

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC APPEAL NO. E030 OF 2025

MBOSE MUKOKO & KYEVA MUKOKO (*Suing as legal representatives*

of the Estate of MUKOKO

KATHUKU):.....**APPELLANTS/APPLICANTS**

VERSUS

JOSEPH

MUTUA

MUINDE):.....**RESPONDENT**

RULING

The application is dated 12th June 2025 and is brought under Order 51 Rule 1, of the Civil Procedure Rules, Section 1A, 1B, 3A and Section 66 of the Civil Procedure Act seeking the following orders;

1. That this application be certified urgent and heard ex parte in the first instance.
2. That there be a stay of execution of the Judgment delivered on 16th May, 2025 in the Chief Magistrate’s Court of Kenya at Machakos Civil Case No. 84 of 2014, pending the hearing and determination of this application.

3. That there be a stay of execution of the Judgment delivered on 16th May, 2025 in the Chief Magistrate's Court of Kenya at Machakos Civil Case No. 84 of 2014, pending the hearing and determination of the appeal herein.
4. That costs of this application be provided for.

It is based on the affidavit of Kyevea Mukoko and grounds that the Applicant has filed an Appeal against the Judgment issued on 16th May, 2025 in the Chief Magistrate's Court of Kenya at Machakos Civil Case No. 84 of 2014, which ordered the Applicant to vacate the suit land. That the Appeal raises serious arguable grounds including jurisdictional errors, limitation of action, and failure to consider the Applicant's beneficial interest in the suit land. That unless stay is granted, the Respondent may proceed to execute the Judgment, thereby evicting the Applicant, rendering the appeal nugatory and occasioning irreparable harm. That the Respondent has commenced or is threatening execution proceedings following Judgment delivered in Chief Magistrate's Court of Kenya at Machakos Civil Case No. 84 of 2014, by way of sell, as several people have been seen surveying the property and some doing due diligence. That the appeal has high chances of success and will be rendered nugatory unless execution is stayed. That the Applicant is willing to abide by any conditions that this Court may impose, including provision of security if necessary. That this application has been made

without reasonable delay and in good faith. That it is in interest of justice that the orders sought are granted.

This court has considered the application and the submissions therein. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the Civil Procedure Rules as follows;

“No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”

Order 42, rule 6 states:

“No order for stay of execution shall be made under sub-rule (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.”

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 Applicants have not established an arguable appeal and litigation must come to an end. That the grounds of appeal pleaded have all been addressed by the trial court.

I find that the Applicants are not guilty of laches as judgement was delivered on 16th May, 2025 and this application is dated 12th June 2025. The Appellants/Applicants submitted that the suit land has been their homestead and their family since the year 1971 and contains permanent structures, family graves

and cultivated land. That the Respondent has commenced execution proceedings to evict them from their home of 50 years. That the 1st Appellant/Applicant is an elderly woman aged 85 years. The memorandum of appeal filed raises inter alia, issues of limitation of actions, jurisdiction and beneficial interests. I find that the memorandum of appeal raises an arguable appeal and I find that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the Applicants have fulfilled the above grounds mentioned to enable me grant the stay. I find that the application is merited and I grant the same. Costs to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 24TH DAY OF
FEBRUARY 2026.**

N.A. MATHEKA

JUDGE

ORIGINAL