



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ELC APPEAL NO. E014 OF 2022**

**COSMAS WAMBUA MUTUTU.....1<sup>ST</sup>**  
**APPELLANT**

**JOSEPHINE MUENI NDETO.....2<sup>ND</sup>**  
**APPELLANT**

**VERSUS**

**HENRIETTA MUKII MWILU.....1<sup>ST</sup>**  
**DEFENDANT**

**MORRIS MATHEKA KIMEU.....2<sup>ND</sup>**  
**RESPONDENT**

**RULING**

1. Being dissatisfied with the judgment delivered by this court on 29/04/2024, the appellants promptly lodged a notice of appeal on 8/05/2024, thus paving the way for this court to entertain the notice of motion dated 19/07/2024 that is the subject of this ruling, expressed to have been moved within the provisions of **Sections 1A** and **1B** of the **Civil Procedure Act**, **Orders 42 Rule 6, 50 Rule 1** of the **Civil Procedure Rules**,

and all other enabling provisions of the law. The following reliefs are sought in the motion: -

***a. Spent.***

***b. Spent.***

***c. THAT pending the hearing and determination of the intended appeal, this honourable court be pleased to grant an order of stay staying execution of the judgement of this honourable court issued on the 29/04/2024 and all consequential orders therefrom and restrain the respondents, their agents, servants, or anyone acting under their instructions from occupying, collecting rent, or in any other manner interfering with appellants' possession and use of the parcel of land known as plot no. 33 phase 1 Ngwata-2008.***

***d. THAT the costs of this motion be in the cause.***

2. The motion is supported by the grounds therein as well as the affidavit sworn on the instant date by the 2<sup>nd</sup> appellant. In summary, she stated that: a) the respondents herein have taken control of **plot No. 33 Phase 1 Ngwata-2008 (“suit property”)** and started collecting rent from the 2<sup>nd</sup> appellant’s

tenant in May and June following the judgment, and if not halted by an order of this honourable court, then execution will proceed to the detriment of the appellant.

3. B) The appellants have filed a notice of appeal, and if execution proceeds, the intended appeal may be rendered nugatory; c) if not stopped by an order of this court and execution proceeds, the 2<sup>nd</sup> appellant will suffer irreparably; and, d) the respondents herein will suffer no prejudice, as they will still enjoy the fruits of their judgement if the intended appeal is not decided in favour of the appellants.
4. The motion is opposed by a replying affidavit sworn by the 1<sup>st</sup> respondent on 3/02/2024. In short, she asserted that: a) the motion offends the mandatory provisions of **Order 9 Rule 9** of the **Civil Procedure Rules**; b) the notice of appeal is not signed by the deputy registrar, therefore it is irregular; c) as per the court's judgement delivered on 29/04/2024, the respondents are entitled to the suit property; d) the 2<sup>nd</sup> appellant has not provided sufficient reasons to justify the grant of the orders sought; e) the motion does not meet the threshold for the grant of a stay pending appeal as no substantial loss has been demonstrated; f) it will deny the respondents the right to enjoy the fruits of the judgment; and, finally g) the intended appeal does not raise triable grounds and therefore the chances of success are very minimal.

5. The respondents also filed a notice of preliminary objection dated 24/10/2024, which raised the issue of whether the mandatory provisions of **Order 9 Rule 9** of the **Civil Procedure Rules** were satisfied. A similar concern is addressed in the replying affidavit; therefore, it would be redundant to examine this preliminary objection. Nonetheless, it concerns factual matters that have been contested, as will be demonstrated shortly.
6. Accordingly, when parties appeared before this court, they were directed to canvass the motion through written submissions, and only the law firm of **Ms. B.M. Mung'ata & Co. Advocates** for the respondents duly complied. Thus, having carefully considered the motion, its grounds, affidavits, and written submissions, including the provisions of law and judicial precedents relied upon, the two issues for determination are: **(a) whether the law firm of Ms. Evans Muli & Co. Advocates, which acts alongside Ms. Kioko & Gathoni Advocates LLP, is properly on record;** and **(b) whether the appellants have met the legal threshold to warrant a stay of execution pending appeal.** The issues will shortly be addressed distinctly in this court's analysis and decision.

**a. Whether the law firm of Ms. Evans Muli & Co. Advocates, which acts alongside Ms. Kioko & Gathoni Advocates LLP, is properly on record**

1. Respecting this issue, the respondents' counsel made heavy weather of the appointment of **Ms. Evans Muli & Co. Advocates** while citing the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules**, which pertains to the post-judgment process where an advocate or party seeks to come on record in place of an advocate who was previously on record. This provision states as follows:

***“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—***

***(a) upon an application with notice to all the parties; or***

***(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”***

1. However, it appears the respondents' counsel overlooked that both of these law firms are on record for the appellants and are acting jointly, without one law firm replacing the other. It is also probable that these law firms have reached an agreement on who will be the lead counsel. The manner in which these law

firms are appearing for the appellants is permitted under the law, particularly under **Rules 6(1)** and **7** of the **Advocates (Practice) Rules**. Hence, this argument by the respondents fails.

**b. Whether the appellants have met the legal threshold to warrant a stay of execution pending appeal.**

2. Concerning the applicable law and jurisprudence, the instant motion has been brought within the auspices of **Order 42 Rule 6** of the **Civil Procedure Rules** and the long-standing principles therein are that an applicant has to demonstrate that the motion is brought without undue delay, demonstrate to the court's satisfaction that substantial loss may result to her unless stay of execution is ordered and award such security as the court orders for the due performance of such decree or order as may ultimately be binding on her has been given. Furthermore, a notice of appeal against the decision of this court must have been filed within the stipulated timelines.
3. Additionally, it is pertinent to observe that when entertaining motions of this nature, this court exercises prudent discretion, guided by the law, evidence, and reason. Kenya's jurisprudential legal principles concerning the stay of execution pending appeal are numerous, but to highlight a few: -

In **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] KECA 94 (KLR)**, the Court of Appeal stated:

***“Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”***

**M/S PORTREITZ MATERNITY -VS- JAMES KARANGA KABIA CIVIL APPEAL NO. 63 OF 1997**, which is cited with the approval in the Court of Appeal decision of **Kiarie v Mwaura [2022] KECA 1147 (KLR)** had this to say:-

***“That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”***

In **Halai & another v Thornton & Turpin (1963) Ltd [1990] KECA 65 (KLR)**, the Court of Appeal made the following rendition:-

***“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.”***

4. Now, having considered the substance of the motion before this court and in relation to the first test of delay, this court does find that the motion was filed with an unreasonable delay, as it was submitted approximately three months after the judgment was rendered. Moreover, it is recognised that even a single day can constitute a delay. In this case, the respondents have initiated the execution process and have already taken their respective portions of the suit property by collecting rent. The appellants fail on this first test.
5. On the second test of loss, the second appellant merely stated that her tenant had started paying rent to the respondents and not to her, as the location of the rentable property was within the portion allocated to the respondents. Essentially, the appellants are suggesting that if the appeal succeeds, the respondents may not be able to provide full restitution. However, it was not enough for them merely to make such assertions, as they were required to demonstrate with concrete

evidence that the loss was significant, which they have failed to do.

6. Now, concerning tests such as demonstrating that the appeal or intended appeal is arguable, or that, unless the orders sought are granted, the appeal, if successful, will be rendered nugatory as argued by the appellants, are not criteria applied in this case because they are functions of the Court of Appeal, which is the court to which an appeal has been preferred. Therefore, these two principles will not be tested.

7. Thus, in conclusion, this court finds and holds that the appellants have not met the legal threshold to warrant a stay pending appeal. It also finds that the notice of motion is not merited. Since it is trite law that costs follow the event, and being unsuccessful, costs are awarded to the respondents. In the end, this court hereby issues the following final disposal order: -

***a. The notice of motion dated 29/04/2024 is hereby dismissed with costs to the respondents.***

Orders accordingly.

**Delivered and Dated at Machakos this 25<sup>th</sup> day of November, 2025.**

**HON. A. Y. KOROSS  
JUDGE  
25.11.2025**

**Ruling delivered virtually through Microsoft Teams Video  
Conferencing Platform**

In the presence of;

Ms. Kanja Court Assistant.

Miss. Mutuku for Respondent.

Mr. Muli for Applicant.