



**TOO v MW (Civil Appeal E065 of 2025) [2025] KEHC 16341 (KLR) (7 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 16341 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E065 OF 2025  
SM MOHOCHI, J  
NOVEMBER 7, 2025**

**BETWEEN**

**TOO ..... APPLICANT**

**AND**

**MW ..... RESPONDENT**

**RULING**

1. This matter is a children’s matter that has evolved into an interlocutory Civil Appeal from a consent-based ruling that is now in contest all in all the face and voices of the children appear obfuscated in the fight by the two parents.
2. The impugned ruling dated 28<sup>th</sup> February, 2025, in Nakuru MCCC No.75 OF 2016, MW v TOO, the Children’s Court, transferred the Applicant’s property Njoro Ngata XXX/47 to the Respondent based on a purported consent, thereby dismissing the Appellant’s application dated 18<sup>th</sup> Novembe2024 before the court.
3. The Applicant now moves this court in order to preserve the substratum of appeal, the Appellant has filed a motion dated 23<sup>rd</sup> June, 2025 seeking orders, inter-alia; -
  - a. Spent
  - b. Spent
  - c. That, pending the hearing and determination of the appeal, there be a stay of execution of the decree and or orders dated 28.02.2025 in NAKURU MCCC NO.75 OF 2016.
  - d. That, costs of the suit be provided for.
4. The application is supported by two Affidavits sworn by the Applicant and also based on the grounds on the body of the application.



## Applicants Case

5. The Applicants regurgitate the principles for grant of stay, ultimately seeking solace in the overriding objective and relying on the case of Kenya Women Microfinance Ltd v Martha Wangari Kamau [2020] eKLR, thus:
  - “29. In Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai.15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 (sic) rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#), the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions. According to section 1A(2) of the [Civil Procedure Act](#) “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.
6. As to whether the application dated 23<sup>rd</sup> June, 2025 has met the threshold for grant of the prayer of stay of execution pending the hearing and determination of the appeal. The Applicant submits that he has satisfied the provisions of Order 42 Rule 6(1) and has also met the threshold set by the Courts for the grant of stay of proceedings and stay of execution, as demonstrated hereunder. As held in Kenya Women Microfinance Ltd (Supra) the Honourable Court is not limited to the conditions for stay as provided for in Order 42 Rule (6) but can exercise its inherent jurisdiction as well as the provisions of [the Constitution](#), more so Article 50 and Article 48, so as to effect the right of appeal provided for in the statute and constitution.
7. The Applicant will suffer substantial and irreparable loss if the orders of stay of proceedings and stay of execution are not granted.
8. If the Orders issued by the Subordinate Court as per the ruling dated 28<sup>th</sup> February, 2025 are enforced and come to fruition, the Appellant’s right to appeal as enshrined in Article 50 of [the Constitution](#) of Kenya, 2010 will have been contravened and no amount of damages will suffice. The substratum of appeal will forever be destroyed as demonstrated in the affidavits that the property may end up in third parties beyond the reach of the Applicant, and in the event the Appellant succeeds on appeal, which looks certain, the judgment will be only academic. The Applicant will suffer irreparable loss and injustice inflicted on him will remain to be a permanent scar without a reprieve.
9. That it will also render the success of the appeal nugatory and moot as the Appellant would have already suffered the consequences of the impugned ruling.



10. Furthermore, the Respondent will not suffer ANY prejudice save for a very short period the appeal will take to be heard and determined.
11. That the appeal herein, raises serious issues of law and fact with certain chances of success. From decided cases by this Court and other superior courts, a decision made without jurisdiction is null and void abinitio.
12. That Applicant will suffer substantial loss if the stay orders are not granted as prayed and has an arguable appeal which will be rendered nugatory if the stay orders are not granted. The Applicant has demonstrated sufficient cause by affidavits and grounds in support of the motion for the Honourable Court to exercise its discretion in favour of the Applicant by granting the motion, so as not to render the Applicant's appeal an academic exercise.
13. The Applicant relies on the case of *Josphat Kitheme Kyalo v Webster Muema Muambi* [2017] eKLR where the Court considered the issue of substantial loss in an application made under Order 42 Rule 6, thus:

“22. In the case of *JASON NGUMBA KAGU & 2 OTHERS -VS- INTRA AFRICA ASSURANCE CO. LIMITED* the court held that:

“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. [Emphasis added] Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process”

Furthermore in the case of *Bungoma Hc Misc Application No. 42 Of 2011 James Wangalwa & Another -vs- Agnes Naliaka Cheseto* the court held that:-  
“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...”

14. That, the Court defined substantial loss as outlined above as factors which show that the execution of the judgment 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.



15. And that, in James Wangalwa & Another -Vs- Agnes Naliaka Cheseto Misc Application No 42 of 2011 [2012] eKLR (Gikonyo J as he then was) stated that:-

“...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.”[Emphasis added]

16. And In the case of Nicholas Stephen Okaka & another v Alfred Waga Wesonga [2022] eKLR , the Court stated that:

“23. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely

- (a) that substantial loss may result to the applicant unless the order is made,
- (b) that the application has been made without unreasonable delay, and
- (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See Antoine Ndiaye v African Virtual University [2015] eKLR.

17. As to what substantial loss is, it was observed in James Wangalwa & Another v 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.” .... 28. In this case, the Respondent has not given any material as to his ability to repay the decretal sum in case the appeal succeeds and in light of the depositions by the applicants’ counsel that they shall suffer substantial loss if stay is not granted. Accordingly, I am persuaded that substantial loss has been proved.”

18. That, the Applicant has an arguable appeal which will be rendered nugatory if the stay orders sought are not granted.

19. That, the Applicant has an arguable appeal on the ground that the Trial Court lacked jurisdiction to issue the impugned orders, among other several grounds. If execution of the said order is not stayed, the Applicant will face dire consequences of the ruling including a possible transfer of the property to a third party with obvious proprietary interest beyond the control of the Applicant.



20. That, In Stanley Kangethe Kinyanjui versus Tony Ketter & 5 others [2013] eKLR, the Court held that a single bonafide arguable ground of appeal is sufficient. Even though before this Honourable Court there is no such requirement, the Applicant submits his appeal is not frivolous but raises serious issues of law and fact. The court held thus:-

“vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004. vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.”

21. And In Sarah N. Sakwa v Elizabeth Wamwanyi t/a Namukhosi Ltd & another [2017] eKLR, the Court while considering an application for stay of execution stated:

“The right of appeal is a constitutional right that actualize the right to access to justice, protection and benefit of the law, whose essential substance, encapsulates that the appeal should not be rendered nugatory for anything that renders the appeal nugatory impinges on the very right of appeal.”

22. The Applicant submits that, it has demonstrated it has an arguable appeal which will be rendered nugatory unless the stay orders sought are granted to protect the Applicant’s right of appeal.

23. That, the appeal will be rendered otiose if the stay of the execution of the orders issued on 28<sup>th</sup> February, 2025 is not granted.

24. That, the Application has been made without delay.

25. That, the impugned order on which stay is sought was issued on 28<sup>th</sup> February, 2025 and the application was made on 23<sup>rd</sup> June, 2025, after receiving a copy of the ruling by the Applicant in person.

26. That, the application for the stay orders was therefore made without inordinate delay. This is one of the conditions set out for the grant of stay orders as was held by the Court in the Halal Case (supra), where the Court held:-

“Thus, the Superior Court’s discretion is fettered by three conditions. Firstly the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay.” (Emphasis Added)

27. That, the Respondent will not suffer prejudice that cannot be compensated by way of costs if the stay orders are granted. Reliance is placed on the case of *RWW Versus EKW* [2019] eKLR, it was observed that:

“The purpose of an application for stay of execution pending an 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 a litigant who



should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

28. The Respondent has not demonstrated by affidavit or otherwise any prejudice she will suffer.
29. In any event, there is no comparable prejudice she will ever suffer like the Applicant whose property may be disposed off to third parties beyond his reach.
30. That, any prejudice which the Respondent may suffer due to the grant of the stay orders sought by the Applicant can be compensated by way of damages. In the converse, the Applicant will suffer irreparable loss.
31. The Applicant need not furnish security for the due performance of the Order and decree of the Court.
32. That, the issues on appeal is not anchored on monetary claim. The cornerstone of the appeal is a transfer of land to the Respondent and whether the court had jurisdiction and the issue of whether there was any consent to that effect, hence the Applicant need not furnish any security for the decree's due performance. In the case of Sarah N. Sakwa Case (supra), the Court stated that:

“This being a non-monetary decree, the condition of security for due performance of the order does not arise. Refer to the case of Praxades Okutoyi –v- Medical Practitioners and Dentists Board (2008)eKLR where Visram, J (now JA) stated that: “As this is not a monetary decree, no financial obligations are involved on either side, the issue of security does not arise...”[Emphasis added]

33. That, the Security for due performance of the judgment should not be an impediment to access to justice as provided for under Article 48 of *The Constitution* of Kenya 2010. The Supreme Court in the case of Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others (Petition 16 (E023) of 2021) [2023] KESC 11 (KLR) (17 February 2023) (Judgment) held thus;

“2 ... .. *The Constitution* safeguarded a person's right to have any dispute resolved by the application of law decided in a fair and public hearing as provided under article 50 thereby ensuring a party's access to justice was not violated. 6. The rationale for security for costs was aimed at balancing the overarching objectives in the administration of justice as expressed under Articles 48, 50 and 159 of *the Constitution*, that courts should aim to dispense justice... 13. In determining whether it was appropriate to make an order that a party gave security for costs, the court could have regard to the following matters and such other matters as it considered relevant in the peculiar circumstances of each case:

- a. the prospects of success or merits of the proceedings.
- b. the genuineness of the proceedings.
- c. the impecuniosity of the plaintiff.
- d. whether the plaintiff's impecuniosity was attributable to the defendant's conduct.
- e. whether the plaintiff was effectively in the position of a defendant.



- f. whether an order for security for costs would stifle the proceedings and/or impede access to justice.
- g. whether the proceedings involved a matter of public importance.
- h. whether there had been an admission or payment in court.
- i. whether delay by the plaintiff in commencing the proceedings had prejudiced the defendant.
- j. the costs of the proceedings. Whether the security sought was proportionate....”

34. That, the Apex Court went on to hold that ;

“ 17. Instead, it should be used as an instrument that ensured that there was a balance of interests between parties in the suit. Any directive by the court that placed a barrier on the path to justice obstructs the right to access justice and defeated the purpose of having the dispute determined on its merits. Such an order would be contrary to the spirit and letter of *the Constitution*”.

35. That, the Applicant has demonstrated sufficient cause for the grant of the orders sought. The Court has discretion to grant the Orders sought.

36. That, the Applicant has met the threshold for the grant of the stay orders under Order 42 Rule 6(1) and has also met the threshold set by the Courts. The Court thus has discretion to grant the orders sought. The discretion should be exercised judiciously and should be aimed at lowering the risk of injustice. In the Kenya Women Microfinance Ltd Case (supra) the Court stated that:

“What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman vs. Amboseli Resort Limited* [2004] 2 KLR 589.”

37. That, In the case of *Amal Hawliers Ltd -vs- Abdulnasir Abubar Hassan* [2017] eKLR the court citing the Court of Appeal in *Butt -vs- Rent Restriction Tribunal* [1982] KLR 417 which gave guidance on how a court should exercise discretion held;

- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion...”



38. That, the Court is clothed with inherent jurisdiction to grant the prayers sought including, but not limited, to grant of even stay of proceedings. In the case of *Savings & Loan Kenya Ltd v Odongo* [1987] eKLR the Court of appeal dealt with the high Court's inherent jurisdiction in granting stay as thus:-

“It will first be noted that there is inherent jurisdiction to stay execution in the alternative to order XLI rule 4[Now Order 42 Rule 6] of the rules in the circumstances applying in *Ujagar Singh v Runda Coffee Estates Ltd* [1966] EA 263 where at page 267 Sir Clement de Lestang concluded: “Since there can be no doubt that the High Court has power to order a stay of execution either in the exercise of its inherent jurisdiction or under order XLI rule 4, it follows that a like jurisdiction is conferred on this court ....” It was held possible to stay the drawing up of the court's own order or to suspend that operation, if the necessities of justice so required. *Msst Brij Coomaree v Ramnick Das* [1901] 5 Case WN 781, 796; to stay execution or operation of the order appealed from, so that the order which might be passed in appeal might not be rendered infructuous, ..... and to order a stay of execution in view of an application by a judgment debtor to the judicial committee for special leave to appeal to His Majesty in Council; or to maintain the status quo in a fit case till the filing of an intended application for leave to appeal to His Majesty in Council (*Ramendra Nath Roy v Bibhaati Deuf*, (1942) (42) AC 488). The Bombay court had stayed execution of an award under an arbitration pending an appeal against the order refusing to set it aside. (*Mohamed Alli v Dharamsey*, (1931) 55 BOM 801). These are all examples of the use of inherent powers illustrating different aspects and purposes connected with the issue in this appeal. ....

In the exercise of the inherent powers when they are applicable the test is justice. Here it is very clear that the tenants ought to be preserved pending appeal, if that is possible, because after all the time that has passed, the landlord will not be greatly prejudiced by a little more patience awaiting the appeal. Considering the matter all round, it is my opinion that the Indian courts have given a useful and proper lead as to the exercise of inherent powers in cases like the present appeal. Consequently with respect, I would agree with them that in cases of this nature the court should exercise its inherent power in a fit case, so that the appeal may not be rendered nugatory. (See *Wilson v Church*, (1979) 11 Ch D 576; approved by the Court of Appeal for Eastern Africa and the Kenya Court of Appeal in a number of well-known cases). The learned judge was, in effect, correctly preserving the status quo pending the appeal”.

39. The mere inconvenience that may be occasioned to the Respondent, cannot be equated to the hardship and substantial loss and damage that the Applicant may suffer in the event the application is not granted. Leave alone the prejudice will be suffered.
40. That, the Court is clothed with constitutional jurisdiction to make any order or give any direction it considers appropriate to ensure the fair administration of justice.
41. That, the response to the application and submissions thereof are wholly centered on the main appeal itself which is premature and it is for that reason that the application should be allowed to maintain the substratum of appeal. The parties cannot by consent give court jurisdiction where there is none donated by the statute or constitution.
42. That, the Applicant has demonstrated that he will suffer substantial and irreparable loss if the stay orders are not granted, that he has an arguable appeal which will be rendered nugatory if the orders are not granted, that any prejudice that the Respondent may suffer due to the grant of the orders can be compensated by way of costs and that the application has been made without inordinate delay, amongst



other grounds, in support of its application for stay orders as demonstrated in the Application, the Supporting and Supplementary Affidavits.

43. That, as was held by The Supreme Court in the case of Board of Governors, Moi High School Kabarak & Anor V Malcom Bell SC Petition No.6 & 7 of 2013 where it emphasized the pride and place of an order of stay as a necessary step to preserve the character and integrity of the subject of appeal thus: -

“(33) It is clear to us that if interlocutory applications are excluded as a necessary step to preserve the subject-matter of an appeal, the Supreme Court’s capability to arrive at a just decision on the merits of the appeal, would be substantially diminished. Both *the Constitution* and the *Supreme Court Act* have granted the Court the appellate jurisdiction; and within that jurisdiction, the parties are at liberty to seek interlocutory reliefs, in a proper case.... 37.... where the Supreme Court has appellate jurisdiction derived from *the Constitution* and the law, it is equally empowered not only to exercise its inherent jurisdiction, but also to make any essential or ancillary orders such as will enable it to sustain its constitutional mandate as the ultimate judicial forum. A typical instance of such exercise of ancillary power is that of safeguarding the character and integrity of the subject-matter of the appeal, pending the resolution of the contested issues”. [Emphasis added].

44. The Applicant urges the court to find that this is a merited application to safeguard the character and integrity of the substratum of the appeal pending the resolution of the contested issues on appeal by granting stay of execution of the orders dated 28<sup>th</sup> February, 2025 and stay of further proceedings pending the hearing and determination of the appeal. The Respondent has explained any prejudice to be suffered if stay is granted. It will only be for the short period pending hearing and determination of the appeal.
45. That, the Applicant has met the conditions set for the grant of stay of execution. Hence, the Applicant humbly prays that his Notice of Motion dated 23<sup>rd</sup> June, 2025 be allowed in its entirety with costs to be met by the Respondent. Costs follow event.

### **Respondents Case**

46. The Application is vehemently opposed by the Petitioner Respondent in his Affidavit dated 9<sup>th</sup> April 2025 that he is informed by his Advocate on record which information he believes and trust to be true that the Applicant’s Application is frivolous, vexatious, and an abuse of the court process, devoid of merit, incompetent, misconceived and ought to be dismissed in the first instance.
47. That, she is further informed by his Advocate on record which information he believes and trust to be true that the Applicant’s Application is fatally defective a leave to appeal to the court of appeal can only be made to the Court of Appeal and not this honourable court which is functus officio.
48. That, he is further informed by his Advocate on record which information he believes and trust to be true that the Applicant has not satisfied and/or demonstrated the basic grounds/condition to warrant grant of an order of stay pending appeal if any
49. That the Applicant has not placed before the court material facts or evidence that he is likely to distribute or execute any soon.
50. He relies on his advocates advice whose advice he hold as sound that an application for stay pending Appeal is on condition that:



- a. The court is satisfied that substantial loss may result to the applicant
  - b. The applicant is able and willing to place any security.
51. That, the Applicant has not brought before this honourable court reasons as to justify the order of stay of execution as to the loss that would be occasioned to her. On the contrary, the Respondent stands to lose if stay is granted as estate risks not being administered.
  52. That the Applicant has not shown any iota of willingness to place a security for grant of prayers sought
  53. That none of the conditions referred in paragraph 9 above have been justified by the Applicant as she has failed in the instant application to justify both in substance and procedure the grant of stay pending appeal.
  54. That, he is further informed by his Advocate on record which information he believes and trust to be true that the Applicant's application is an afterthought brought with the sole aim of frustrating the distribution process.
  55. That, the relief sought herein is discretionary and the discretion must be exercised judicially and can only be granted upon the court being satisfied that there is sufficient cause to warrant.
  56. That, the Applicant has not adduced any evidence to warrant a grant of an order of stay pending appeal as the said appeal has not yet been filed and as such the Applicant is not entitled to have the court exercise discretion in her favour.
  57. That, the orders sought by the Applicant is prejudicial to me and estate as it shall interfere with my right of enjoyment of fruits of a successful litigation.
  58. That, he is further informed by his Advocate on record which information he believes and trusts to be true that the Applicant will not suffer substantial loss if denied the prayers sought.
  59. That, he is further informed by his Advocate on record which information he believes and trust to be true that the Applicant has not met the threshold for granting orders required in law and therefore she cannot be granted the orders sought.
  60. That in light of the foregoing and in the interest of justice and in view of the judgment in his favour and this Honourable Court in assisting him enjoy the fruits of my judgement, he humbly pray that the Honourable court disallow the application.

### **Analysis and Determination**

61. The principles guiding the grant of a stay of execution pending appeal are provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules which provides:
  - “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.”
62. The Applicant has to satisfy the following conditions:



- i. that unless the order is issued, substantial loss may befall the Applicant;
- ii. that the Application has been made without unreasonable delay,
- iii. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

### **Unreasonable Delay**

63. The Application was filed on 23<sup>rd</sup> June 2025, the Impugned ruling subject to the interlocutory Appeal is made on the 28<sup>th</sup> February 2025. The Applicant casually states that the 4 months delay is not inordinate and does not in any way account for the period of delay. This limb has not been satisfied.

### **Security**

64. The Applicant have not offered any security despite having accumulated 529,984/- in child maintenance arrears and the continued obfuscation of the interests of the child is palpable.

### **Substantial Loss**

65. According to the Applicant, he would suffer substantial loss since the property's value (Kshs. 3.5M) is 660% higher than the debt (Kshs. 529,984) no valuation was presented during consent negotiations.

66. Execution is a legal process sanctioned by Court and Courts have held time without number, that fear of execution does not in any way amount to substantial loss. Without proper reasons of the substantial loss to be suffered the Court cannot rightfully stop a legal process.

67. In the celebrated case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, the Court stated;

“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.”

68. Secondly, the child's best interest would supersede any substantial loss being argued under these circumstances.

69. Be that as it may, having that the enforcement of one party's rights to enjoy the fruits of his judgment should not be to the detriment of another party's right to challenge the decision of a Court in a Higher Court.

70. The rights of each party have to be weighed and in balancing those rights, the Court has to consider what is justice dictates. In this instance the court notes that the Applicant has accumulated child maintenance arrears to an extent of execution consent and instant Appeal.



71. The question that begs is what is the effect of this litigation on the children? How do they wait for resources they need in the upbringing? Do the parties step back to reflect on the impact and damage on the children such litigation causes?
72. In view of the above and in the interest of justice, I find that the Applicant has not satisfied the conditions for grant of stay, however in exercise of my discretion in the child's best interest and interests of justice, it is just and reasonable to allow a conditional stay of the execution conditionally pending the hearing of the interlocutory Appeal.
- a. A conditional Order of Stay of execution of the ruling dated 28.02.2025, in NAKURU MCCC NO.75 OF 2016, MW Vs TOO is hereby granted pending hearing and disposal of the Appeal.
  - b. The Applicant shall forthwith and not later than thirty (30) days from the date of this ruling pay the Respondent a sum of 529,984/-kes .
  - c. The Applicant shall within 90 days from this Ruling set down the Appeal for admission and hearing
  - d. In default of Any of the conditions set in paragraphs (b) and (c) above, the conditional stay shall automatically be vacated and the Application shall be deemed to have been dismissed with costs and the Respondent will be at liberty to execute.
  - e. Costs shall be in the cause

It is So Ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 7<sup>TH</sup> NOVEMBER 2025.**

---

**S. MOHOCHI**  
**JUDGE**

