

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
HCCA NO. E059 OF 2025

ALI MUTONGA KHALFAN

MWANAISHA ALI UYSUFAPPELLANTS

VERSUS

TUSMO NJERI

KHALFAN.....

.....RESPONDENT

RULING

1. The application before me is dated **28th October 2025**. Through the said application, the appellants/applicants seek a stay of execution of the ruling delivered by the Hon Gathogo Sogomo on 28th October 2025 in Mombasa Succession Cause No E 114 of 2020. They contend that the orders issued on **6th May 2025**, in respect of the application dated 6th May 2025, were illegal and issued without jurisdiction. The respondent, in reliance on the impugned decision, subsequently filed an application dated **18th September 2025**, alleging that the appellants had been in contempt of court. The said application was allowed on **24th October 2025** by the Hon **Gathogo Sogomo**. Being aggrieved by the latter decision, the appellants filed an appeal to this court.

2. The appellants contend that unless a stay is granted, they, having been found to be in contempt of court, are in danger of losing their liberty and that their appeal will be rendered nugatory.

3. I note that in his ruling delivered on 24 October 2025, the court below noted that the contempt application had not been opposed. The court was satisfied that there were grounds to cite the appellants and summoned them to appear in court on 23rd October 2025 at 11.30 am to show cause why they should not be committed to civil jail for 6 months, or for any period that the court deems fit, and until they purge the contempt.

4. In a replying affidavit sworn on 18th November 2025, the respondent deposed that the appellants were aware of the orders of the court below and opposed the application that gave rise to the impugned decision, vide a replying affidavit sworn on 14th October 2025. She urged that the application be dismissed, as it would be unjust to allow it.

5. The application was canvassed by way of written and oral submissions. The appellants' written submissions were dated 18th November 2025. The appellants contended that they would suffer substantial loss unless a stay was granted. It was contended that the application was filed without undue delay and that it would be fair and just for the orders of stay to issue.

6. The respondent didn't file written submissions. Mr Kututa made oral submissions on 19th November 2025. Counsel urged this court to dismiss the application on the ground that the appellants had an opportunity to appear before the lower court and to argue against the application seeking to cite them for contempt, which they didn't do. In his submissions, he submitted that the appellants were approbating and reprobating the orders of the Court below. Mr. Kututa relied on the holding in the case of **Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another [2005] KEHC 1767 (KLR)**.

7. I have considered the application, the response thereto, as well as the oral and written submissions of the parties. This is an application for a stay pending appeal. For such an application to succeed, the applicants must show that they have satisfied the conditions set out in **Order 42 Rule 6(2) of the Civil Procedure Rules**. The said rule states that:-

“(2) 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.”

8. Thus, the appellants had the duty of showing: -
 - a. That they would suffer substantial loss unless a stay is granted;
 - b. That the application was filed without undue delay; and
 - c. Give security for the due performance of any orders that may ultimately be binding upon them.
9. I have seen the memorandum of appeal. The same appears to raise substantial issues. The appellants are at risk of losing their liberty if notice to show cause proceeds.
10. In the case of **Butt v Rent Restriction Tribunal [1979] KECA 22 (KLR)**, Madan JA, as he then was, stated that:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church (No 2)* 12 Ch D (1879) 454 at p 459.”
11. There is no doubt that the application was filed without undue delay. That being the case, the second condition was therefore met.

12. On the third condition, I note that the appellants have been accused of evicting the respondent from a dwelling house she previously occupied, among other claims. These are serious accusations that the court must consider. In the circumstances, I am inclined to allow the application, subject to the appellant depositing **Kes 500,000** in court as security **within 30 days of the date hereof**. In default, the respondent will be at liberty to proceed with the execution process before the court below.

13. Each of the parties will bear their own costs.

14. It is so ordered.

Dated and signed in Mombasa, this 27th day of January 2026.

Delivered virtually through **Microsoft TEAMS**.

Gregory Mutai

JUDGE

In the presence of: -

Mr Kututa, for the Respondent;

Mr Mabeya, for the Appellants; and

Ms Bancy - Court Assistant.