

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MILIMANI**  
**ELC PETITION NO 67 OF 2019**

**CHRISTOPHER OWINO N’GANYA ..... 1<sup>ST</sup>**  
**PETITIONER**

**AGGREY MAGANGA APAMO ..... 2<sup>ND</sup>**  
**PETITIONER**

**CATHERINE ODERO ..... 3<sup>RD</sup>**  
**PETITIONER**

**(Suing on their behalf and on behalf of 29 others)**

**VERSUS**

**NAMAN NDONJI MUKABANA**  
**(Sued as the Administrator of the Estate of**  
**Peter Keya-Were(deceased) ..... 1<sup>ST</sup>**  
**RESPONDENT**

**EVANS OCHIENG OTIENO, JUDITH GRACE ODHIAMBO,**  
**EVANS MUKABANA, KENNEDY OCHIENG**  
**T/A OFFICIALS AND MEMBERS OF**  
**KASARANI YOUTH PANORAMA ASSOCIATION**  
**(Being sued as Agents of the Estate of**  
**Peter Keya Were-Deceased) ..... 2<sup>ND</sup>**  
**RESPONDENT**

**EVANS OCHIENG OTIENO, JUDITH GRACE ODHIAMBO,**  
**EVANS MUKABANA, KENNEDY OCHIENG**  
**T/A OFFICIALS AND MEMBERS OF**  
**BAMAHO DEVELOPMENT GROUP**

**HOUSING PROJECT (Being sued as Agents of the Estate of Peter Keya Were-Deceased) ..... 3<sup>RD</sup>**  
**RESPONDENT**  
**KENYA BUILDERS**  
**CONCRETE CO. LTD ..... 4<sup>TH</sup>**  
**RESPONDENT/APPLICANT**  
**CITY COUNTY GOVERNMENT**  
**OF NAIROBI ..... 5<sup>TH</sup>**  
**RESPONDENT**  
**INSPECTOR GENERAL OF POLICE ..... 6<sup>TH</sup>**  
**RESPONDENT**  
**AND**  
**NATIONAL ENVIRONMENT MANAGEMENT**  
**AUTHORITY (NEMA).....INTERESTED**  
**PARTY**

**RULING**

1. Before this court for determination is the 4<sup>th</sup> Respondent/Applicant’s Notice of Motion application dated 12<sup>th</sup> June, 2025. The Motion, brought pursuant to the provisions of **Sections 1A, 1B, 3, 3A and 63(e)** of the **Civil Procedure Act**, and **Order 40 Rules 1, 2 and 3, & Order 51 Rule 1** of the **Civil Procedure Rules** seeks the following reliefs:

- i. That the Applicant be granted leave to Appeal out of time and to file and serve Notice of***

***Appeal against the Judgment dated 17<sup>th</sup> October, 2024.***

***ii. That there be a Stay of Execution of this Honourable Court's Judgment dated 17<sup>th</sup> October, 2024 and Decree dated 13<sup>th</sup> May, 2025 pending the filing and service of the Appeal.***

***iii. That costs of this Application be provided for.***

2. The application is premised on the grounds set out on the face of the Motion and is supported by the Affidavit of Dhirajlal Ramji Devshi Patel, a Director of the 4<sup>th</sup> Respondent, sworn on even date. He deponed that on the 5<sup>th</sup> June 2025, the 4<sup>th</sup> Respondent was served with a letter dated 4<sup>th</sup> June 2025 from the law firm of Musungu Pekke & Co. Advocates, being an execution notice, to which was attached the Decree of this court issued on the 13<sup>th</sup> May 2025.
3. Prior to receipt of the aforesaid correspondence, Mr. Patel stated, the 4<sup>th</sup> Respondent was unaware of the Judgment and Decree of this court, the same having not been communicated to it by its former Counsel. Upon becoming aware thereof, the 4<sup>th</sup> Respondent promptly instructed the firm of Ashiruma & Co. Advocates to come on record for the purpose of seeking leave to appeal out of time and orders for stay of execution of the Judgment and Decree pending appeal, and thereafter to lodge the intended appeal on its behalf.

4. According to Mr. Patel, as advised by Counsel, this court is vested with jurisdiction to enlarge time for the filing of an appeal against its decisions. He averred that the present Motion was filed timeously and in good faith.
5. In response to the Motion, the 1<sup>st</sup> -3<sup>rd</sup> Petitioners/Respondents, on their own behalf and on behalf of the other Petitioners swore a Replying Affidavit dated the 16<sup>th</sup> July, 2025. They deponed that the present Motion lacks merit, is misconceived and meant to delay the enjoyment of the fruits of their judgment.
6. As advised by Counsel, they deponed, this court has no jurisdiction to issue orders for extension of time within which to lodge an appeal before the Court of Appeal. Further, while there are clear legal provisions upon which orders for stay of execution may be granted by the court, none of them have been met herein.
7. According to the Petitioners, the extraction of the decree, service of the said decree to the 4<sup>th</sup> Respondent and the demands for payment do not constitute justifiable grounds for applying for stay of execution pending appeal.
8. They further deponed that no prejudice whatsoever will be occasioned to the 4<sup>th</sup> Respondent should they proceed with recovery of the decretal sum, such recovery being a lawful and regular process. They contended that the 4<sup>th</sup>

Respondent's assertion that its former Advocate neither sought stay of execution nor filed a notice of appeal does not constitute a reasonable basis for the grant of the orders sought, particularly given that it was represented by Counsel throughout the proceedings. In addition, it has failed to demonstrate what steps, if any, it took following delivery of the judgment to initiate the appellate process.

- 9.** It was further noted that although Judgment was delivered on 17<sup>th</sup> October, 2024, the decree, as evinced by the letter dated 4<sup>th</sup> July, 2025, was served upon the 4<sup>th</sup> Respondent on 5<sup>th</sup> July, 2025, more than eight months after delivery of judgment. Further, the 4<sup>th</sup> Respondent's Advocate was duly served with a notice of delivery of judgment on 29<sup>th</sup> August, 2024, and an affidavit of service to that effect was filed in court.
- 10.** Consequently, it was averred that the 4<sup>th</sup> Respondent having taken over eight months to file the present Motion and now seeking to initiate an appeal without offering any satisfactory explanation for the delay, is guilty of abusing the court process.
- 11.** Similarly, it was urged, the mere assertion that the 4<sup>th</sup> Respondent intends to lodge an appeal does not constitute sufficient ground for the grant of stay orders and that while the right of appeal is a constitutional one, an applicant must

nonetheless demonstrate and satisfactorily explain any delay, a threshold which has not been met in the present case.

12. They further stated, on the advice of Counsel, that no draft memorandum of appeal has been annexed to demonstrate the proposed grounds of appeal or to assist the court in assessing the arguability of the intended appeal. In the absence of such a draft, it was deposed, the purported appeal remains speculative and academic.
13. Contrary to the 4<sup>th</sup> Respondent's assertions, it was averred, it is the Petitioners who stand to suffer prejudice if the orders sought are granted, as the present application would unjustifiably impede their lawful recovery of the decretal sum, deny them the enjoyment of the fruits of a valid judgment, and delay the finality of the litigation.

### **Submissions**

14. The 4<sup>th</sup> Respondent/Applicant filed submissions on 6<sup>th</sup> August 2025. According to Counsel, the 4<sup>th</sup> Respondent only became aware of the Judgment on 5<sup>th</sup> June 2025 when it was served with a Notice of Execution accompanied by the Decree and that the 4<sup>th</sup> Respondent's previous Advocate had not notified it earlier and this mistake of Counsel ought not be visited upon the Respondent.
15. It was submitted that immediately upon discovering the Judgment, the 4<sup>th</sup> Respondent instructed new Counsel, who promptly filed a Consent and Notice of Change of Advocates

on 9<sup>th</sup> June 2025 and lodged the current application under Certificate of Urgency on 12<sup>th</sup> June 2025 and that the Motion has been made timeously and without unreasonable delay, demonstrating diligence once the 4<sup>th</sup> Respondent became aware of the adverse decision.

- 16.** It was argued that this court retains discretion and inherent power to extend time for filing an appeal where sufficient cause has been established. Reliance in this regard was placed on **Article 159** of the **Constitution** and the overriding objectives as set out in **Sections 1A, 1B, 3A and 63** of the **Civil Procedure Act**.
- 17.** Counsel maintained that good reasons had been advanced for the delay and that the intended appeal is arguable with high chances of success, such that allowing execution to proceed would render the appeal nugatory. Further, it was urged, the decretal sum of Kshs. 10,000,000 is substantial and execution would severely paralyse its business, thereby occasioning irreparable harm.
- 18.** On the issue of extension of time, reliance was placed on **Geoffrey Oguna & Gerald Iha Thoya t/a Bayulage Total Service Station vs Mohamed Yusuf Osman & Others (2022) eKLR**, wherein the court applied the well-established principles in considering whether or not to extend time set out in **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi Civil Application No. Nai. 255 of 1997 (unreported)**.

These include the length of the delay, the reasons for the delay, the arguability of the intended appeal, and the degree of prejudice likely to be suffered by the opposing party.

- 19.** It was submitted that the 4<sup>th</sup> Respondent has satisfactorily addressed and explained each of these considerations. With regard to prejudice, it was urged that the Petitioners would suffer none, as they would have an opportunity to be heard upon the determination of the intended appeal.
- 20.** In response, the Petitioners filed their written submissions on 13<sup>th</sup> October 2025. Counsel submitted that the court has no jurisdiction to extend time for appealing to the Court of Appeal. They referred to **Article 162(2)(b)** of the **Constitution** and **Section 13** of the **Environment and Land Court Act**, arguing that the court's mandate is confined to disputes relating to land and the environment.
- 21.** It was submitted that pursuant to **Rule 77(2)** of the **Court of Appeal Rules**, a Notice of Appeal should be filed within 14 days of the Judgment or Order appealed against. Extension of time to appeal, it was stated, lies exclusively with the Court of Appeal under **Rule 4** of the **Court of Appeal Rules 2022**, and that this court cannot arrogate to itself a power expressly reserved for the appellate court.
- 22.** Counsel asserted that the 4<sup>th</sup> Respondent has not demonstrated diligence, as Judgment was delivered on 17<sup>th</sup>

October 2024 and the present Motion filed eight months later. Further, that the 4<sup>th</sup> Respondent has not shown substantial loss as required under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**, noting that execution is a lawful process and not a basis for stay.

23. They relied on *Machira t/a Machira & Co Advocates vs East African Standard [2002] KEHC 1167 (KLR)* and **Section 107 (1)** of the **Evidence Act, Cap 80, laws of Kenya**, in support of the contention that allegations of loss must be sufficiently demonstrated.
24. Counsel argued further that the 4<sup>th</sup> Respondent has not demonstrated an arguable appeal, given the absence of a draft memorandum of appeal. A stay, it was urged, would improperly deprive the Petitioners of the fruits of their judgment, contrary to the principle affirmed in *Butt vs Rent Restriction Tribunal [1982] KLR 417*. Finally, they noted that the Applicant has not offered security as mandated by **Order 42 Rule 6(2)(b)**, thereby rendering the application fatally defective.

### **Analysis and Determination**

25. Having considered the Motion, Affidavits and submissions, the issues that arise for determination are:
- i. *Whether this court has jurisdiction to extend time for filing a Notice of Appeal to the Court of Appeal?*

- ii. If so, whether the 4th Respondent/Applicant has satisfied the threshold for the grant of leave to file a Notice of Appeal out of time?
- iii. Whether the 4<sup>th</sup> Respondent/Applicant has met the threshold for the grant of stay of execution pending appeal?

26. Vide the present Motion, the 4<sup>th</sup> Respondent seeks leave to lodge an appeal out of time to the Court of Appeal against the Judgment of this court delivered on 17<sup>th</sup> October, 2024. At the outset, the Petitioners assert that this court lacks jurisdiction to entertain the said request. The question of jurisdiction therefore arises as a threshold issue and constitutes this court's first port of call. It is trite that jurisdiction is everything. As expressed in **Owners of Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Limited (1989) IKLR:**

***"Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction..... where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision***

***amounts to nothing. Jurisdiction must be acquired before Judgement is given.”***

27. According to the Petitioners, guided by **Rule 4** of the **Court of Appeal Rules 2022**, it is only the Court of Appeal that may extend time for appealing to it from a decision of this court. The provision states:

***“The Court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”***

28. However, **Section 7** of the **Appellate Jurisdiction Act (Cap 9)** provides as follows:

***“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:***

***Provided that in the case of a sentence of death no extension of time shall be granted after the***

***issue of the warrant for the execution of that sentence.”***

29. Courts have, on several occasions, delineated the respective jurisdictions of the High Court and the Court of Appeal in matters relating to extension of time to appeal out of time from the High Court to the Court of Appeal. In ***Edward Njane Nganga & Another vs Damaris Wanjiku Kamau & Another [2016] eKLR***, the court adopted with approval the reasoning of Munyao J in ***Loise Chemutai Ngurule & Another vs Winfred Leshwari Kimung'en & 2 Others [2015] eKLR***, where the learned Judge noted as follows:

***“It was argued that this court has no jurisdiction to entertain an application for extension of time to lodge a Notice of Appeal out of time, and that jurisdiction is only in the Court of Appeal. Reliance was made on the decision in the case of Simon Towett Martim v Jotham Muiruri Kibaru, Nakuru High Court, Miscellaneous Civil Application No. 172 of 2004 (2004) eKLR. In the matter, it was held that Rule 4 of the Court of Appeal Rules grants the Court of Appeal exclusive jurisdiction to grant extension of time to file an Appeal to the Court of Appeal. The Court (Kimaru J) held that in the circumstances, the High Court had no jurisdiction to entertain an application for***

***extension of time to lodge Notice of Appeal out of time.***

***With respect I disagree with the above decision...***

***The intention to appeal is the Notice of Appeal. I think Section 7 does not need any more than a literal interpretation. Jurisdiction is clearly conferred to the High Court to extend time for the filing of a Notice of Appeal. To decide otherwise is akin to completely disregarding, what in my view, is a clear provision in the law.***

***Neither am I of the view that there is any conflict between the above provision and the provisions in the Court of Appeal Rules. Rule 4 of the Court of Appeal Rules also gives the Court of Appeal power to extend time, but it does not say that it is the Court of Appeal with exclusive power, in so far as the filing of a Notice of Appeal is concerned...***

***In my opinion, the power to extend time for the filing of a Notice of Appeal is vested in both the High Court (and courts of equal status) and the Court of Appeal. One can approach either court for the order. This is indeed the import of Rule 41 of the Court of Appeal Rules which provides as follows:-One is therefore free to approach either the High Court or the Court of Appeal for***

*extension of time to lodge Notice of Appeal out of time...”*

30. In the case of *Sammy Kuria Ndungu vs Samuel Mbugua Ikumbu [2021]KEHC7*, the court relied on the Court of Appeal’s exposition in *Trimborn Agricultural engineering Limited vs David Njoroge Kabaiko and Another (2000) eKLR* thus:

*“The powers of the superior court to enlarge the time for lodging a notice of appeal out of time have been well defined by now. This Court in a recent decision delivered in the case of Peter Njoroge Mairo vs Francis Gicharu Kariri & another, Civil Appeal (Application) No 186 of 1999, (unreported), said:*

*“In our view section 7, above, should be given a construction which would obviate ridiculous result. The intention of the Legislature in enacting section 7, above, clearly appears to us to be that it can only be used and more specifically the very first time the intending appellant manifests his intention to appeal. It is for this reason that we agree with the remarks of Bosire Ag, JA (as he then was) in the case of Edward Allan Robinson & 2 others vs Philip Gikaria Muthami, (Civil Application No Nai 187 of 1997)*

*(unreported), where he remarked, in pertinent part, thus:*

*‘Section 7, above was not, in my view, intended to cover appellants whose appeals have been struck out for incompetence and who desire to file competent appeals. Once a litigant files a valid notice of appeal and had obtained the necessary leave to appeal, where necessary, the matter respecting which an appeal is intended, is thereby removed from the jurisdiction of the superior court, except for limited matters in which specific jurisdiction has been conferred on it to deal with. Section 7, above, presupposes that an intending appellant has not taken any other steps in pursuance of that appeal.’ Besides, from a careful reading of the provisions of rules 74 and 81 of the Rules of this Court, it is clear that they are intended to deal with the filing of appeals for the first time.”*

31. The court thereafter stated:

*“The binding reasoning of the Court of Appeal in the Trimborn Agricultural Engineering Limited Case and the persuasive reasoning of the High Court in the Cosmas Mutiso Muema Case appear self-evidently dispositive of the case. While the*

***High Court is clothed with jurisdiction by section 7 of the Appellate Jurisdiction Act to extend time for a litigant who is desirous of filing a Notice of Appeal to the Court of Appeal for the first time and before he has taken any action at the Court of Appeal, such authority dissipates once the intended Appellant has taken any step at the Court of Appeal. This is so however incompetent the Notice of Appeal filed at the Court of Appeal is. Once a party has filed a Notice of Appeal, the authority to strike it out, extend time, deem it regular or any other action related to it lies with the Court of Appeal not the High Court.”***

- 32.** Drawing from the foregoing, the court finds that whereas **Section 7 of the Appellate Jurisdiction Act** grants this court jurisdiction to extend time for filing an appeal out of time to the Court of Appeal, this jurisdiction is properly invoked where an intending Appellant seeks, for the first time, enlargement of time to give notice of intention to appeal, and no Notice of Appeal has been lodged in the Court of Appeal.
- 33.** Where any step has been taken in furtherance of the appellate process before the Court of Appeal, that jurisdiction shifts exclusively to that court.

34. In the present case, it is common ground that no Notice of Appeal has been filed and that the 4<sup>th</sup> Respondent has not taken any step before the Court of Appeal. In those circumstances, this court is satisfied that it is properly seized of jurisdiction to entertain the prayer for extension of time to lodge a Notice of Appeal, and the Respondents' objection on jurisdiction therefore fails.
35. Having addressed the issue of jurisdiction, the court proceeds to consider whether the Applicant has met the requisite threshold for the grant of leave to file a Notice of Appeal out of time. In determining this issue, the court is guided by the sentiments expressed in **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No Nai 255 of 1997) (unreported)**, thus:

***“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”***

36. In the case of *Nicholas Kiptoo Arap Korir Salat vs The Independent Electoral and Boundaries Commission & 7 others [2014] eKLR* the court held that:

*“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the Applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the Applicant.*

*“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:*

*1.extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court; a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;*

*1.whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;*

*where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;*

*whether there will be any prejudice suffered by the Respondent, if extension is granted;*

***whether the application has been brought without undue delay; and whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied].”***

- 37.** It is clear from the foregoing that the grant of leave to appeal out of time is an exercise of judicial discretion guided by well-settled principles. As stated in **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi(supra)**, the court must consider the length of the delay, the reasons for the delay, the arguability of the intended appeal, and the prejudice, if any, to the respondent.
- 38.** In the present matter, judgment was delivered on 17<sup>th</sup> October, 2024, yet the Motion seeking extension of time was filed in June 2025, approximately seven months later. Such delay is, on its face, inordinate and therefore demands a plausible and satisfactory explanation. The sole reason advanced by the 4<sup>th</sup> Respondent is that it was not informed of the delivery of judgment by its former Counsel.
- 39.** The record shows that the 4<sup>th</sup> Respondent participated in the proceedings. Whereas indeed its Counsel was not present at the delivery of the Judgement, they had been duly served with notice thereof. In any event, the absence of Counsel at the delivery of the Judgment cannot of itself, excuse inaction. Beyond the bare assertion of non-communication, no

evidence has been placed before the court to demonstrate diligence or any attempt by the 4<sup>th</sup> Respondent to follow up on the outcome of the case.

- 40.** The law is clear that litigation belongs to a litigant and not to Counsel, and that a party bears the responsibility of monitoring the progress of its case. As stated by Kimaru J. in **Savings and Loans Limited vs Susan Wanjiru Muritu, NRB HCC 397 of 2002**, a litigant cannot escape the consequences of inaction by simply shifting blame to Counsel. In these circumstances, the explanation offered does not satisfactorily account for the delay.
- 41.** As regards the arguability of the intended appeal, while this court is not required to determine the merits at this stage, an applicant must nonetheless demonstrate, at least *prima facie*, that the intended appeal is not frivolous. In the present case, no proposed grounds of appeal have been disclosed. The court is therefore unable to assess the arguability of the intended appeal.
- 42.** Finally, on the question of prejudice, the court must balance the competing interests of the parties. Granting the orders sought would delay the Petitioners' enjoyment of the fruits of a valid judgment and prolong litigation that has already been concluded, while no exceptional circumstances have been demonstrated to justify such indulgence. Taking all these considerations cumulatively, the court is not persuaded that

the 4<sup>th</sup> Respondent has laid a proper basis for the grant of leave to appeal out of time.

- 43.** The law with respect to stay of execution pending appeal is found under **Order 42 Rule 6(1) and (2)** of the **Civil Procedure Rules**, 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 appeal case of 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 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.”*

44. In *Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365*, the Court of Appeal, discussing the High Court’s [read ELC’s] jurisdiction under this Order stated:

*“The Superior Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, 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. The application must of course be made without unreasonable delay.”*

45. What arises from the foregoing is that the grant of orders of stay of execution is subject to the court’s discretion, the court in this respect being guided by the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules**. The question of how the court should exercise this discretion was extensively

discussed by the Court of Appeal in **Butt vs Rent Restriction Tribunal [1982] KLR 417** 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.”***

**46.** The court has already examined the 4<sup>th</sup> Respondent’s plea for leave to file an appeal out of time and found that the same lacked merit. In the absence of leave to appeal, there is nothing upon which an order of stay of execution pending appeal can be anchored, rendering that prayer moot.

**47.** In the end, the Notice of Motion dated 12<sup>th</sup> June, 2025 fails and is dismissed with costs.

**Dated, signed and delivered virtually in Nairobi this 26<sup>th</sup> day of February, 2026.**

**O. A. Angote  
Judge**

**In the presence of;**

Mr. Musungu for Petitioner/Respondent

Mr. Ashirima for 4<sup>th</sup> Respondent

Mr. Indosio for Kithi for 5<sup>th</sup> Respondent

Court Assistant: Tracy