



**Salim & 2 others v Agunga & Company Limited (Family Appeal
E045 of 2025) [2025] KEHC 16263 (KLR) (11 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 16263 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E045 OF 2025
G MUTAI, J
NOVEMBER 11, 2025**

BETWEEN

MAIMUNA HASHAM HAJI 1ST APPELLANT

YUSRA AHMED ABDALLA 2ND APPELLANT

HUSSEIN ABDALLA SALIM 3RD APPELLANT

AND

AGUNGA & COMPANY LIMITED RESPONDENT

RULING

1. The court below delivered a ruling on 18th July 2025 in Mombasa Chief Magistrate’s Court Succession Cause No 352 of 2008. The appellants/applicants were aggrieved by the said decision and have filed an appeal to this court.
2. In the memorandum of appeal, it is stated that the learned magistrate, the Hon Gathogo Sogomo, PM, made a jurisdictional error in hearing and determining issues which are within the province of the Environment and Land Court, by violating the appellants/applicants’ right to a fair hearing and in considering irrelevant matters and disregarding material evidence. It is also stated that he failed to apply established legal principles and issued unreasonable and unjust orders that resulted in a miscarriage of justice.
3. The appellants/applicants filed a notice of motion application dated 1st August 2025, vide which they sought to have a stay of execution and of implementation of the ruling and the order issued on 18th July 2025 in Mombasa Chief Magistrate’s Court Succession Cause No 352 of 2008.
4. The said application is supported by the affidavit of Yusra Ahmed Abdalla, the second appellant/applicant.



5. The application was opposed. Mr Alfred Agunga filed a replying affidavit sworn on 1st September 2025 and signed on behalf of Agunga & Co. Ltd. In the said affidavit, it was deposed that the application has no merit and should be dismissed with costs. The deponent denied that the court below lacked jurisdiction and averred that the cause was filed by the appellants /applicants themselves.
6. The application was canvassed by way of written submissions. Both parties filed their written submissions. I have considered the said submissions. The sole issue for the court's consideration is whether to issue a stay pending appeal.
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. The appellant/applicant has filed an appeal. The appeal does not appear to me to be idle. Serious jurisdictional issues have been raised that warrant this Court's consideration. I am persuaded that if the orders sought are not issued, the appellants/applicants will suffer substantial loss.
10. I am guided by the persuasive authority of the case of RWW v EKW [2019] KEHC 6523 (KLR), where the court, while considering what substantial loss had the following to say: -

“ 11. Demonstrating what substantial loss is likely to be suffered is the core to granting a stay order pending Appeal. Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which



an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum. – See the decision of Musinga J (as he then was) in the case of Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001.”

11. Regarding the second consideration, I note that the application was filed without delay.
12. On provision of security, it is my view that, given that the appeal is not in respect of a money decree, the same is inapplicable.
13. In my view, the application dated 1st August 2025 has merit. I allow the same.
14. In the interest of justice, the appeal will be heard on a priority basis.
15. Orders accordingly.

DATED AND SIGNED IN MOMBASA, THIS 11TH DAY OF NOVEMBER 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr Kimanzi, holding brief for Mr Abdirazak, for the Appellants/Applicants;

No appearance for the Respondent; and

Arthur – Court Assistant.

