



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC APPEAL NO. ELCLA E073 OF 2025**

**BETWEEN**

**MABOKO DISTRIBUTORS LTD .....1<sup>ST</sup>**  
**APPELLANT**

**GEORGE MUCHIRI MUHURI .....2<sup>ND</sup>**  
**APPELLANT**

**EMBAKASI RANCHING CO. LTD .....3<sup>RD</sup>**  
**APPELLANT**

**=VERSUS=**

**MOSES NDOTONO NJAHIRA .....**  
**....RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated 14<sup>th</sup> April 2025 brought under Sections 1A, 3A, 3B, and 65 of the Civil Procedure Act and Orders 42 and 43 of the Civil Procedure Rules, in which the Appellants/Applicants seek the following orders:

***a. Spent***

***b. Spent***

***c. THAT there be a stay of execution of the judgment and Decree given by the trial court***

***on the 18<sup>th</sup> March 2025, pending the hearing and determination of the Appellant's Appeal.***  
***d. THAT the costs of this application be in the cause.***

2. The application is based on the grounds appearing on its face together with the supporting affidavit of George Muchiri, a Director of the 1<sup>st</sup> Appellant sworn on even date.

### **THE APPELLANTS CASE**

3. The deponent averred that they are aggrieved by the Judgment in Milimani Commercial COMSU No. E1031 of 2023, delivered on 18<sup>th</sup> March 2025, and that they have filed an appeal against it.
4. He further averred that the judgment was issued without prior notice and in the absence of the Appellants' Advocate, after multiple adjournments, thereby denying them the opportunity to seek a stay of execution. He stated that their Advocate was indisposed due to bereavement at the time.
5. The deponent contended that the Appellants would suffer substantial loss if execution proceeded, as they risked losing parcels of land they claimed to own lawfully, and that such loss might not be recoverable even if the appeal ultimately succeeded.
6. He maintained that the appeal was arguable and meritorious. In summary, he contended that the learned trial magistrate erred in law and fact by finding that they had encroached on the Respondent's parcels; by awarding general damages for trespass and costs without proper legal

and factual basis; by failing to analyze the evidence on record, including evidence relating to possession and the Land Surveyor's report; by failing to consider all issues placed before the court; by placing undue weight on the Plaintiff's submissions; and by granting remedies not supported by the evidence.

7. He argued that the orders were ambiguous and unenforceable; that the title was conferred on the Plaintiff without adequate legal and evidentiary support; that the magistrate failed to properly analyze the ownership rights of the parties involved; and that significant evidence and submissions were overlooked, resulting in a miscarriage of justice. It was further argued that the decision violated applicable laws and principles governing ownership and possession.
8. He argued that the Respondent would suffer no prejudice if the orders sought were granted.

### **THE RESPONDENT'S CASE**

9. The Respondent filed Grounds of Opposition dated 22<sup>nd</sup> April, 2025, in opposition to the application.
10. According to the Respondent, the application is incompetent, misconceived, and an abuse of the Court's process.
11. He contended that the Appellants had failed to meet the requirements for a stay of execution pending appeal under Order 42, Rule 6(2) of the Civil Procedure Rules

because they had not shown that substantial loss would result if a stay were not granted, there was unexplained delay in filing the application, and the Applicants had not offered security for the due performance of the decree.

12. The Respondent asserts that he had sufficient financial capacity to refund the Appellants the decretal sums if the Appeal succeeded. He maintains that the Memorandum of Appeal does not disclose an arguable appeal and that the Judgment of the learned trial magistrate was sound in law and well reasoned.
13. He stated that the 3<sup>rd</sup> Appellant had been ordered to pay costs in the trial court and that, in light of the decision in **Francis Kabaa v Nancy Wambui & Another [1996] KECA 1 (KLR)**, a stay of costs could not issue. The Respondent also filed a replying affidavit dated 9<sup>th</sup> May 2025 in which he reiterated the foregoing grounds.
14. In conclusion, he urged the court to dismiss the application with costs.
15. The application was canvassed by way of written submissions

### **THE APPELLANTS/APPLICANTS SUBMISSIONS**

16. The Appellants filed their submissions dated 24<sup>th</sup> June 2025.
17. On behalf of the Appellants, Counsel submitted that the Applicants had met the threshold for the grant of a stay of execution pending the hearing and determination of the appeal.

18. On substantial loss, Counsel submitted that the impugned Judgment ordered the Appellants to vacate Plots V2594 and V2595, which they asserted they had lawfully occupied and developed. Counsel argued that the Appellants would suffer irreparable harm if evicted from the suit property before the appeal is determined, including the loss of developments and disruption of proprietary and business interests. Counsel contended that land, being unique and irreplaceable, cannot readily be restored once possession is lost, and that execution would render the appeal nugatory.
19. To support this point, Counsel relied on **Butt v Rent Restriction Tribunal [1979]**, in which the Court of Appeal held that the discretion to grant a stay should be exercised to prevent an appeal from being rendered nugatory.
20. Counsel also cited **RWW v EKW [2019] eKLR; Emaar Consult Limited v Lakhman [2025] KEELC 1379 (KLR); and Consolidated Marine vs Nampijja & Another, Civil App No. 93 of 1989 (Nairobi)**, which emphasized that the purpose of a stay is to preserve the substratum of the appeal while balancing the successful party's right to enjoy the fruits of judgment. Further reliance was placed on **James Wangalwa & Another vs. Agnes Naliaka Cheseto**, which underscored that substantial loss is the cornerstone of the jurisdiction to grant a stay of execution.
21. Counsel argued that the application was filed promptly, as the Judgment was delivered on 18<sup>th</sup> March 2025, and the current application was filed on 14<sup>th</sup> April 2025.

22.Regarding security, Counsel submitted that the Appellants are willing to comply with any reasonable conditions the Court may impose to ensure the proper execution of the Decree.

23.In conclusion, Counsel urged the Court to allow the application as prayed.

### **THE RESPONDENT'S SUBMISSIONS**

24.The Respondent filed his submissions dated 24<sup>th</sup> July 2025.

25.On behalf of the Respondent, Counsel submitted that under Order 42 Rule 6(2) of the Civil Procedure Rules, the governing principle is that a stay of execution is the exception rather than the rule. Counsel urged the court to exercise caution to avoid unjustifiably depriving the Respondent of the fruits of the judgment.

26.In that regard, reliance was placed on **Machira t/a Machira & Co. Advocates vs. East African Standard [2002] KEHC 1167 (KLR)**, where Kuloba J emphasized that a successful party is ordinarily entitled to the benefits of judgment and that suspending that right should occur only in exceptional circumstances. Counsel further submitted that the requirements under Order 42 Rule 6(2) of the Civil Procedure Rules are conjunctive, and that failure to meet any one of them is fatal to the application.

27. Counsel submitted that substantial loss is the cornerstone of the jurisdiction to grant a stay and must be substantiated by evidence. Counsel relied on **Kenya Shell Limited vs**

**Kibiru (1986) KLR 410** and **James Wangalwa & Another v Agnes Naliaka Cheseto** to argue that substantial loss requires proof that execution would create a state of affairs irreparably affecting the core of the appeal.

28. Counsel argued that the Appellants failed to show that payment of the decretal sum of Kshs 1,000,000/= awarded as general damages would cause substantial loss or render the appeal nugatory. It was submitted that no evidence was presented to the Court demonstrating an inability to recover the sum if the appeal succeeded.

29. Regarding security, Counsel submitted that the Appellants had neither offered nor proposed any security for the due performance of the decree, despite its partly monetary nature. To support this point, reliance was placed on **Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another [2018] eKLR**, in which the Court observed that an applicant's willingness to provide security is indicative of good faith. Further reliance was placed on **Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others [2015] eKLR**, to argue that security must cover the entire decretal sum, including costs and interest.

30. Counsel submitted that the Appellants had failed to meet the threshold for the grant of a stay of execution and that the application was intended to frustrate the Respondent's enjoyment of the fruits of judgment. Counsel argued that, should the Court be inclined to grant a stay, it should be

conditional upon the deposit of the entire decretal sum together with costs and interest within a specified period.

### **ANALYSIS AND DETERMINATION**

31. Having considered the application, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the Applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for the grant of a stay of execution pending Appeal.
32. Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules outlines the guiding principles to be met for the grant of a stay and provides that:

***6(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.***

**6(2) 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**

**Such security of costs for the performance of such decree or order as may ultimately be binding on him has been given by Applicant.**

33. In **Butt vs Rent Restriction Tribunal (1982) KLR 417**,

the Court of Appeal set out the following guidelines for applications to stay execution:

***“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 overwhelming hindrance, the stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. 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 Applicants at the end of the proceedings. The court, in exercise of its discretion whether to grant or refuse an application for stay, will***

***consider the special circumstances of the case and its unique requirements.”***

34. The court has the discretion to grant an order to stay execution. In **RWW vs EKW (2019) eKLR**, the Court noted that:

***“...the purpose of an application for stay of execution pending an appeal is to preserve the subject 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 the 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 damages.”***

35. The Court is therefore called upon to balance the rights of the successful party, so as not to hinder him from the fruits of judgment, with those of the Appellants, whose Appeal may succeed and be rendered nugatory if a stay of execution is not granted.

36. The purpose of a stay of execution is to preserve the substratum of the case. In **Consolidated Marine vs Nampijja & Another Civil App No. 93 of 1989 (Nairobi)**, the Court held that;

***“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal is safeguarded and the appeal, if successful, is not rendered nugatory.”***

37. The Court will now determine whether the Applicants have satisfied the conditions set out in Order 42 Rule 6(1) and (2) of the Civil Procedure Rules.

38. Regarding the first condition, that substantial loss may result unless a stay order is granted, the Applicants should not only state that they are likely to suffer substantial loss but must prove that they will suffer such loss if stay orders are not granted.

39. In **Charles Wahome Gethi vs Angela Wairimu Gethi (2008) eKLR**, the Court of Appeal held that:

***“...it is not enough for the Applicants to say that they live or reside on the suit land and they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent executes the decree in this suit against them.”***

40. In the case of **Mukuma vs. Abuoga (1988) KLR**, the Court of Appeal defined what constitutes substantial loss as follows:

***“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.***

41. On substantial loss, the Appellants contended that execution of the decree would result in eviction from the suit properties, destruction of developments thereon, and cancellation of ownership documents. The decree includes orders that dispossess the Appellants of parcels of land they claim to own lawfully.

42. The Respondent contended that he has the financial capacity to refund the decretal sum if the appeal ultimately succeeds. While the refundability of a monetary award may, in appropriate circumstances, mitigate the risk of substantial loss in respect of a purely monetary decree, the present decree is not confined to a pecuniary award. It includes orders of eviction, cancellation of ownership documents, and permanent injunctive relief. The proprietary and possessory consequences of such orders cannot be remedied solely by repayment of damages. The ability to refund the decretal sum does not eliminate the risk of dispossession, alteration of title, or destruction of developments.

43. In land matters, eviction and alteration of title carry consequences that are not easily reversible. These consequences extend beyond ordinary pecuniary loss and cannot be adequately remedied by an award of damages. The court is therefore convinced that the Appellants have

shown they will suffer substantial loss if an injunction is not granted.

44. In an application for stay of execution pending Appeal, an Applicant must also satisfy the Court that the application has been made without unreasonable delay. It is not in dispute that the judgment was delivered on 18<sup>th</sup> March 2025. The present application was filed on 14<sup>th</sup> April 2025. I find that the application was brought without unreasonable delay.

45. Regarding the last condition on the provision of security for costs, Order 42, Rule 6(2)(b) of the Civil Procedure Rules is couched in mandatory terms, requiring the Applicant to furnish security for the performance of the order or decree. In **Arun C Sharma vs Ashana Raikundalia T/A Raikundalia & Co. Advocates and 2 others (2014) eKLR**, the court held that:

***“The purpose of the security under Order 42 is to guarantee due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor....civil process is quite different because in civil process the judgment is like a debt hence the applicant 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 a security for the 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.”***

46. The Respondent has argued that an order of stay cannot issue with respect to costs, particularly against the 3rd Appellant, who was ordered to pay costs in the trial court. It is correct that an order for costs is ordinarily enforceable as a monetary decree. However, the court retains discretion under Order 42 Rule 6 to stay execution of the decree, in whole or in part, upon such terms as are just. The Applicants have expressed their willingness to provide security for the due performance of the decree.

47. In the end, I find that the Applicants have met the threshold for the grant of a stay of execution pending the hearing and determination of the appeal. Consequently, the application dated April 14, 2025, is allowed on the following terms:

***a. A stay of execution of the Judgment delivered on 18<sup>th</sup> March 2025 is hereby granted pending the hearing and determination of the Appeal.***

***b. The Appellants shall deposit with the court the sum of Kshs 1,000,000/= as security for the due performance of the decree within thirty days of***

*the date of this ruling, and in default, the stay shall lapse automatically.*

*c. Costs of the application shall abide by the outcome of the appeal.*

**RULING SIGNED, DATED, AND DELIVERED VIA MICROSOFT TEAMS THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2026.**

.....  
**HON. T. MURIGI  
JUDGE**

**IN THE PRESENCE OF:**

Warutumo for the Respondent