

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELC APPEAL NO. E007 OF 2025

SAMMY MBISI1ST APPELLANT
PETER MWANZIA MULENGE2ND
APPELLANT
SILVESTER MUTINDA KIVUVO3RD
APPELLANT
FELISTER NZISA MUTINDA4TH
APPELLANT
PETER MUTUKU MBITHI (Suing on behalf of the
Estate of the late MBITHI NGUUWE UMBA5TH
APPELLANT

-VERSUS-

NZISA KOMBO NDUTO1ST RESPONDENT
FREDRICK DAVID MWEMA2ND
RESPONDENT

RULING

1. Before this court for determination is the Notice of Motion dated 3rd May, 2025 in which the Appellants/Applicants seek issuance of the following orders: -
 - 1) [SPENT]
 - 2) [SPENT]
 - 3) **THAT the Honourable Court be pleased to grant the Applicants/Appellants stay of execution of the judgment and decree/orders in the counterclaim delivered on 24/4/2025 pending the hearing and determination of the appeal herein.**
 - 4) **THAT the costs of the application be provided for.**
2. The application is premised on the grounds appearing on its face in addition to the supporting affidavit sworn by Sammy Mbisi on even date. On behalf of his Co-applicants, the deponent averred that being dissatisfied with the judgment of the subordinate court delivered on 24/4/2025, they had preferred the present

appeal. He further averred that the Appellants have an arguable appeal and that they shall suffer irreparable loss if the orders sought are not granted.

3. The deponent contended that the Applicants are apprehensive of execution of the judgment and decree by the Respondents which will ultimately interfere with their peaceful occupation of the suit property. It was averred that the Respondents will not suffer any prejudice if the application is allowed whereas the appeal shall be rendered nugatory if the orders of stay are not granted. The deponent further averred that the Appellants are willing to pay reasonable security if ordered by the court.
4. Opposing the application, the Respondent filed a replying affidavit which was sworn by Fredrick David Muema on 16th June, 2025. He averred that the application does not satisfy the conditions set out under Order 42 Rule 6 for stay of execution. He further averred that the Appellants filed Makueni MCELC No. E030 of 2021 which was dismissed upon being heard with costs to the Respondents. The deponent contended that there is no positive order that can be stayed.
5. The 2nd Respondent contended that the Applicants had not demonstrated what loss and damage they would suffer if the orders sought were not granted. It was further contended that the Applicants had not demonstrated that they have an arguable appeal and if at all they have any claim then the same lies against the estate of the deceased. The 2nd Respondent maintained that the Applicants have not advanced any sufficient reasons to warrant the orders sought being granted.
6. The Applicants filed a further affidavit on 22/9/2025 sworn on their behalf by Sammy Mbisi. He averred that the Applicants have been in possession of the suit property by virtue of their respective sale agreements dating back to 1987 and more recently in 2011. He further averred that they have extensively developed their respective portions and that when the 2nd Respondent was being

registered as the owner of the suit property, they were lawfully residing on the land.

7. The application was canvassed by way of written submissions.
8. In the Applicants' submissions dated 5th September, 2025, Counsel submitted that the instant application together with the memorandum of appeal had been filed without delay after judgment was delivered on 24th April, 2025. It was further contended that the Applicants have built permanent and semi-permanent residences within the suit property and hence, if the judgment is executed and they are evicted, substantial loss would be occasioned on them and their families.
9. It was argued that the Respondents will not suffer any prejudice if stay is granted as the 2nd Respondent is the registered owner of the suit property. Counsel submitted that the Applicants had demonstrated the conditions outlined under Order 42 Rule 6 of the Civil Procedure Rules.
10. In the Respondents' submissions dated 7th October, 2025, Counsel submitted that the Applicants had not demonstrated the preconditions for stay of execution. It was urged that the application ought to be dismissed with costs.
11. The sole issue for determination is whether the Applicants have demonstrated merit in their application for the issuance of an order for stay of execution pending hearing and determination of the appeal.
12. The Applicants have sought stay of execution of the judgment delivered on 24th April, 2025 by the subordinate court. The governing law in an application for stay of execution pending appeal is Order 42 Rule 6 (1) and (2) which provides as follows: -

- 1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from**

may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

2) No order for stay of execution shall be made under subrule (1) unless

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- 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.

13. Upon perusal of the judgment annexed as Exhibit “SM1”, the subordinate court indeed issued an order for the eviction and demolition of structures put up by the Applicants within the suit property known as Makueni/Kyaluma/3 as per the Respondents’ counterclaim.

14. This Court’s discretion to grant an order for stay of execution pending the determination of an appeal is guided by the decision of the Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** where it held as follows: -

***“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*”**

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

15.Platt Ag. J.A. (as he then was) held as follows in Kenya Shell Ltd v Kibiru [1986] KLR 416: -

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented.”

16.Whereas the Applicants have an undoubted right of appeal against the decree of the trial court delivered in MAKUENI MCELC CASE NO. E030/2021, the Respondents have an equally undoubted right to enjoy the fruits of their

judgment. It is clear from the Respondents' replying affidavit that they intend to commence lawful execution of the resulting decree.

17. The Applicants produced Exhibit "SM3" which is a photograph showing the extent of developments they have undertaken in the suit property. It is against this backdrop that they claim to have a real apprehension that eviction from the suit property will cause substantial and irreparable loss interfering with their livelihoods as expressed in paragraph 7 of the supporting affidavit.

18. The Applicants annexed a copy of the memorandum of appeal as Exhibit "SM2A" in their supporting affidavit. Among the grounds of appeal is their contention that the 1st Respondent as the personal representative of her late husband was under an obligation in accordance with the sale agreements entered into between her late husband and the Appellants.

19. In the case of James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR the court observed as follows: -

"The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein Vs. Chesoni [2002] 1KLR 867, and also in the case of Mukuma Vs. Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

"...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

20. It is manifestly clear that if the eviction and demolition order is executed, then the Applicants risk being put in hardship. They have indeed demonstrated that the said developments in the suit property support their livelihoods and that they would suffer substantial loss if an order for stay is disallowed. Through their memorandum of appeal, they have also demonstrated that they have an arguable appeal which would be rendered nugatory if stay of execution is not granted.

21. It is not in doubt that there was no delay in filing of the present application which was filed on 3rd May, 2025 after judgment was delivered by the lower court on 24th April, 2025.

22. In **Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates, Nishit Raikundalia & Sapphire Trading & Marketing Ltd** [2014] KEHC 2430 (KLR) the Court held as follows: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment-debtor... This is a civil suit where the Applicants are judgment-debtors... Civil process is quite different because, in a civil process, the judgment is like a debt hence the Applicants become and are judgment-debtors in relation to the Respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the Applicants. I presume, the security must be one which can serve that purpose.”

23. The Applicants have expressed their willingness to pay reasonable security as required under Order 42 Rule 6 of the Civil Procedure Rules. In the circumstances of the case, it is in the interest of justice that the application be allowed in terms of prayer number three (3) with a condition that the Applicants

do deposit Kshs.100,000/= within 60 days as security for any decree which may ultimately be binding upon them.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS

THIS 12TH DAY OF FEBRUARY, 2026.

IN THE PRESENCE OF:

Ms. Sila for Respondent.

Mr. Mwanzia for Applicant.

Court assistant – Steve Musoki

ORIGINAL