**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. APPEAL NO. E012 OF 2025**

**JOSHUA MAWEU KILUNDO::::::::::::::::::::::::APPELLANT/APPLICANT**

**VERSUS**

**PHILES MUTHAMBA MBAI:::::::::::::::::::::::::::::::::::::1ST RESPONDENT**

**AIMI MA KILUNGU LIMITED::::::::::::::::::::::::::::::::::2ND RESPONDENT**

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**RULING**

The application is dated 7th April 2025 and is brought under Sections 3 and 3A of the Civil Procedure Act, and Order 42 Rule 6(1) of the Civil Procedure Rules seeking the following orders;

1. THAT this application be certified as urgent and be heard *ex-parte* in the first instance.
2. THAT pending the hearing and determination of this application *inter-partes* there be a stay of execution of the Judgment delivered on 28th January, 2025 in CMCC No. 693 of 2014 (Machakos) Joshua Maweu Kilundo -vs- Philes Muthamba Mbai and Aimi Ma Kilungu Limited.
3. THAT pending the healing and determination of the Appeal herein, there be a stay of execution of the Judgment delivered on 28th January, 2025 in

CMCNO. 693 of 2014 (Machakos) Joshua Maweu Kilundo -vs- Philes Muthamba Mbai and Aimi Ma Kilungu Limited.

4. THAT costs of this application be in the cause.

It is based on the following grounds that the Subordinate Court delivered its Judgment in this matter on 28th January, 2025. That the Appellant/Applicant being aggrieved by the said Judgment has now appealed to this court. That the Subordinate Court ordered, *inter alia,* that the Respondent shall get the cost of this suit. That if stay of execution is not granted, the Applicant shall suffer substantial loss. That the Applicant is ready and willing to abide by any orders as to security that this Honourable Court may deem fit to grant. That unless the sought orders are granted, the Appeal will be rendered nugatory. That the Appellant's Appeal has overwhelming chances of success.

This court has considered the application and the submissions therein. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the Civil Procedure Rules as follows;

*"No appeal or a second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order, but the Court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred, shall be at*

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*liberty, on an application being made, to consider such application and to make such orders thereon as may to it seem just, any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have the orders set aside."*

Order 42, rule 6 states:

*"No order for stay of execution shall be made under sub-rule (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."*

The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

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The principles governing the exercise of the court's jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicant must show that they have an arguable appeal and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of Reliance Bank Ltd (In Liquidation) vs Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR), thus;

> *"Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-*
>
> *1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,*
>
> *2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction."*

The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in Chris Munga N. Bichange vs Richard Nyagaka Tongi & 2 Others eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus;

> *"……………. The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would*

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*succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated………"*

In the case of Mohamed Salim T/A Choice Butchery vs Nasserpuria Memon Jamat (2013) eKLR, the court stated that;

> *"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 ……………"*

We are further guided by the court's decision in Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997, at Page 4 as follows:

> *" . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .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, and the application must, of course, be made without unreasonable delay."*

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The 1st Respondent stated that the Applicant has not established any substantial loss as the suit property is in the 1st Respondent is in possession of the suit property since 2012 and has developed the same by building both temporary and permanent structures. That the 1st Respondent acquired the suit property procedurally and legally from the 2nd Respondent. That he also keeps livestock. That they have failed to establish that substantial loss will be suffered.

I find that the applicant is guilty of laches as judgement was delivered on 28th January 2025 and this application is dated 7th April 2025. The Plaintiff/Applicant submitted that the suit land had been transferred to him lawfully. That the Appellant is in possession of the suit plot. The court dismissed the Plaintiff's suit and I see nothing to stay in the circumstances. I find that the draft memorandum attached to the application on the grounds of appeal does not raise an arguable appeal and I do not find that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicant has failed to fulfil the above grounds mentioned to enable me grant the stay. I find that the application is not merited and is dismissed with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 18TH DAY OF DECEMBER 2025.**

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**N.A. MATHEKA**

**JUDGE**

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