appeal.
5. Under Order 42 rule 6 of the Civil Procedure Rules, the applicant must demonstrate three elements which must be present conjunctively for the order of stay to issue. These are:-
  - a. That a substantial loss may result to him or her unless an order of stay is made;
  - b. That the application was filed without undue delay; and
  - c. That such security as may ultimately be binding on the applicant has been given.
6. In the often cited case of **JAMES WANGALWA & ANOTHER V AGNES NALIKA CHESETO [2012] KEHC 1094 (KLR)**, the court held as follows:  
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“11.No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss, thus:

*“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”*

7. The appellant/applicant has filed an appeal. The appeal does not appear to me to be idle. Moreover, the applicant may be evicted from the premises. Eviction, no doubt, will cause the appellant/applicant substantial loss.
8. I am guided by the persuasive authority of the case of *RWW v EKW [2019] KEHC 6523 (KLR)*, where the court, while considering what substantial loss had the following to say:-

**“11. Demonstrating what substantial loss is likely to be suffered is the core to granting a stay order pending Appeal. Substantial**

loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum. – See the decision of Musinga J (as he then was) in the case of Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001.”

9. I agree with the counsel for the applicant that the application was filed without undue delay. Regarding security, it is my view that security is not necessary for two reasons. Firstly, the contested properties are residential premises; these are unlikely to be lost during the pendency of the appeal. Secondly, the appeal concerns a family dispute over inheritance.
10. The upshot of the foregoing is that the application has merit and is allowed.
11. In the interest of justice, the appeal will be heard on a priority basis.
12. As this is a family dispute between close kin, I make no order as to costs.
13. Orders accordingly.

**Dated and signed in Mombasa, this 29<sup>th</sup> day of October 2025. Delivered virtually through Microsoft TEAMS.**

**Gregory Mutai**

**JUDGE**

In the presence of: -

Mr Egunza, for the Applicant;

Mr Akanga, for the Respondent; and

Arthur - Court Assistant.

Original