

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL APPEAL NO. E126 OF 2025

MOHAMED AHMED SAROYA.....APPELLANT/OBJECTOR

-VERSUS-

EASTADIL INTERNATIONAL LIMITED..... RESPONDENT/DECREE HOLDER

ZAN STEEL LIMITED.....RESPONDENT/JUDGMENT DEBTOR

MOHAMED ZESHAN SAROYA.....RESPONDENT/JUDGMENT DEBTOR

RULING

Introduction

1. The Appellant/Objector moved this Court by a Notice of Motion dated 16th April 2025 seeking, inter alia, a stay of execution of the ruling and orders issued on 11th April 2025 by Hon. A. Nyoike, SPM, in Milimani MCCC No. E854 of 2023.
2. The application is premised on the grounds that the Appellant is not a party to the suit in the lower court, is not a judgment debtor, and that the proclamation and intended attachment of his property by the decree holder and its agents is wrongful. He annexed a tenancy agreement over **Maisonette No. 1 LR 1870/11/293 (MAS-1)** and his ID card showing he is a different person from the judgment debtor, **Mohamed Zeshan Saroya**.

3. The Appellant further contends that unless stay is granted, the intended execution will proceed, thereby rendering the pending appeal nugatory.
4. The Applicant also asserts that unless this Court intervenes, the Respondent may proceed with execution, thereby rendering the appeal nugatory.
5. The application is not opposed; no replying affidavit appears in the uploaded record.

Analysis and Determination

6. The present application arises from execution proceedings in which the Respondent/Decree Holder sought to execute against certain premises alleged to belong to, or be associated with, the 2nd and 3rd Respondents/Judgment Debtors. The Appellant/Objector moved the subordinate court by way of objection proceedings, contending that he was a lawful tenant of the premises pursuant to a lease agreement with a third party, and that he had no contractual or legal relationship with the Respondent/Decree Holder or the Judgment Debtors.
7. By a ruling delivered on 11th April 2025, the learned magistrate dismissed the objection application. Aggrieved by that decision, the Appellant lodged the present appeal and contemporaneously filed the instant Motion seeking stay of execution.
8. Having considered the application and the submissions filed by the Appellant/Objector herein, I find that the single issue for determination is whether the Appellant has satisfied the threshold for grant of stay of

execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules.

9. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 Rule 6(2) of the *Civil Procedure Rules* which provides:

“No order for stay of execution shall be made under subrule (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.”

10. **Order 42 Rule 6(2) of the Civil Procedure Rules** provides that no order for stay of execution shall be made unless the court is satisfied that:

- (a) substantial loss may result to the applicant unless the order is made;
- (b) the application has been made without unreasonable delay; and
- (c) such security as the court orders for the due performance of the decree has been given.

7. These principles are now well settled. In addition, the Court, in the exercise of its discretion, is enjoined to consider whether the appeal is

arguable and whether, absent a stay, the appeal would be rendered nugatory.

(i) Whether the appeal is arguable

11. An arguable appeal is not one that must ultimately succeed, but one that raises at least one bona fide issue deserving full consideration by the appellate court. This position was succinctly stated in **Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR**, where the Court of Appeal stated that:

“In dealing with Rule 5(2)(b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this Court. The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the fresh hold that an intended appeal is arguable.”

12. From the grounds set out in the Memorandum of Appeal and reiterated in the Appellant’s submissions, the Appellant contends, inter alia, that the learned magistrate failed to properly evaluate the evidence placed before the court showing that the lease to the suit premises was between the Appellant and a third party, and not the Judgment Debtors; that there was no contractual nexus between the Appellant and the Respondent/Decree Holder; and that the court dismissed the objection proceedings without addressing these material issues.

13. At this interlocutory stage, this Court must guard against making definitive findings on the merits of the appeal (see *Stanley Kangethe Kinyanjui v Tony Keter & 5 others (supra)*). Suffice to say that the

questions raised touch on the proper exercise of judicial discretion in objection proceedings and the evidentiary burden borne by a decree holder alleging ownership or control of attached property. These are not frivolous issues.

14. The Court is satisfied that the appeal is arguable, and raises issues such as whether the learned magistrate properly addressed the ownership evidence and whether the Appellant, as a non-party to the decree, could properly be subjected to conditional orders.

(ii) Whether substantial loss has been demonstrated

15. Substantial loss is the cornerstone of an application for stay. The Appellant asserts that execution against the premises he occupies would disrupt his possession and tenancy rights, notwithstanding his claim that he is not a judgment debtor and was not party to the decree.

16. Execution, once carried out, may occasion consequences that are difficult to reverse, particularly where third-party interests in property are implicated. If the execution proceeds and the Appellant is dispossessed before the appeal is heard, the substratum of the appeal would be undermined. I am persuaded that the Appellant has demonstrated the likelihood of substantial loss if stay is denied.

(iii) Whether the application was made without unreasonable delay

14. The impugned ruling was delivered on 11th April 2025, and the present Motion was filed on 16th April 2025. I find that the application was made timeously and without unreasonable delay.

(iv) Security for due performance

17. Order 42 Rule 6(2)(b) requires an applicant to provide such security as the court may order. The purpose of security is to balance the competing interests of the decree holder and the appellant, ensuring that the decree holder is not prejudiced by the delay occasioned by the appeal.
18. In the circumstances of this case, noting that the Appellant is an objector claiming independent rights over the premises and not the judgment debtor against whom the decree was issued, I find that the application has merit.

Disposition

19. In the result, I am satisfied that the Appellant has met the threshold for the grant of stay of execution pending appeal.
20. Accordingly, the Notice of Motion dated 16th April 2025 is allowed on the following terms:
 - a) There shall be a stay of execution of the ruling and orders delivered on 11th April 2025 in Milimani MCCC No. E854 of 2023, pending the hearing and determination of this appeal.
 - b) The stay granted herein is conditional upon the Appellant filing and serving the record of appeal within 60 days from the date of this Ruling.
 - c) In default of compliance with paragraph (b), the stay orders herein shall lapse automatically.
 - d) Costs of the application shall abide by the outcome of the appeal.
21. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH JANUARY
2026**

A handwritten signature in blue ink, appearing to read 'ADO MOSES', is written over a light-colored rectangular background.

**ADO MOSES
JUDGE**

In the presence of: -

C/A - Moses

Abutika.....for the Applicant.

N/A..... for the Respondent.

ORIGINAL FILE