



REPUBLIC OF KENYA



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**Rotich v Barmasai (Civil Appeal E276 of 2025)
[2025] KEHC 16321 (KLR) (12 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 16321 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E276 OF 2025
RN NYAKUNDI, J
NOVEMBER 12, 2025**

BETWEEN

SAMUEL ROTICH APPELLANT

AND

SAMUEL KIPKEMOI CHEBII BARMASAI RESPONDENT

RULING

1. Before this Court is an application dated 6 November 2025 brought under Article 159 of *the Constitution*, sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 42 rule 6(1) and (2), Order 51 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. The applicant moved this Court seeking the following prayers;
 - a. Spent
 - b. That pending hearing and determination of this application, this Honorable Court be pleased to order stay of execution of the judgment dated 7th October 2025 together with any subsequent decree.
 - c. That pending hearing and determination of the intended appeal, this Court be pleased to order stay of execution of the judgment dated 7th October 2025 together with any subsequent decree.
 - d. That costs of this application be provided for.
2. The application is made on the following grounds;
 - a. That the subordinate Court delivered its judgment on 7th October 2025 in favor of the Respondent as against the Applicant and the Applicant is now seeking to set it aside and or vary the said judgment against itself and also seeks stay of execution of the judgment.



- b. That the Applicant is aggrieved by the said judgment and wishes to lodge an appeal against the same, noting that the applicant has an arguable appeal with a high probability of success.
 - c. That there is an imminent threat to commence execution proceedings after the lapse of 30-day stay period granted by the trial Court and which lapses on 7th November 2025.
 - d. That the application is brought timeously and the time to lodge the appeal is yet to lapse.
 - e. That if the orders sought herein are not granted, the Applicant will be greatly prejudiced.
 - f. That this application has been brought in utmost good faith and it is in the interest of justice that the same be allowed.
 - g. That if the stay orders sought herein are not granted, the operations of the Applicant as a company may end up incurring quantifiable and unquantifiable losses.
 - h. That the Applicant is ready and capable of abiding by the conditions for granting of stay of execution pending appeal as may be ordered by this Honorable Court.
 - i. That this Honorable Court has the power to grant the orders sought herein in the interest of justice.
3. The application is supported by an affidavit by Samuel Rotich deponed as follows;
- i. That I am the Defendant in this matter hence duly authorized and competent to swear this affidavit.
 - ii. That I am well versed with the issues herein and therefore fit and competent to swear this affidavit on behalf of the Applicant.
 - iii. That the subordinate Court delivered its judgment on 7th November 2025 in favor of the Respondent as against the Applicant. (Annexed and marked SR 1 is a copy of the judgment)
 - iv. That the Applicant is aggrieved by the said judgment and wishes to lodge an appeal against the same, noting that the Applicant has an arguable appeal with a high probability of success. (Annexed and marked SR2 and ESR3 is a copy of a duly filed memorandum of appeal and a receipt indicating payment of the appeal respectively)
 - v. That the Appellant has since written to the trial Court requesting for a certified copy of the proceedings with the intention of prosecuting the appeal. (Annexed and marked SR4 is a copy of the letter requesting for the proceedings)
 - vi. That there is an imminent threat to commence execution proceedings after the lapse of the 30-day stay period granted by the trial Court and which lapses on 7th November 2025.
 - vii. That the application is brought timeously and the time to lodge the appeal is yet to lapse.
 - viii. That if the orders sought herein are not granted, the Applicant will be greatly prejudiced.
 - ix. That this application has been brought in utmost good faith and it is in the interest of justice that the same be allowed.
 - x. That if the stay orders sought herein are not granted, the operations of the Applicant as a company may end up incurring quantifiable and unquantifiable losses.
 - xi. That the Applicant is ready and capable of abiding by the conditions for granting of stay of execution pending appeal as may be ordered by this Honourable Court.



- xii. That this Honourable Court has the power to grant the orders sought herein.
 - xiii. That I swear this affidavit in support to the application now before this Honourable Court and pray that the application be granted with an order as to costs.
 - xiv. That all I have stated herein are true to the best of my knowledge, information and belief save where sources
4. The Respondent responded to the Application vide a Replying Affidavit dated 10th November 2025 sworn by Samuel Kipkemoi stating as follows;
- i. That I am the Plaintiff/Respondent herein.
 - ii. That I have read and understood the Certificate of Urgency, Notice of Motion and the affidavit of SAMUEL ROTICH sworn herein all dated 6.11.2025.
 - iii. That the judgment herein was delivered on 7.10.2025 and the Appellant was ordered to release the tractor and its accompanying trailer to me within 30 days from the date of judgment.
 - iv. That the Appellant now has come to this Court at the last-minute claiming that the matter is urgent yet he had all the time from 7.10.2025.
 - v. That this amounts to delaying this case in order to enable the Appellant to continue making use of my tractor and trailer.
 - vi. That I am opposed to the order of stay of execution being granted for the reasons that:
 - a. The Appellant has not given an undertaking as to costs and damages.
 - b. I am losing an average of Kshs. 5000/= per day on the loss of use of my tractor and the Appellant needs to make an undertaking as to my loss.
 - c. The tractor is an asset that is deprecating on a daily basis and the Appellant should deposit at least Kshs. 3,000,000/= in an income earning account as security for the same.
 - vii. That as to the affidavit of SAMUEL ROTICH dated 6.11.2025, I admit paragraphs 1, 2 and 3 of the said affidavit.
 - viii. That I deny paragraphs 4 and 5 of the said affidavit and state that the appeal in issue has no chance of success given that:
 - a. I hold the log book to the said vehicle.
 - b. There is no agreement of sale.
 - c. There is no agreement for the alleged lien herein on the said tractor and its trailer.
 - d. The Appellant has not furnished any security as to my losses as per section 65 of the *Civil Procedure Act*.
 - ix. That I state that the intended appeal is an afterthought as the Appellant lodged the same at the 11th hour.
 - x. That I deny paragraphs 6 and 7 of the said affidavit and state that:
 - a. There has been an inordinate delay in lodging the appeal.



- b. The decree appealed against has not been attached.
 - c. No security for damages and costs has been given.
 - d. The Appellant has not met the requirements of Order 42 Rule 6 of the Civil Procedure Rules,
- xi. That I deny paragraphs 8 and 9 of the said affidavit and state that the Appellant has failed to demonstrate the basis for the grant of any orders.
 - xii. That the admission in paragraphs 10 and 11 means that the Appellant should deposit the earnings per day of the said tractor to the tune of Kshs. 3,000,000/= inclusive of the trailer in an income earning account as security in the event he loses the appeal. Annexed hereto marked SKC1, SKC2, SKC3, SKC4 and SKC5 are copies of earnings of the said tractor during my use doing contracts for Kenya Seed Company Limited.
 - xiii. That I deny paragraphs 13 and 15 of the said affidavit.
 - xiv. That what is deponed herein is true to the best of my knowledge, information and belief

Decision

5. I have now since had an advantage of having a bird's eye-view of Eldoret CMCC E851 OF 2024 including the impugned Judgement dated 7th October 2025. From the perspective of the applicant's/ intended appellant legal perspective as adverted to in his Memorandum of Appeal which provided inter alia;
 - a. That the trial Court erred in law and in fact by finding that a sale transaction of a magnitude of Kshs 2.3 million would ordinarily be documented and a lease of a magnitude of 1.3 million not documented(verbal).
 - b. That the trial Court erred in law and in fact by failing to consider that the Appellant had a verbal sale agreement but considered a verbal lease agreement of the Plaintiff/Respondent.
 - c. That the trial Court erred in law and in fact by failing to consider that payments were made even before the alleged oral lease agreement were done.
 - d. That the trial Court erred in law and in fact by finding that the Mpesa transactions could support the Plaintiffs claim for lease payment, yet some payments were made way before the aforesaid oral lease was done.
 - e. That the trial Court erred in law and in fact by failing to consider the evidence on record therefore arriving at an erroneous judgment
 - f. That the trial Court erred in law and in fact by failing to consider the Appellant's submissions and authorities therefore arriving at an erroneous judgment.
6. During a status conference on 11th November 2025 both Legal Counsels made brief remarks on the application with no convergence on the findings made by the Court below with regard to the rights touching on the asset registration number KTCA 571E. It appears there is a serious contention on the subject motor tractor make Ferguson. The rival supporting affidavit and the affidavit in opposition to the application address the issues at the cross purposes.
7. The anchor provision in which this Court can exercise discretion is provided under Order 42 Rule 6 of the Civil Procedure Rules. The legal lens being that the applicant must condition his/her obligation



on it being filed timeously, demonstrate substantial laws and the condition to deposit security for costs for the intended appeal and in addition, the grounds on sufficient cause and that the appeal in question has high chances of success and therefore in the event no stay of execution is granted that appeal will be rendered nugatory.

8. One of the key battle ground contention in all application for stay of execution is on substantial laws. This what the Court remarked on its element in *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR the Court stated 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. Similarly, in the case of *Antoine Ndiaye vs African Virtual University* [2015] KEHC 6783 (KLR) the Court stated that;

“So the Applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the Respondent. in other words, he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed. Therefore, in a money decree, like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back. The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant; follows after the long age legal adage that he who alleges must proof. Real and cogent evidence must be placed before the Court to show that the Respondent is not able to refund the decretal sum should the appeal succeed.”

10. I have considered the processes filed together with the affidavits formulated by both Counsels in this matter. The application for stay of execution is an interlocutory issue which does not venture into the merits and the demerits of the appeal. In the instant case it appears on the face of it there is a dispute on the fact and how the trial Court applied the law on the issue of the tractor make Ferguson Registration Number KTCA 571E. There seems to be deep sitting issues on this issue of the tractor. There is therefore prima facie evidence that the decision to grant or refuse a stay of execution which lies within the discretion powers of this Court must be exercised judicially and judiciously and in the interest of justice. It is not time to rule on the contentious issues subject matter of the intended appeal.
11. On the whole, the application for stay of execution succeeds and leave is hereby granted for the intended appeal to be prosecuted in earnest and with speed so that the fruits of the judgement are released to the winner of the dispute. In this respect, the proceedings shall be typed within 7 days from todays ruling. Thereafter, directions shall be taken on the 24th November 2025 for the very purpose of setting timelines to dispose the appeal which should not be later than 15th December 2025.
12. The costs of this application to abide the outcome of the appeal.



GIVEN UNDER MY HAND AND THE SEAL OF THIS COURT THIS 12TH DAY OF NOVEMBER
2025

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R. NYAKUNDI

JUDGE

