

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**  
**ELC CASE NO 140 OF 2019**  
**(FORMERLY HCC NO 77 OF 2011)**

**GEOFREY KEGODE MUDAVADI** (Suing as the Administrator of the Estate  
of **ROSEBELLA JERONO MUDAVADI** (deceased)).....**1<sup>ST</sup>**  
**PLAINTIFF**  
**JOSEPH MOJONG**.....**2<sup>ND</sup> PLAINTIFF**  
**ROBERT LANGAT**.....**3<sup>RD</sup> PLAINTIFF**  
**RICHARD AMDANY**.....**4<sup>TH</sup> PLAINTIFF**  
**JOSHUA CHEPSERGON**.....**5<sup>TH</sup> PLAINTIFF**  
**JOSHUA SOI**.....**6<sup>TH</sup>**  
**PLAINTIFF**  
**FRANCIS RUTO**.....**7<sup>TH</sup> PLAINTIFF**  
**SAMMARY CHEPKEMOI**.....**8<sup>TH</sup> PLAINTIFF**

**VERSUS**

**JANE NJAMBI KARIUKI** (Sued as Administrator  
of the Estate of **DAVID KARIUKI WAIGANJO** (deceased)).....**1<sup>ST</sup>**  
**DEFENDANT**  
**GILLETTE AUCTIONEERS**.....**2<sup>ND</sup> DEFENDANT**  
**THE OCS NAKURU POLICE STATION**.....**3<sup>RD</sup>**  
**DEFENDANT**  
**THE HONOURABLE ATTORNEY GENERAL**.....**4<sup>TH</sup>**  
**DEFENDANT**

**RULING**

1. This ruling is in respect of two Notice of Motion applications, dated 19<sup>th</sup> September, 2025, and 22<sup>nd</sup> September, 2025, by the 2<sup>nd</sup> and 1<sup>st</sup> Defendants respectively. The first application by the 2<sup>nd</sup> Defendant sought the following orders:

***a) Spent***

***b) Spent***

***c) THAT this Honorable Court be pleased to grant an order of stay of execution staying the execution of both the***

*judgment delivered on the 6<sup>th</sup> August, 2025 and any consequential orders or proceedings arising therefrom pending the hearing and determination of the appeal filed herewith.*

**d) THAT costs of this application be in the cause.**

2. The application is supported by the annexed affidavit of Philip Mwaura Munyua (who trades in the name of the 2<sup>nd</sup> Defendant) sworn on 19<sup>th</sup> September, 2025, where he deponed that the 2<sup>nd</sup> Defendant is aggrieved by the judgment of the court dated 6<sup>th</sup> August, 2025, and has already filed a Notice of Appeal, further that the application has been filed without undue delay.
3. It was the 2<sup>nd</sup> Defendant's deposition that the Plaintiffs may execute the judgment/decree, and further that he is aware that the Plaintiffs intend to subdivide the suit land and sell it off to third parties who will not be aware that there is a legal tussle involving the suit land. He stated that he has an arguable appeal and is willing to abide by any reasonable conditions set by the court as a prerequisite to granting the orders sought.
4. Richard Amdany, the 4<sup>th</sup> Plaintiff filed a Replying Affidavit sworn on 21<sup>st</sup> October, 2025, and deponed that he has the authority of his co-respondents to swear the affidavit on their behalf. It was his deposition that the Applicant has not offered any security towards the application pending appeal. The 4<sup>th</sup> Plaintiff deponed that the Applicant has not

exhibited any prejudice that it will suffer should the orders sought not be granted.

5. The second application is the Notice of Motion application dated 22<sup>nd</sup> September, 2025, by the 1<sup>st</sup> Defendant seeking the following orders:

*a) Spent*

*b) Spent*

*c) THAT pending the hearing and determination of the Applicant's intended appeal to the Court of Appeal, this Honourable Court be pleased to grant a stay of execution of the judgment issued on 6<sup>th</sup> August 2025 together with all the consequential orders thereof.*

*d) THAT the costs of this application be provided for.*

6. The application is supported by the annexed affidavit of Jane Njambi Kariuki, the 1<sup>st</sup> Defendant, who deponed that a dispute arose between the parties and upon hearing the matter, the trial court rendered a judgment on 6<sup>th</sup> August, 2025. The court found in favour of the Plaintiffs who are in the process of executing the said judgment as a warrant of sale of property in execution of a decree for money was applied for on 28<sup>th</sup> August, 2025.

7. It was the 1<sup>st</sup> Defendant's deposition that she is likely to suffer irreparable and substantial loss if execution proceeds. She further stated that the intended appeal to the Court of Appeal is meritorious and has a high chance of success, and she is willing and ready to comply with any additional directions the court may give.

8. Richard Amdany, the 4<sup>th</sup> Plaintiff, filed a Replying Affidavit sworn on 30<sup>th</sup> September, 2025, with the authority of his co-respondents and deponed that a Notice of Appeal is not an appeal in itself as there is no Memorandum of Appeal filed. The 4<sup>th</sup> Plaintiff deponed that if the applicants are genuine with their application, then they need to deposit with the court a sum of Ksh.11, 253, 567/=.
9. It was his deposition that they have information that the 1<sup>st</sup> Applicant is disposing off all her property with the ultimate aim of defeating justice. Further that the Applicant will not suffer any prejudice should the orders sought not be granted.

### **1<sup>ST</sup> DEFENDANT'S SUBMISSIONS**

10. Counsel for the 1<sup>st</sup> Defendant filed submissions dated 3<sup>rd</sup> November, 2025, and relied on the provisions of Order 42 of the Civil Procedure Rules and submitted that the judgment was delivered on 6<sup>th</sup> August, 2025, and the application was filed on 22<sup>nd</sup> September, 2025, immediately after the court resumed from recess. Counsel submitted that the application for stay was filed within a reasonable time and there was no delay.
11. On the issue of substantial loss, counsel submitted that without the order of the court, there is nothing preventing the Respondents from executing the judgment thus attaching and selling the Applicant's property to

recover the sums awarded in the judgment. Counsel submitted that there is no evidence that if the amounts awarded by the court are paid to the Respondents and the Applicant succeeds in the appeal, she would be able to recover the same from the Respondents.

12. Counsel submitted that the applicant is willing to comply with any conditions given by the court and urged the court to grant the orders sought and costs await the outcome of the appeal. Counsel relied on the cases of **Butt vs Rent Restriction Tribunal [1982] KLR 417** and **Consolidated Marine vs Nampijja & Another, Civil App No 93 of 1989 (Nairobi)**.

#### **2<sup>ND</sup> DEFENDANT'S SUBMISSIONS**

13. Counsel for the 2<sup>nd</sup> Defendant filed submissions dated 27<sup>th</sup> October, 2025 and identified the following issues for determination:

*a) Merits of the Application?*

*b) Who should bear the costs of the Application?*

14. On the first issue, counsel submitted that the 2<sup>nd</sup> Defendant will suffer substantial loss should the Plaintiff execute the judgment and further no evidence has been adduced that the Plaintiff will refund the substantial sum awarded to the applicants should their respective appeals be allowed.
15. Counsel relied on Order 42 Rule 6 of the Civil Procedure Rules and the cases of **Runda Water Limited & another vs Timothy John Nicklin**

**& another [2017] eKLR, RWW vs EKW and James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR.**

16. On the issue of security, counsel submitted that the Applicant, vide affidavit evidence has confirmed that he is ready and willing to abide by any reasonable conditions that this Court will impose for the grant of the stay of execution. Counsel relied on the cases of **Absalom Dova vs Tarbo Transporters [2013] eKLR** and **Focin Motorcycle Co. Limited vs Ann Wambui Wangui & another [2018] eKLR.**
  
17. Counsel submitted that the application was filed without unreasonable delay as the judgment was delivered on 6<sup>th</sup> August, 2025, and the application for stay of execution was filed on 19<sup>th</sup> September, 2025, immediately after the court resumed from recess. Counsel submitted that the appeal has high chances of success and will be rendered nugatory if the application for stay is not granted and urged the court to grant the orders sought. He relied on the case of **Nduhiu Gitahi and Another vs Anna Wambui Warugongo [1988] 2 KAR.**

### **RESPONDENTS' SUBMISSIONS**

18. Counsel for the Respondents filed submissions dated 14<sup>th</sup> October, 2025, and opposed the two applications and submitted that no evidence of execution has been exhibited to the honourable court. Counsel submitted that the applicants have evaded the issue of security and proposed that a sum of Ksh.11, 253, 567/- be deposited with the court. Counsel urged the

court to consider the duration this matter has taken in court and submitted that litigation must come to an end.

### **ANALYSIS AND DETERMINATION**

19. The issue for determination in the two applications is whether the Applicants have met the threshold for the grant of stay of execution orders pending appeal.
20. For an Applicant to succeed in an application for stay of execution pending appeal, he/she must comply with the provisions under Order 42 Rule 6 of the Civil Procedure Rules which guide the court on whether to grant a stay of execution or not. A party must apply without undue delay, must prove that he/she will suffer substantial loss if stay orders are not granted, and offer such security as the court orders for the due performance of such decree or order as may ultimately be binding on him/her.
21. The grant of stay of execution is discretionary and such discretion must be exercised judiciously as was held in the Court of Appeal case of **Butt v Rent Restriction Tribunal (1982) KLR 417** which provides guidance on how a court should exercise discretion and held that:
  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.*

*3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of proceedings.*

*4. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount or rent in dispute and the appellant had an undoubted right of appeal.*

*5. The court in exercising its powers under Order XLI rule 4 (2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse'.*

22. On whether the application has been made without unreasonable delay, the judgment was delivered on 6<sup>th</sup> August, 2025, while the applications under consideration are dated 19<sup>th</sup> September, 2025, and 22<sup>nd</sup> September, 2025. I find that there was no unreasonable delay in filing the applications.

23. On whether the Applicants shall suffer substantial loss if the stay orders are not granted, the 1<sup>st</sup> Defendant informed the court that without the order of the court, there is nothing preventing the Respondents from executing the judgment of the court thus attaching and selling the 1<sup>st</sup> Defendant's property to recover the sums awarded in the judgment. The 2<sup>nd</sup> Defendant on the other hand informed the court that it will suffer substantial loss should the Plaintiff execute the judgment and further no evidence has been adduced that the Plaintiff will refund the substantial sum awarded to the applicants should their respective appeals be allowed.

24. In the case of **Samvir Trustees Ltd. –vs- Guardian Bank Ltd. (Nairobi (Milimani) HCCC No. 795 of 1997**, the court held that:

*“... For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss ...”*

25. In the case of **Tropical Commodities Suppliers Limited 7 others v International Credit Bank Ltd (in liquidation) (2004) 2 EA 331** the Court persuasively defined the aspect of substantial loss thus:

*“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth*

*or value as distinguished from a loss without value is a loss that is merely nominal.”*

26. The Applicants have stated that they have an arguable Appeal and if stay orders are not granted, their appeal will be rendered nugatory. As to what constitutes an arguable appeal, the Court of Appeal in **Nairobi Women’s Hospital vs. Purity Kemunto [2018] eKLR** held that:

*“To say that an appeal is arguable is another way of saying that it is not frivolous and that it raises a bona fide issue deserving full consideration by the Court. Even one bona fide issue will satisfy the requirement, for the law does not look for a multiplicity of arguable issues.”*

27. This is a case involving several Plaintiff/Respondents who have given the 4<sup>th</sup> Plaintiff the authority to swear an affidavit on their behalf. The plaintiffs have different capacities in terms of finances and this decree involves payment of a decretal sum running into millions.
28. The Applicants have stated that the Respondents are in the process of execution of the money decree and that if the money is paid, they may not be in a position to refund the money should the appeal succeed.
29. Courts rarely grant a stay of execution of a money decree, but that is not to say that they will never grant a stay of execution of a money decree. Each case will depend on the circumstances at hand, and should the Applicant succeed in demonstrating the extreme difficulty in recovering the decretal sum from the Respondent in the event the appeal succeeds, the Applicant will have succeeded in showing that he stands to suffer substantial loss.

30. This is a matter that has been in court for more than a decade, as much as litigation must come to an end, the court has to balance the rights of a successful litigant and one who wants to appeal to have a second bite of the cherry.
31. I have considered the two applications and the submissions by counsel and find that in the interest of justice, it would be prudent and just to grant a conditional stay of execution in the following terms:
- a) That an order of stay of execution is hereby granted to the Applicants on condition that they deposit Kshs 200,000/ in a joint interest earning account of the Advocates on record within 30 days, failure of which the order lapses.*
  - b) Costs to abide by the outcome of the Appeal*

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 5<sup>TH</sup> DAY OF DECEMBER 2025.**

**M. A. ODENY**

**JUDGE**