

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 155 OF 2016

**THE EAST AFRICAN PORTLAND CEMENT CO.
LTD:::PLAINTIFF**

VERSUS

**SAMMY KATHILU & 273
OTHERS:::DEFENDANTS**

RULING

The application is dated 5th August 2025 and is brought under Order 42 Rule 6 of the Civil Procedure Rules seeking the following orders;

1. That this application be certified as urgent and service thereof be dispensed with.
2. That this Honourable Court do issue order of stay of execution of the Court's Judgment delivered on 29th November, 2024 pending the hearing of this application interpartes.
3. That this Honourable Court to issue order of stay of execution of the Court's Judgment delivered on 29th November, 2024 pending the hearing and determination of this application.
4. That the cost of this application be provided

It is supported by the affidavit of Paul Nzei and on further grounds that the Applicant and Dama Mavoko Welfare Society were dissatisfied with the decision of the court. That they have appealed against the said decision. That the applicant stands to suffer substantial loss. That the appeal herein has substantial chances of success. That the application has been made without substantial delay.

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 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.”

The Respondent stated that the Applicant does not have an arguable appeal and the application was brought late and has been overtaken by events. Upon perusal of the court record, I find that the Applicant is guilty of laches as judgement was delivered on 29th October 2024 and this application is filed on 11th August 2025.

I find that no draft memorandum of appeal was attached to the application. I find that the grounds of appeal raised in the application do 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. From the judgement the court considered the facts and evidence before it and made a determination on the same. I find that in this case Machakos ELC No. 155 of 2016 East African Portland Cement vs Sammy Kathilu and 72 others the court determined that only the

Plaintiff has exclusive entitlement and unhindered right of possession and occupation of the suit property. That the court found that the Defendants and Interested Parties in that suit had trespassed on the suit land by building houses, schools and churches knowing fully well that the property did not belong to them. I find that the applicant has not fulfilled the above grounds mentioned to enable me grant the stay. I find that the application is not merited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF
JANUARY 2026.**

N.A. MATHEKA

JUDGE