

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM. APPEAL NO. E059 OF 2025

BETWEEN

DOUGLAS MUCHUI NTURANGI.....1ST

APPELLANT

PAULINE NJERI MUCHUI.....2ND

APPELLANT

ISAIAH NTURANGI M'ITURUI.....3RD

APPELLANT

AND

PROGRESSIVE CREDIT LIMITED.....1ST

RESPONDENT

TIMELESS DOLPHINE AUCTIONEERS.....2ND

RESPONDENT

RULING

Introduction & Background

1. By the Notice of Motion dated 14th February 2025, the Appellants seek to stay the execution of the subordinate court's ruling of 7th February 2025 that dismissed the Appellants' application seeking an injunction. They also seek an injunction from this court to

restrain the Respondents from selling, transferring, or in any way interfering with the property known as L.R No. KIANJAI/KIANJAI/2432 and halt all further proceedings in the subordinate court pending the outcome of this appeal. The application is supported by the affidavit of the 1st Appellant **DOUGLAS MUCHUI NTURANGI** sworn on 14th February 2025 and opposed by the Respondents through the replying affidavit of the 1st Respondent's Legal Officer, **CHRISTINE MIKAL** sworn on 10th March 2025. The parties have also supplemented their arguments by filing written submissions which I have considered and I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

2. From the pleadings and the submissions, I note that the court is being called to determine whether there should be a stay of execution of the subordinate court's ruling, whether the proceedings of the subordinate court should be stayed and whether the injunction should be issued pending the appeal. On the stay of execution, it is not in dispute that under **Order 42 Rule 6** of the ***Civil Procedure Rules***, the Appellants must demonstrate that they will suffer substantial loss if the order is not granted, that the application has been made without unreasonable delay; and that

they are willing to provide such security as the court may order for the due performance of the decree.

3. However, the prerequisite to this entire inquiry is the existence of an executable order or decree. An order for stay of execution presupposes that there is something to "execute" or enforce. This foundational point is where the Appellants' case for stay of execution falters and I will explain why. I note that this appeal and application is in respect of a dismissal order. The subordinate court simply dismissed the Appellants' application with costs. Such is in the nature of a negative order because it does not order any of the parties to do anything or restrain from doing anything. It is for this reason that negative orders have been held to be incapable of execution and for that reason, such an order is incapable of being stayed. The Court of Appeal, in **Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah [2008] KECA 346 (KLR)** held the same position when it stated that *"an order dismissing a suit with costs is a negative order incapable of execution as the same does not order any of the parties to do anything or refrain from doing anything or to pay any sum."*
4. I find this reasoning directly applicable to the present case. An order dismissing an application is a negative order that does not

command any positive action from the successful party. A negative order cannot be stayed and this prayer by the Appellants is only available for rejection (see **Nywele Nzuri Limited v Captain Real Estate Limited [2025] KEHC 11515 (KLR)**). As I have declined the prayer for stay or execution, I find that the prayer for stay of proceedings is also dismissed as the Appellants hinged this prayer on the success of the prayer for stay of execution.

5. Turning to the prayer for an injunction pending the appeal, **Order 42 Rule 6(6)** of the **Civil Procedure Rules** empowers this court to grant a temporary injunction on terms it deems fit so long as the procedure for filing an appeal from subordinate court has been complied with. Visram J.,(as he was then) in **Patricia Njeri & 3 Others v National Museum of Kenya [2004] KEHC 1614 (KLR)** outlined the following principles applicable in considering an application for an injunction pending appeal. *(1)That an order of injunction pending appeal is discretionary. The discretion must, however, be “exercised judicially and not in whimsical or arbitrary fashion and will be exercised against an applicant whose appeal is frivolous. (2) That the discretion should be refused where it would inflict greater hardship than it would avoid and (3)that the applicant must show*

refusal of the injunction would render the appeal nugatory. The court added that the court should also be guided by the principles in **Giella v Cassman Brown & Co., Ltd. [1973] E.A. 358**

6. The Appellants believe that their appeal has a high chance of success due to legal and factual errors and they fear the Respondents will auction the subject property imminently, which would dispossess the 3rd Appellant and render their appeal nugatory. That the sale would cause them significant financial loss and that their right to property under **Article 40** of the Constitution would be violated if the subject property is sold. They claim the balance of convenience tilts in their favor, as the harm they would suffer from a sale outweighs any inconvenience to the Respondents from a temporary delay. The Appellants further state that the application was filed without delay.
7. In the application and submissions, I note that the Appellants have raised grounds faulting the ruling of the Subordinate Court. It should not be lost that the main substance in issue will be determined at the hearing of the appeal and that at this stage, the court eschews making any determination on its merits. What I think is important at this stage it to determine whether the Appellants

would suffer undue hardship if the injunction is denied and whether in fact the appeal will be rendered nugatory.

8. In this appeal, the court will be called to determine whether the injunction ought to have been issued by the subordinate court considering the Appellants' arguments that the Respondents levied unconscionable interest and that they had fully repaid the loan. There is also the counter position by the Respondents that the Appellants are still indebted to them and that the Appellants have been making intermittent and insufficient payments and also issuing bouncing cheques. In short, the dispute revolves around the level of the Appellants' indebtedness to the Respondents. This court and the Court of Appeal has always held that an injunction cannot be issued solely on the ground that there is a dispute as to the amount due under an agreement (see **J. L. Lavuna and Others v Civil Servants Housing Co. Ltd. & Savings And Loan Kenya Ltd [1995] KECA 111 (KLR)**).
9. Therefore, on a prima facie basis, the Appellants are not entitled to an injunction at this point and ultimately, any hardship the Appellants may suffer can be compensated by an award of damages equivalent to any sums paid or the value of the subject

property (see **Esso Kenya Ltd v Mark Makwata Okiya [1992] KECA 53 (KLR)**).

Conclusion & Disposition

10. In the upshot, I find and hold that the Appellants' application dated 14th February 2025 lacks merit. It is therefore dismissed with costs to the Respondents. The interim orders in force are vacated and discharged and the amount of Kshs.200,000.00/= deposited in court shall be released to the Respondents on account of any charges incurred as a result of the aborted auction. It is so ordered.

**DATED SIGNED and DELIVERED virtually at NAIROBI this 1ST
DAY of DECEMBER 2025**

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Mr. Hasea for the Appellants/Applicants.
2. Mr. Musamali for the 1st & 2nd Respondents.
3. Ivan - Court Assistant

ORIGINAL