

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ELC APPEAL NO. E026 OF 2025**

**TONY NJOROGI .....**  
**APPLICANT/RESPONDENT**

**VERSUS**

**MUKOMBE SAID MWAGANDI .....**  
**RESPONDENT/APPLICANT**

**RULING**

1. In a notice of motion application dated 22/4/2025 premised under the provisions of Article 159 of the constitution of Kenya 2010, Section 1A, 1B and 3A of the Civil Procedure Act, Order 42 Rule 6, and Order 40 rule 1 & 2 of the Civil Procedure Rules, the applicant seeks an order of stay of execution of the judgment of the court delivered on 7/4/2025 pending the hearing and determination of an intended appeal.
2. The application is based on the grounds set out at the foot of the application and also in the supporting affidavit of the Respondent/applicant sworn on an even date. The Applicant avers that he is dissatisfied with the judgment of the court and he wishes to appeal against it; that he has filed a notice of appeal and requested for certified copies as required; that he would be prejudiced if the plaintiffs executed the judgment of the court as that would mean his being evicted from the suit property which is his sole source of income. He exhibits in his application the photographs of the property before and after he improved it. He also exhibited photographs of the property during construction he undertook on it to become what it is today. He is apprehensive that the present appeal would be rendered nugatory if the orders sought are not granted as he would be denied the opportunity to exhaust his legal remedies. He states that he is willing to give an undertaking as to damages or comply with any conditions that the court sets.
3. The respondent filed grounds of opposition dated 7/5/2025 stating as follows: that the notice of appeal is defective; that the application does

not meet the threshold for the granting of stay; that stay if granted would result in continued denial of the respondent of the use and benefit of the suit property; that the respondent would thus be denied the fruits of judgment; that the filing of a notice of appeal is not the equivalent of the filing of an appeal; that the applicant has not demonstrated any substantial loss that is likely to occur should the orders sought not issue.

4. The applicant also filed a further affidavit dated 21/5/2025 exhibiting a draft memorandum of appeal. He added in that affidavit that he has since obtained the certified copies of the typed proceeding and judgment and was in the process of compiling an appeal record.
5. The application was disposed of by way of written submissions which the applicant filed, dated 22/5/2024. He relied on Stanley Kangethe Kinyanjui V Tony Keter & 5 Others 2013 eKLR as emphasizing that in dealing with order 42 rule 6 the court exercises discretionary jurisdiction. He relied on Kenya Tea Growers Association and Anor Vs Kenya Planters & Agricultural Workers Union 2012 eKLR for the proposition that an appeal is not one that must necessarily succeed. He pointed out several issues arising for determination on appeal one of which is whether the trial court erred in holding that the oral lease did not allow subleasing when no such restriction existed. Another issue was the liability of the respondent to indemnify him. He also relied on religious society of Friends (Quakers) V The Attorney General & 2 Others 2021 eKLR for the proposition that he being in possession execution may render the appeal nugatory. Finally, relying on Kenya Shell Ltd Vs Benjamin Karuga Kibiru & Another 1986 KLR 40. He argued that he has invested substantive capital in developing the suit property and that he stands to suffer substantial loss. He maintained, relying on Butt Vs Rent Restriction Tribunal 1982 KLR that the balance of convenience tilts in favour of preserving the *status quo* which he pointed out has existed since 2005.
6. The respondent filed submissions dated 9/6/2025. He urged, citing James Wangalwa & Anor V Agnes Naliaka Cheseto 2012 eKLR, that the applicant

has not demonstrated any evidence of substantial loss, such as valuation, photographs or receipts. Further it was urged that the applicant has not established that there is an arguable appeal. the respondent urges that if any condition is to be imposed the court should order the filing of an appeal within 30 days in default of which the stay order would automatically lapse.

7. I have considered the conditions set by Order 42 Rule 6 of the Civil Procedure Rules regarding stay of execution. There is a Notice of Appeal in place. It has not been denied that the applicant developed the premises although the respondent faults him for failure to provide proof of any actual loss, in the form of a valuation report or receipts, that he would suffer if the stay was not granted. It is not controverted that the applicant has been in possession of the premises for over **10** years now.
8. This court has upon considering the application and the response as well as the supplementary affidavit come to the conclusion that the only step remaining is for the applicant to file the record of appeal since he has obtained the requisite documents needed for that task.
9. In the circumstances, this court hereby grants **prayer no 4** of the application dated 22/4/2025 on condition that the applicant shall file and serve the record of appeal on the respondent **within 45 days** of this order in default of which the stay of execution order shall automatically lapse.

**Dated, signed and delivered at Malindi on this 12<sup>th</sup> day of November, 2025.**



**MWANGI NJOROGE  
JUDGE, ELC, MALINDI.**