

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELCA. 034 OF 2025**

**WILLIAM KABURU ..... APPELLANT/APPLICANT**

**VERSUS**

**JAMILA ALI MOHAMED**

**FARID ALI MOHAMED**

**ABDULHAMID MOHAMED ALI .....**

**RESPONDENTS**

**RULING**

1. By the Notice of Motion dated 3<sup>rd</sup> June 2025, William Kaburu (the Appellant) prays for an order of stay of execution of the judgment of the Honorable J.B. Kalo, CM as delivered on 19<sup>th</sup> May, 2025 in Mombasa MCELC No. E480 of 2024 and that the Respondents be restrained from advertising, auctioning, offering for sale, mortgaging or transferring the property known as Plot No. 9084/IV/MN pending the hearing and determination of this Appeal.
2. The application which is supported by an Affidavit sworn by the Appellant is premised on the grounds inter alia:

- i) That the Respondents filed Mombasa MCELC No. 480 of 2024 against the Appellant and judgment was delivered thereon on 19<sup>th</sup> May 2025;**
  - ii) That the said judgment directed the Appellant to give vacant possession of the suit property to the Respondents within 90 days failure to which he would be forcefully evicted therefrom;**
  - iii) That the Appellant is aggrieved by the said judgment and has preferred the instant Appeal;**
  - iv) That the Appellant is apprehensive that unless the orders sought herein are issued, the Respondents will commence the eviction after the lapse of the 90 days period;**
  - v) That the Appellant is ready and willing to comply with the conditions of stay as may be directed by the court; and**
  - vi) That unless the orders are granted the Appeal will be rendered nugatory and it is only the interest of justice that the application be allowed as prayed.**
3. The three (3) Respondents are opposed to the application. In a Replying Affidavit sworn on their behalf by the 1<sup>st</sup> Respondent –

Jamila Ali Mohamed, the Respondents assert that the Appellant is not a bona fide purchaser for value of the suit property and that he has never acquired any right over the property measuring 50ft by 70ft.

4. The Respondents aver that the alleged sale agreement was incomplete and that the Appellant remained on the land as a tenant on sufferance. It is the Respondents case that the Appellant shall suffer no harm if the orders are executed because he has enjoyed mesne profits illegally at the suit property and his continued stay thereon is aimed at causing more losses to the Respondents.
5. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the submissions placed before the court by the Learned Advocates representing the parties herein.
6. The single issue for determination before this court is whether or not the Appellant has satisfied the legal grounds to warrant the grant of an order of stay of execution. The principles to be considered by the court in determining whether or not to grant

an order staying execution are set out under Order 42 Rule 6(2) of the Civil Procedure Rules which provides as follows:

**“2. 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.”**

7. In ***Butt -vs- Rent Restriction Tribunal (1982) KLR 417*** at Page 419, Madan JA (as he then was) held as follows:

**“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory...”**

8. As for what substantial loss is, it was observed in ***James Wangalwa & Another -vs- Agnes Naliaka Cheseto (2012) eKLR***, that:

**“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... 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. In the matter before me, the Appellant avers that he is apprehensive that upon the lapse of the 90 days period granted by the trial court, the Respondents shall move to evict him and demolish the house he has constructed in the suit

premises. On their part, the Respondents assert that the Appellant will not suffer any loss as he has been illegally occupying the suit property and enjoying profits therefrom.

10. While the issue of whether or not the Appellant had purchased the suit property is a matter that has to be determined upon the hearing of the Appeal, I was not persuaded that the Appellant had been illegally occupying the property as contended by the Respondents. In the Affidavit filed in support of the application, the Appellant has annexed as annexure "W K-1" a copy of a tenancy agreement executed on 1<sup>st</sup> January 1995 between himself and the Respondents and their predecessors in title. Clause 3 of the agreement is clear that the Appellant was "entitled to construct a dwelling house with stone blocks" on the demised premises.
11. It is apparent also that the Appellant had pursuant to that clause constructed a dwelling house wherein he resides. Annexures WK-6(a) and (b) are photographs of the house and the approval he obtained for its construction.
12. Arising from the foregoing, I was persuaded that the Appellant stood to suffer substantial loss if the Respondents were allowed

to evict him and demolish the house before the Appeal is heard.

13. In the premises, I am persuaded that there is merit in the Motion dated 3<sup>rd</sup> June 2025. I allow the same in terms of Prayer No. 4.

14. The costs shall be in the Appeal.

**Ruling dated, signed and delivered in open court and virtually at Mombasa this 13<sup>th</sup> day of November, 2025**

.....  
**J.O. OLOLA**  
**JUDGE**

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Ms. Kariuki Advocate for the Appellant/Applicant
- c) Ms. Mohamed Advocate for the Respondents