

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA

ELCLA NO. E068 OF 2025

MOHAMED NAGIB
APPELLANT

VERSUS

JANE WAMBUI KARIUKI 1ST
RESPONDENT

COUNTY LAND REGISTRAR MOMBASA COUNTY 2ND
RESPONDENT

MARGARET KARIUKI 3RD
RESPONDENT

DANIEL NJOROGE 4TH
RESPONDENT

RULING

[NOTICE OF MOTION DATED 9TH OCTOBER 2025]

1. The appellant filed the notice of motion dated 9th October 2025 seeking for orders among others that pending the hearing and determination of the appeal, there be a temporary order of stay of execution of the judgement and decree of Hon. J. B. Kalo, CM, delivered on 19th September 2025 in Mombasa MCELC No. E195 & E197 of 2022. The application is based on the three (3) grounds on its face marked (a) to (c) respectively, and supported by the affidavit of Mohamed Nagib, the appellant, sworn on 9th

October 2025, inter alia deposing that he was aggrieved by the judgement and decree delivered in Mombasa MCELC No. 195 & 197 of 2022, delivered by Hon. J. B. Kalo on 19th September 2025 and has filed the appeal through the memorandum of appeal dated 30th September 2025; that the appeal is arguable with high chances of success and if stay is not granted the appeal will be rendered nugatory, as the trial court ordered that he vacates from the suit properties and demolish his structures thereon in ninety (90) days where he has lived for more than twelve (12) years.

2. The application is opposed by the 1st & 3rd respondents through their grounds of opposition dated 16th October 2025 inter alia stating that the application has not met the threshold for stay order pending appeal to issue; that the appellant has no arguable appeal as he admitted being a trespasser during the hearing and has not offered security for due performance of the decree.
3. On the 16th October 2025, the heard counsel for the appellant, 1st & 3rd defendants and 2nd defendant and directed inter alia that respondents file and serve replies in

seven days and appellant be at liberty to respond to new issues of facts, and that the appellant to file and serve submissions in twenty one (21) days and respondents in fourteen (14) days after service. I have perused the CTS and physical record and no further replies have been filed since that date, and the appellant has to date not filed any submissions. However, the learned counsel for the 2nd defendant and 1st & 3rd defendants have filed their submissions dated the 24th November 2025 and 25th November 2025 that the court has considered.

4. The main issue for determination is whether the appellant has met the threshold for the court to issue the order of stay of execution pending the hearing and determination of the appeal.

5. The court has considered the grounds on the notice of motion and grounds of opposition, affidavit evidence, submissions by the learned counsel, superior courts decisions cited and come to the following conclusions:

a. Though the learned counsel has at paragraph 2 of their submissions indicated that they responded to the application through the replying affidavit of Mike Segoo

Manyarkiy, no such affidavit has been traced on the CTS or the physical record. Indeed the CTS shows that the submissions dated the 24th November 2025 and filed on that same date at 13.15.43 is the only document so far filed by the State Law Office in this matter. I have noted the learned counsel for the 1st & 3rd respondents has at paragraph 1 of their submissions alluded to the 2nd respondent's replying affidavit of Mike Sego Manyarkiy, which could probably mean the State Law Office served it without filing it. As *Order 51 Rule 14(1)* of the Civil Procedure Rules require any respondent desires to oppose an application to file either or a combination of a notice of preliminary objection or replying affidavit or grounds of opposition, and none was filed by or for the 2nd respondent, then it will be taken that the 2nd respondent does not challenge the facts presented by the appellant. Accordingly, only that portion of the 2nd respondent's submissions that addresses the issues of law will be considered by the court.

- b. Though the learned counsel for the 1st & 3rd respondents had on 16th October 2025 indicated they would be filing a replying affidavit in seven days, none was filed. The grounds of opposition filed in response to the application essentially means they did not challenge the facts presented by the appellant.
- c. That a perusal of the judgement delivered by the trial court confirms that the court found in favour of the plaintiff, in respect of Mombasa/Block 1/MS/474, and inter alia awarded her Kshs.500,000 and 300,000 as general damages and mesne profits respectively. The appellant, who was the 1st defendant before the trial court, claims in his application that his appeal has a high chance of success, and if stay is not granted it will be rendered nugatory, as he is likely to be evicted and his structures demolished at the expiry of 90 days. While no respondent has disputed that fact as no replying affidavits were filed in reply, it is indeed a fact the eviction from the suit property where he has been for years and the demolition of the structures thereon at the expiry of 90 days from 19th September 2025,

would amount to substantial loss, were he to later succeed on appeal.

- d. The appellant filed the instant application on 9th October 2025, which was on the 20th day after the judgement of 19th September was delivered. There was therefore no undue delay in the filing the application.
- e. Though the appellant has not offered any security for due performance of the decree in his application, the court is with discretion in appropriate cases to determine the condition to attach to the issuing of stay orders. In this instance, I am of the view that it would be fair and just for stay of execution pending determination to be granted on condition that the appellant deposits Kshs.1,000,000 in an interest earning account in the joint names of his counsel and that for the 1st & 3rd respondents, or with the court, in thirty (30) days from today, as security for due performance of the decree.
- f. That under *section 27* of the Civil Procedure Act chapter 21 of Laws of Kenya, costs follow the event unless where otherwise directed for good reason by

the court. in this instant matter, though the appellant has emerged successful in his application, I find it just and fair for costs to abide the outcome of the appeal

6. Flowing from the foregoing conclusions, the court finds and orders as follows:

a. That the appellant's application dated 9th October 2025 has merit and stay of execution order in terms of prayer (2) is granted, pending the hearing and determination of the appeal, on condition the appellant deposits Kshs.1,000,000 [one million] in an interest earning bank account in the joint names of his counsel and counsel for the 1st & 3rd respondents within thirty (30) days.

b. That should the appellant fail to comply with the condition, the stay order to lapse automatically.

c. Costs to abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 17TH DAY OF DECEMBER 2025.

Kibunja, J.

MOMBASA.

IN THE PRESENCE OF:

S. M.

ELC

APPELLANT: No Appearance

RESPONDENTS : Mr Waga for 2nd Respondent

Mr. Origi for 3rd Respondent

KALEKYE-COURT ASSISTANT.

Kibunja, J.

MOMBASA.

S. M.

ELC