

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

HIGH COURT CIVIL APPEAL NO. E040 OF 2025

**AMICA SAVINGS & CREDIT COOPERATIVE SOCIETY
LIMITED.....APPLICANT/
APPELLANT**

VERSUS

**STEPHEN MUNGAI MWAHU.....1ST
RESPONDENT**

**MARGARET KAHUMBU MWAHU.....2ND
RESPONDENT**

**FORTUNE AUCTIONEERS.....3RD
RESPONDENT**

RULING

1. By a Notice of Motion dated 25th March 2025, the Applicant herein substantially seeks this honourable court to stay the proceedings Kangema Magistrates Court in MCCC E048/2024 pending hearing and determination of this application and appeal.
2. The Application was supported by grounds on the face of the record and the affidavit of *Robert Mbau*, for the Applicant herein of even date. It is averred that a loan of kshs.1,000,000 was advanced to the 2nd Respondent guaranteed by the 1st Respondent by offering his property known as Loc/ Muthithi/1746 which was charged as security. That the 2nd respondent defaulted in payment of the loan and the Appellant initiated the process of exercising statutory power of sale of the suit property when the 1st and 2nd Respondents filed suit at the trial court seeking to restrain the appellant.

3. It is averred further that the Appellant filed a Memorandum of Appearance simultaneously with a notice of Preliminary Objection to the effect that the trial court lacked jurisdiction to handle the matter by virtue of **section 76 of the Cooperative Societies Act**. However, on 24th March 2025 the trial magistrate delivered a ruling in respect of the Preliminary Objection dismissing it and holding that it had jurisdiction to try the matter.
4. The Appellant has appealed against the said Ruling and is apprehensive that if the proceedings in the trial court are not stayed, the appeal will be rendered nugatory.
5. The 1st and 2nd Respondents filed grounds of opposition to the effect that the notice of motion application should be dismissed *in limine* as it is highly prejudicial to the 1st and 2nd Respondents to afford hearing and an affront to their right to expeditious hearing. That it is a delaying tactic made in bad faith to frustrate the 1st Respondent's efforts to his proprietary rights and is an abuse of the process of the court.
6. The Applicant avers further that she stands to suffer irreparable loss if the stay she is seeking is not granted.
7. In response to the Application, the Respondent relied on the Replying Affidavit sworn on 16th September 2024 by *Loise Mary Muthoni Mbogo*, the 1st Respondent herein. The Respondent deposed that the application has failed to meet the required threshold for granting the orders sought in that the Appellant has not demonstrated that substantial loss may result unless stay of execution is granted nor has she provided any security as a condition for granting stay.
8. The Respondents contend that they are in a position to refund the decretal amount in the event the intended appeal

succeeds. It is the respondent's position that the application is unmerited and should be dismissed. However, should the court be inclined to grant the same then the Applicant should be ordered to deposit the entire decretal amount in an interest earning escrow account.

9. This application was dispensed with through written submissions by both parties. The Applicant's position is premised on the argument that this application does not meet the threshold for grant of an order for stay as provided under **order 42 rule 6 of the Civil Procedure rules** namely: the likelihood of substantial loss and unreasonable delay and provision for security for performance. Reliance was placed upon the authorities of **National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another (UR) C. A. 238/2005; Gianfranco Mamenthi & Another v Africa Merchant Assurance Company and Issa Mbaya (Suing as the Legal Administrator of the Estate of the late Leonard Waiganjo Karanja)2024 KEHC 1280 (KLR)**.
10. The Applicant further urged the court to use its discretionary power to balance out the interests of the successful litigant (Respondent) and the Applicant's unfettered right to file an appeal in making orders for depositing of security.
11. The Respondent made reference to **order 42 rule 6 of the Civil procedure rules** and argues that she has met the required threshold for grant of the orders sought. Reliance was placed on the authorities of **Butt v Rent Restrictions Tribunal (1979) Tropical Commodities Suppliers Ltd & Others v international Credit Bank Ltd (2024) 2 EA 331; Gianfranco (supra)** among others. In a nutshell, the Respondent argues that the Applicant has not demonstrated

that she will suffer substantial loss if the order for stay is not granted but concedes that the applicant has averred her willingness and ability to make deposit for security and to abide by any orders of the court.

12. I have considered the application, the supporting and replying affidavits and the submissions filed as well as the authorities relied upon. I have also considered the Preliminary Objection raised against this application.

13. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under **Order 42 rule 6(2)** of the **Civil Procedure Rules** which provides as follows:

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.

14. In ***Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365***, the Court of Appeal held that:

“...whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the

furnishing of security. Further the application must be made without unreasonable delay...”

15. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Civil Procedure Act or in the interpretation of any of its provisions.

“According to section 1A(2) of the Civil Procedure Act “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”

16. In **Mbukoni Services Limited another v Mutinda Reuben Nzili 2 others Misc Application No. 77 of 2021**, the court stated that:

“32. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the

said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the Civil Procedure Act are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice.”

17. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. This was the position in **Jason Ngumba Kagu & 2 Others vs. Intra Africa Assurance Co. Limited [2014] eKLR** where it was held that:

“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the

Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.”

18. Guided by the principles above I find that there is sufficient cause to grant the orders sought, that is stay of proceedings pending hearing and determination of this Application and Appeal.
19. I hereby grant the following orders:
 - a. There will be stay of proceedings in the Lower Court pending the hearing of this appeal.***
 - b. The Applicant/Appellant to file and serve Memorandum of Appeal and submissions thereto within 30 days from the date hereof.***
 - c. Respondent to file and serve submissions on the appeal within 30 days of service.***
 - d. The interim orders issued by the lower court on 19th September 2024 shall remain intact and are not affected by the order for stay of proceedings.***
 - e. Mention for compliance will be on 15th January 2026***
 - f. That costs of this application will be in the intended appeal.***

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 12TH NOVEMBER 2025.

**HON. T. W. Ouya
JUDGE**

ORIGINAL