

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**  
**ELC APPEAL NO. E015 OF 2025**

**SOLOMON NGUI MUTUA, MONICA MUTUA MULINGE, KEVIN SOO MUTUA & PAUL MULINGE MUTUA (Being legal representatives of the estate of Fredrick Mutua t/a Makueni Uniforms.....APPELLANT**

**-VERSUS-**

**JUSTIN MASUI NTHIWA.....**  
**RESPONDENT**

**RULING**

1. This is a ruling in respect of a notice of motion dated 10<sup>th</sup> July, 2025 in which the Appellant/Applicant seeks the following orders:

**1) Spent**

**2) Spent**

**3) That this honourable court stay the execution proceedings being levied including the warrants of attachment and sale taken out by Ms. Betabase Auctioneers, and other execution orders emanating from the trial court in Makueni Chief Magistrate's Court MCELC Misc Case No. E011 of 2022 Justine Masui Nthiwa –vs- Solomon Ngui Mutua, Monica Mutua Mulinge, Kevin Soo Mutua, and Paul Mulinge Mutua pending the hearing and determination of this appeal.**

**4) That the costs fo this application abide in the appeal.**

2. The Appellants had been sued by the Respondent in the Chief Magistrate Court on account of rent arrears. During the hearing before the lower court, the Applicants were duly represented by their advocate who was present but the Applicants were not in court. The Respondent testified and was cross examined by the Applicants' advocate. The parties were directed to file submissions. During the date of judgment on 3<sup>rd</sup> October, 2023 the

Applicants' advocate was present and applied for stay of execution. A stay of execution was granted for 20 days.

3. On 29<sup>th</sup> October, 2024 the Applicants filed an application in which they sought to set aside the judgment of 23<sup>rd</sup> September, 2023 together with the execution which resulted from the decree. In a ruling delivered on 19<sup>th</sup> June, 2025, the trial magistrate dismissed the Applicants' application with costs. The Applicants then filed an appeal against the ruling of 19<sup>th</sup> June, 2025 hence this application.
4. The Applicants contend that they were tenants in a premises which was later purchased by the Respondent without their knowledge. They continued paying rent to the previous landlord until when the Respondent sued them. They state that they wanted to have the judgment of 23<sup>rd</sup> September, 2023 set aside so that they could bring on board the previous landlord who could take responsibility for the rent being claimed by the Respondent.
5. The Applicants state that they want the judgment set aside so that they can appoint a lawyer of their choice who will follow up the matter on their behalf. They state that the Respondent has already instructed auctioneers who have already proclaimed their properties and that if the execution is allowed to proceed, their appeal will be rendered nugatory.
6. The Respondent opposed the Applicants' application based on a replying affidavit sworn on 23<sup>rd</sup> July, 2025. The Respondent contends that the application is a delaying tactic meant to prevent him from enjoying the fruits of his judgment. He states that the Applicants have failed to disclose that judgment was as a result of participation of their lawyer.
7. The Respondent states that the Applicants had made an application seeking to set aside the proceedings of 5<sup>th</sup> April, 2023 but a consent was filed. The case was then certified as being ready to proceed. A hearing date was given on 25<sup>th</sup> July, 2023 when the Applicants' counsel was present. The Respondent was cross examined. On the date of judgment the Applicants'

advocate was present and even applied for stay of execution which was granted for 20 days.

8. The Respondent states that the Applicant are raising issues of representation when they ought to have followed up their case with their advocate. The Respondent further contends that the Applicants have not met the threshold for grant of stay of execution pending appeal.
9. In a further affidavit sworn on 15<sup>th</sup> October, 2025, the Applicants contend that their then advocate appeared for them nominally as the communication between them and their advocate was not there. The Applicants further raised the issue of the decree which they claim is irregular in that the decree is dated 23<sup>rd</sup> September, 2023 when judgment was delivered on 5<sup>th</sup> October, 2023.
10. The Applicants further contend that they have an arguable appeal including the issue whether the trial magistrate was correct in finding that their present lawyer had not complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules.
11. The parties were directed to file written submissions. The Applicants filed their submissions dated 15<sup>th</sup> October, 2025. The Respondent filed his submissions dated 16<sup>th</sup> October, 2025.
12. The Applicants submitted that the purpose of stay pending appeal is to preserve the subject matter of the appeal so that an appeal is not rendered nugatory. They submitted that demonstration of substantial loss is the cornerstone for grant of stay. They relied on the case of **Granata Ernesto – vs- Invesco Assurance Company Limited (2016) eKLR.**
13. The Applicants further submitted that the decree obtained is irregular and that if execution is based on it, which will amount to substantial loss. They further submitted that the application for stay was brought promptly and that they are willing to deposit Kshs.50,000/= every month in a joint interest earning account in the name of the advocates for the parties.

14. The Respondent submitted that the Applicants had not demonstrated what substantial loss they will suffer if stay of execution is not granted. The Respondent relied on the case of **James Wangalwa & Another –vs- Agnes Naliaka Cheseto (2012) eKLR** where it was held as follows:

**“No doubt in law, that the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process”.**

15. I have carefully considered the Applicants’ application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties. The only issue for determination is whether the Applicants have met the threshold for grant of stay pending appeal.

16. A look at the memorandum of appeal filed shows that the Applicants are mainly blaming their erstwhile lawyer. During the hearing, the Applicants’ lawyer was present. He even applied for stay of execution on 5<sup>th</sup> October, 2023 which stay was given for 20 days. There is nothing which happened until after the filing of the application before the lower court which sought to set aside judgment which had been delivered on 5<sup>th</sup> October, 2023.

17. The Respondent was seeking to recover rent and he obtained judgment in his favour. The reason being given by the Applicants is that they were paying rent to the previous landlord and were not aware that there was a new landlord who had purchased the premises.

18. The Applicants had opportunity to do that before judgment was entered. They cannot blame their advocate yet they were under duty to follow up on their case. Even if execution proceeds to completion, this will not render the

appeal nugatory. The Applicants have not demonstrated what substantial loss they will suffer if stay is not granted.

19. The fact that the decree is dated 23<sup>rd</sup> September, 2023 when judgment was delivered on 5<sup>th</sup> October, 2023 does not make the decree irregular as to amount to substantial loss. If it be true that judgment was delivered on 5<sup>th</sup> October, 2023 and the decree is dated 23<sup>rd</sup> September, 2023, then there is definitely an error on the face of the record which should have been corrected without making that issue a ground of appeal.

20. Substantial loss is the cornerstone of grant of stay pending appeal. If there is no demonstration of substantial loss no stay can be granted. I therefore find no merit in this application which is dismissed with costs to the Respondent.

It is so ordered.

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**HON. E. O. OBAGA**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 29<sup>TH</sup> DAY OF JANUARY, 2026.**

**IN THE PRESENCE OF:**

Mr. Omondi for Appellants

Ms. Kyalo for Mr. Wekesa for Respondent.

Court assistant – Steve Musyoki