

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(FAMILY DIVISION)
HCFOS NO. 2 OF 2024

ZIPPORAH NJOKI KANGARA.....CLAIMANT

VERSUS

ROCK & PURE LTD.....1ST

RESPONDENT

LAND REGISTRAR, MOMBASA.....2ND RESPONDENT

PETER NJOGU WAWERU.....3RD RESPONDENT

CATHERINE WANJIKU WARUGURU ALIAS

CATE WARUGURU4TH RESPONDENT

RULING

1. This Court delivered a judgment on **11th August 2025**, vide which it held that certain properties claimed by the Claimant were matrimonial properties. The 1st, 3rd, and 4th Respondents were aggrieved by the said decisions and filed an appeal. They also filed a Notice of Motion dated **15th August 2025**, vide which they seek to stay the execution of the judgment of this Court pending the hearing and determination of the appeal by the Court of Appeal. The application is supported by the affidavit of Peter Njogu Waweru, sworn on **15th August 2025**.

2. The application is opposed. The Claimant/Respondent filed a Replying Affidavit sworn on **16th September 2025** in which she stated that the appeal was premature, speculative, lacked cogent facts, and wasn't based on law and evidence adduced during the trial.

3. The application was canvassed by way of written submissions. The applicants filed 2 sets of submissions, one by the firm of **Lawrence Obonyo Legal Advocates**, dated **17th October 2025**, and the other by **Muriu Mungai & Co. Advocates LLP**. In the said submissions, it was urged that the application should be allowed.

4. It was contended that the Respondents/Applicants would suffer substantial loss unless a stay of the execution of the impugned judgment was granted. Counsels relied on the case of **Halai & another v Thornton & Turpin (1963) Ltd 1990] KECA 05(KLR)**, where it was stated that:

“Substantial loss may result to the applicant unless the application is granted, which prima facie means that if the appeal succeeds, the respondent would not be in a position to make full restitution.”

5. Counsels also referred to the case of **RWW v EKW [2019] KEHC 6523 (KLR)**, where the Court stated that:

“8. The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs..”

6. It was urged that if execution were allowed to proceed, the appeal could be rendered nugatory, for the suit properties would have been sold. Counsels doubted the ability of the Claimant/Respondent to pay back whatever she would have got if the execution of the impugned judgment were allowed to proceed.
7. It was contended that the application was filed without undue delay. Regarding security, it was urged that whereas security could be ordered, the fact that the properties in issue were landed meant that the Court could prevent their dissipation while the appeal rages, as to order the deposit of 50% of their value would be oppressive.
8. The submissions of the Claimant/Respondent on the other are dated **31st October 2025**. It was urged firstly that this Court is functus officio, having rendered itself on **11th August 2025**. Counsel relied on the case of **Asanyo & 3 others v Attorney General [2018] KESC 15 (KLR)**.
9. Counsel contended that it had not been demonstrated that the Respondent would suffer substantial loss if the application is dismissed as the same was filed prematurely.
10. Regarding security, it was urged that in the event the Court was minded to allow the application, it should be conditioned on the deposit of 50% of the market value of the properties deemed by this Court as being matrimonial properties.

11. Counsel urged that this Court should favour the enjoyment by a successful litigant of the fruits of the judgment in her favour. Reliance was placed on the decision of Majanja, J in the case of **Republic v Town Clerk Of Webuye County Council & another [2014] KEHC 7207 (KLR)** where it was stated that:-

“On the other hand, a decree holder’s right to enjoy the fruits of his judgment must not be thwarted. When faced with such a scenario, the Court should adopt an interpretation that favours enforcement and, as far as possible, secures accrued rights. My reasoning is underpinned by the values of the Constitution particularized under Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159(2)(a) and (b), and the applicant’s right of access to justice protected under Article 48 of the Constitution.”

12. I have considered the application and the responses thereto, as well as the submissions of the parties.

13. Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that:-

“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.”

14. For a party seeking stay pending appeal to succeed he/she/it/they must demonstrate that:

- i. He/she/it/they will suffer substantial loss unless a stay is granted;
- ii. The application was filed without undue delay;
- iii. Give security for the due of the decree or of any order that may ultimately be binding.

I will consider these conditions below. However, before doing so, I will evaluate the objection by the Claimant/Respondent that this Court is *functus officio*. Is that the case? The short answer is no.

15. Although this Court made a determination on the merits of the case, it has jurisdiction and can hear and determine post-judgment applications, such as those for stay of execution or for review et al. What it is prohibited from doing is engaging in merit-based enquiry. In stating thus, I am guided by the persuasive authority of the case of *Mombasa Bricks & Tiles Limited & 5 others v Arvind Shah & 6 others* [2018] KEHC 5987 (KLR).

16. Having dispensed with the technical objection, I will now turn to the conditions guiding the grant or stay of execution pending appeal. I note that the decision as to whether to grant a stay is discretionary, and that discretion should be exercised so that the appeal is not rendered nugatory. In the case of **Butt v Rent Restriction Tribunal** [1979] KECA 22 (KLR), it was stated by the Court of Appeal that:

“The power of the Court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. 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 is not rendered nugatory should the appeal court reverse the judge's decision."

- 17.** The Respondents/Applicants apprehend that if the execution of the judgment is allowed, the consequences thereof may not be undone. This, in my view, is not an idle argument.
- 18.** The foregoing notwithstanding, the Respondents/Applicants have stated that were the execution to issue, and the appeal, on the other hand, is ultimately successful, the Claimant/Applicant may not be able to pay back what she has got. The Claimant did not rebut this presumption.
- 19.** I must point out that once this assertion/averment was made, she was under a burden to disprove the provenance of such assertion. The Claimant/Respondent did no such thing. The Court of Appeal has held that the obligation to rebut such an assertion falls on the Respondent.
- 20.** There is no doubt that the application was filed without undue delay. That being the case, condition 2 was met.
- 21.** Regarding the provision of security, agree with counsel for the Respondents/Applicants that this has to be considered in line with the circumstances of the case. In this matter, the subject of appeal is properties that the court deemed as being matrimonial properties. My view is that what

the Court should do is to preserve them pending the hearing and determination of the appeal.

22. The upshot of the foregoing is that:

1. I allow the Notice of Motion dated **15th August 2025** on condition that the properties I identified as being matrimonial properties are preserved pending the hearing and determination of the appeal. An order of inhibition will therefore issue against the titles of the subject properties; and
2. Each party shall bear its own costs of the application.

23. Orders accordingly.

Dated and signed in Mombasa, this **5th day of February 2026**. Delivered virtually through **Microsoft TEAMS**.

Gregory Mutai
JUDGE

In the presence of:

Mr. Odero, holding brief for Mr. Billy Kongere, for the 1st, 2nd, and 4th

Respondents;

Ms. Choni, holding brief for Mr. Derrick Odhiambo, for the

Claimant/Respondent;

Ms. Bancy – Court Assistant.