

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(CIVIL DIVISION)
HCCA NO E099 OF 2025

EMMA ATIENO AROGO.....APPELLANT

VERSUS

EUNICE MORAA.....RESPONDENT

RULING

- 1.** In a decision delivered on **26th February 2025**, the Court below found that the respondent herein had proved her case on a balance of probability and allowed the same as prayed in the plaint. The respondent also got the costs of the suit, with interest thereon from the date of institution of the suit.
- 2.** Being aggrieved, the appellant filed a memorandum of appeal dated **27th March 2025**. The same raised 4 grounds of appeal. What the appellant seeks is for the judgment of the trial Court to be set aside, and in lieu thereof, for the respondent's suit to be dismissed with costs.
- 3.** The appellant/applicant filed a notice of motion application, whose date is not stated in the CTS copy. The affidavit in support thereof was sworn on **19th May 2025**. The application was filed on **26th**

May 2025. The application seeks a stay of execution of the impugned judgment, maintenance of the status quo in respect of a 3-bedroom house located on plot No. D45MN, Shanzu, Mombasa, and costs.

4. The application was opposed. Ms Eunice Moraa filed a replying affidavit, sworn on 8th July 2025, in which she deposed that she is the owner of a 3-room house situated in Shanzu, Mombasa, constructed on a non-adjudicated piece of land known as Plot No D45MN, which she has been peacefully occupying since 1998. She further deposed that the appellant has a 7-room house on the aforesaid parcel of land, which she bought from a Mr. David Koroba Omato in 2003. She denied that the appellant owned 2 of her 3 rooms and that she was the appellant's tenant.
5. The respondent stated that he was forced to file the case in the Court below after the appellant instructed Makini Auctioneers to proclaim against her on the allegation of having rent arrears of **Kes.360,000/-**. She sought an injunction against the appellant, and the Court below granted prayers on the grounds that the appellant failed to prove ownership of 2 of 3 rooms. She prayed that the application be dismissed.

6. This matter came for hearing on **13th July 2025**. Although the parties stated they had filed Written Submissions, I haven't seen any in the CTS. That said, the principles applicable to this kind of application are well settled.
7. 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.
8. In the often cited case of **JAMES WANGALWA & ANOTHER V AGNES NALIAKA CHESETO [2012] KEHC 1094 (KLR)**, the court held as follows:-
- “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.”

9. Has the appellant/applicant surmounted the above 3 hurdles? I must state at the outset that the 3 hurdles are conjunctive and not

disjunctive. An applicant must show that all three 3 elements exist together for a stay to issue.

10. Will the appellant/applicant suffer substantial loss? The Court of Appeal in **RWW v EKW [2019]eKLR** stated that:-

The purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal, if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of the litigant, who should not be deprived of the fruits of his/her judgment. The Court is called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

11. Is that the case in this matter? If this Court does not grant a stay, the parties will remain in their present houses until the appeal is heard and determined. I am therefore unable to see any substantial loss that the appellant/applicant will suffer. If, on the other hand, the court grants the orders sought, the respondent may be evicted.

12. That should be enough to dispose of this application. I will, however, look at the other 3 tests.

13. Was the application filed without undue delay? I note as follows. The appeal was filed on **27th March 2025**. The application was filed on **26th May 2025**. There was a delay of 3 months from the time the impugned judgment was delivered to the date the application was filed. In the circumstances of this matter, the delay is long and inexcusable.

14. What of the security? Indeed, this is not a money decree. Having said that, the appellant made no offer of security. In the circumstances, I am of the view that this condition was not met. In the case of **Michael Nthoithi Mitheu v Abraham Kivondo Musau [2021]eKLR**, it was held that:-

“The next issue for consideration is the issue of security. It is true that under Order 42 Rule 6, the applicant is required to offer security for the due performance of the decree, and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder...”

15. Having considered the application, the responses thereto, as well as the applicable law, I am of the view that the application has no merit.
16. The upshot of the foregoing is that the undated application filed on 26th May 2025 is bereft of merit and consequently is dismissed.
17. The Respondent shall have the costs of the application.
18. It is so ordered.

Dated and signed this 7th day of November 2025. Delivered
virtually through **Microsoft TEAMS.**

Gregory Mutai

JUDGE

In the presence of
Ms Onyiego, for the Respondent;
No appearance for the Appellant/Applicant; and
Arthur – Court Assistant.