

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC NO. 528 OF 2014**

**KIMURI HOUSING COMPANY LIMITED .....**  
**PLAINTIFF**

**VERSUS**

**G.C RETAIL LIMITED ..... 1<sup>ST</sup>**  
**DEFENDANT G.C RESIDENTIAL LIMITED.....**  
**.....2<sup>ND</sup> DEFENDANT ACTIS LLP LIMITED .**  
**..... 3<sup>RD</sup> DEFENDANT SINOHYDRO**  
**CORPORATION LIMITED.....4<sup>TH</sup> DEFENDANT**

**CONSOLIDATED WITH ELC NO. 592 OF 2014**

**MERU NORTH CO-OPERATIVE UNION LIMITED .....**  
**PLAINTIFF**

**VERSUS**

**MECADA CONTRACTORS LIMITED ..... 1<sup>ST</sup>**  
**DEFENDANT SINOHYDRO CORPORATION LIMITED.**  
**..... 2<sup>ND</sup> DEFENDANT ACTIS AFRICA LIMITED .**  
**..... 3<sup>RD</sup> DEFENDANT NAIROBI CITY**  
**COUNTY GOVERNMENT ..... 4<sup>TH</sup> DEFENDANT KIMURI**  
**HOUSING COMPANY LIMITED ..... 5<sup>TH</sup> DEFENDANT**  
**THE ATTORNEY GENERAL ..... 6<sup>TH</sup>**  
**DEFENDANT**

**RULING**

1. Before this court for determination are two applications dated 15<sup>th</sup> July, 2025 and 28<sup>th</sup> July, 2025 brought by the Plaintiff and the 2<sup>nd</sup> Defendant respectively in ELC 528 of 2014 (*hereinafter the 1<sup>st</sup> and 2<sup>nd</sup> Applicants*).
2. The Plaintiff's Notice of Motion application dated 15<sup>th</sup> July, 2025 has been brought pursuant to the provisions of **Order 42 Rule 6** of the **Civil Procedures Rules** seeking the following reliefs:
  - i. ***Pending the hearing and determination of the intended appeal, there be a stay of execution of the judgement and or decree dated 26<sup>th</sup> June 2025.***
  - ii. ***Alternative to prayer 4 above, the status quo be maintained in respect of parcel of land L. R. No. 5986/9 pending the hearing and determination of the intended appeal against the Judgement and or Decree dated 26<sup>th</sup> June 2025.***
  - iii. ***Any other or further relief that the court may deem just and appropriate in the circumstances.***
  - iv. ***Costs of the application be in the cause.***
3. The Motion is premised on the grounds set out on its face and is supported by the affidavit of Margaret Wambui Ngugi, a director of the Plaintiff company in ELC No. 528 of 2014 (*hereinafter the 1<sup>st</sup> Applicant*), sworn on an even date.

4. She deponed that the 1<sup>st</sup> Applicant filed an Amended Plaintiff seeking, *inter alia*, a declaration that it was the bona fide registered proprietor of L.R. No. 5986/9 together with reliefs for trespass. Shortly thereafter, on or about 29<sup>th</sup> May 2014, the Plaintiff in ELC No. 592 of 2014(*hereinafter the Respondent*), likewise filed an Amended Plaintiff. The 1<sup>st</sup> Applicant lodged a defence and counterclaim in ELC No. 592 of 2014, following which the two matters were consolidated for hearing and determination.
5. According to her, following a full hearing, the court delivered judgment on 26<sup>th</sup> June, 2025 dismissing the 1<sup>st</sup> Applicant's claim while allowing the claim by the Respondent. Being dissatisfied with that judgment, the 1<sup>st</sup> Applicant filed a notice of appeal on 7<sup>th</sup> July, 2025, which was served upon the Defendants on 9<sup>th</sup> July, 2025. By a letter dated 27<sup>th</sup> June, 2025, it requested certified copies of the proceedings.
6. She explained that in a bid to execute the decree, the Respondent has been harassing the Housing Company's guards stationed at the suit property. Further, persons identifying themselves as agents of the aforesaid Plaintiff have been visiting the suit property with prospective buyers.
7. According to Ms. Ngigi, the Respondent is an old association whose membership has dwindled over time and which, according to her, no longer maintains permanent offices or complies with statutory registration requirements. She

asserted that the union has no known assets, is no longer a going concern, and does not operate any bank account with a substantial balance.

- 8.** Consequently, she urged that unless an order of stay is granted, the 1<sup>st</sup> Applicant stands to suffer substantial loss, as the property may be disposed of beyond its reach and the Respondent will be unable to refund the sale price.
- 9.** She expressed that the 1<sup>st</sup> Applicant is willing to furnish security for the due performance of the decree, including by depositing the title document or providing a bank guarantee for any damages that may ultimately be payable.
- 10.** In response to the Motion, the Plaintiff in ELC No. 592 of 2014/Respondent through its Chairman Josphat Thiaine, filed a Replying Affidavit dated 28<sup>th</sup> July 2025.
- 11.** According to Mr. Thiaine, the 1<sup>st</sup> Applicant has failed to demonstrate the existence of an arguable appeal, no memorandum of appeal having been annexed. Further, that the court correctly found that the 1<sup>st</sup> Applicant was a third party to the contract between it and Mwenendo Investment Company Limited, and therefore lacked legal capacity to execute the indenture over the suit property in 2006.
- 12.** The deponent averred that the 1<sup>st</sup> Applicant would suffer no irreparable loss if the orders sought were declined, as the Respondent has no intention of disposing off the suit property, which had been registered in its name since 3<sup>rd</sup>

August 1990 prior to the 1<sup>st</sup> Applicant's unlawful transfer on 6<sup>th</sup> November 2014.

- 13.** He described the Union as a reputable and operational co-operative representing numerous coffee farmers in Meru County, noting that no resolution had been passed to dispose of the property and that the issue of refund of any sale price would not arise since the property would remain available should the Applicant succeed on appeal.
- 14.** Additionally, he stated that the Union is an umbrella body for nine coffee factory societies, *to wit* Kitheo FCS Ltd, Nunkunu FCS Ltd, Igento FCS Ltd, Tigania North FCS Ltd, 3K FCS Ltd, Thangatha FCS Ltd, New Igembe FCS Ltd, Mutuma FCS Ltd and Mutethia FCS Ltd.
- 15.** He refuted allegations that the Union was defunct, asserting that it remains a going concern with permanent offices at Makiri Union Headquarters, holds regular annual general meetings, and has consistently complied with statutory obligations under the **Co-operative Societies Act**, including filing annual returns.
- 16.** Further, it was deposed, the Union possesses substantial assets in Nairobi and Meru Counties, including Nyambene House along Tom Mboya Street, land, plant and machinery, and shares in various companies valued at over Kshs. 2 billion. In contrast, he alleged that the 1<sup>st</sup> Applicant lacks financial capacity, is heavily indebted to financial

institutions, and faced recovery proceedings, citing **Ngugi & 2 others vs KCB Bank Kenya Limited & another (Commercial Case E263 of 2022) [2023] KENSC 17558 (KLR)**.

17. He expressed apprehension that lenders might attach the suit property, which remains in the 1<sup>st</sup> Applicant's name, to recover outstanding loan facilities.
18. Additionally, he explained, the Applicant has admitted to subdividing the suit property and is therefore likely to transfer portions to third parties, thereby defeating the ends of justice. He stated that as advised by Counsel, the Applicant has approached the court with unclean hands and in breach of the doctrine of *lis pendens* by transferring the property to itself during the pendency of the suit, arguing that maintaining the status quo would expose the property to further dealings.
19. Without prejudice to the foregoing, he urged that if the court were inclined to grant the orders sought, it should impose strict conditions, including a bank guarantee of Kshs. 416,000,000 as security for due performance of the decree and a requirement that the record of appeal be filed within ninety days, failing which the stay orders should automatically lapse.
20. The 2<sup>nd</sup> Defendant's Notice of Motion dated 28<sup>th</sup> July, 2025 is brought pursuant to the provisions of **Sections 1A, 1B &**

**3A, of the Civil Procedure Act, Order 42 Rule 6, and Order 51 rule (1) of the Civil Procedure Rules 2010, and seeks the following reliefs:**

- i. This Honourable Court be pleased to stay the execution of the judgment delivered on 26<sup>th</sup> June 2025 by Honourable Justice Angote and the resultant decree in ELC 528 of 2014 consolidated with ELC 592 of 2014, pending the filing, hearing and determination of the intended appeal of the said judgment and resultant decree.***
- ii. Any further relief that this Honourable Court may deem just and appropriate in the circumstances;***
- iii. Costs of this application be provided for.***

**21.** The Motion is supported by the affidavit of Samuel Kariuki, the Chief Executive Officer of Mi Vida Homes, who holds a Special Power of Attorney in favour of GC Residential Limited, the 2<sup>nd</sup> Defendant in ELC No. 528 of 2014(*hereinafter the 2<sup>nd</sup> Applicant*).

**22.** By way of background, the deponent explained that two separate suits, ELC No. 528 of 2014 filed by Kimuri Housing Company Limited and ELC No. 592 of 2014, filed by Meru North Co-operative Union Limited, had been instituted

alleging trespass by the Actis and GC Companies. He noted that the suits were consolidated by consent on 22<sup>nd</sup> May 2014, with both Plaintiffs granted leave to pursue claims relating to ownership of the suit property.

- 23.** It was deposed that prior to the hearing, the parties jointly instructed Harunani & Associates to conduct a survey to determine the existence and extent of any encroachment; that an initial report dated 9<sup>th</sup> March 2021 was issued, followed by a final report on 25<sup>th</sup> April 2022 which concluded that the sewer line occupied approximately 0.2272 hectares (0.561 acres) of the suit property and that it identified an adjacent area that could be utilized for future development and service connections.
- 24.** According to Mr. Kariuki, judgment was delivered on 26<sup>th</sup> June 2025 in which the court made three principal determinations. First, it found that Kimuri Housing Company Limited had fraudulently procured registration of the suit property and ordered that the title revert to Meru North Co-operative Union Limited. Secondly, the court issued a mandatory injunction directing the removal of the sewer line within ninety days, failing which Meru North would be at liberty to undertake the works at the expense of the 2<sup>nd</sup> Applicant. Third, the court awarded general damages for trespass in the sum of Kshs 10,000,000 against Actis Africa L.L.P Limited and the GC Companies.

- 25.** Being dissatisfied with the decision, it was deposed, the Actis and GC companies lodged a Notice of Appeal dated 9<sup>th</sup> July 2025 and requested typed proceedings to facilitate preparation of the appeal. According to the deponent, the Respondent has taken steps to extract the decree and might commence execution for the decretal sum, exposing the 2<sup>nd</sup> Applicant to immediate financial prejudice.
- 26.** He further contended that the intended appeal challenges this court's reliance on an incorrect measurement of encroachment of 0.77 acres instead of 0.561 acres which, if corrected, could significantly reduce the damages awarded. Should the sums be released, he deposed, they may not be recoverable.
- 27.** He added that Kimuri has also lodged an appeal challenging the entire judgment and has alleged that Meru North lacked assets, thereby raising concerns that any sums paid might be irrecoverable and expose the 2<sup>nd</sup> Applicant to the risk of double enforcement should the Court of Appeal ultimately direct payment to Kimuri.
- 28.** In addition, the deponent addressed the mandatory order requiring removal of the sewer line within ninety days, stating that compliance within that period was impracticable due to statutory regulatory processes under the Environmental Management and Coordination Act, the Water

Act and the Public Health Act, all of which require public participation, technical approvals and prescribed timelines.

- 29.** He deposed that regulatory approvals for the relocation works could not commence in the absence of title documents in Meru North's name together with the requisite letters of no objection, noting that the property remained registered in Kimuri Housing Company Limited's name pending the intended appeal.
- 30.** Mr. Kariuki further explained that the relocation of the sewer line required coordination with third parties, particularly East African Breweries Limited (EABL), whose boundary wall was said to encroach onto the three-meters wayleave and would have to be addressed before any relocation works could proceed.
- 31.** According to him, the process would first require EABL to acknowledge the encroachment and demolish or realign its compound wall constructed over the wayleave, an exercise estimated to take approximately six months. Thereafter, it was deposed, EABL would need to remove or relocate internal installations attached to or running along the wall, including drainage pipes and cable trays, with an additional estimated timeline of about two months.
- 32.** The deponent also expressed concern that demolition of the sewer line without an immediate re-routing plan would disrupt services relied upon by approximately 862

homeowners and Garden City Mall, potentially exposing the Actis and GC Companies to numerous claims arising from breach of lease obligations to provide sewerage services.

- 33.** He added that the 2<sup>nd</sup> Applicant had also lodged a notice of appeal against an earlier ruling of 13<sup>th</sup> May, 2025 which had declined leave to file a witness statement detailing the technical timelines required for removal of the sewer, and argued that a stay was necessary to prevent the intended appeals from being rendered nugatory.
- 34.** Finally, the deponent affirmed that the 2<sup>nd</sup> Applicant is ready and willing to comply with any reasonable conditions for security, including provision of a bank guarantee, and maintained that the application had been filed without delay.
- 35.** In response to the Motion, the Respondent through Josphat Thiaine, its Chairman, swore and filed a Replying Affidavit dated 29<sup>th</sup> August, 2025.
- 36.** Mr. Thiaine deponed that the 2<sup>nd</sup> Applicant had failed to demonstrate that it has an arguable appeal. He pointed out that no draft memorandum of appeal has been annexed to disclose the proposed grounds of challenge, thereby leaving the court without a basis upon which to assess whether the intended appeal raised triable issues.
- 37.** He asserted that the issue of trespass was conclusively determined by this court and independently confirmed by

joint survey reports alluded to. He also averred that during construction of the sewer line, the 2<sup>nd</sup> Applicant neither sought nor obtained consent from Meru North Co-operative Union Limited or Kimuri Housing Company Limited, and therefore could not rely on alleged regulatory hurdles to justify stay.

- 38.** In his view, there was no legal requirement to obtain letters of no objection or further approvals from the Nairobi City County or the National Environment Management Authority prior to removal of the sewer infrastructure, since the orders issued by this Court constituted sufficient legal authority to undertake the works.
- 39.** He further deponed that the 2<sup>nd</sup> Applicant would not suffer any substantial loss if stay of execution was declined. According to him, the companies had already sought access to the suit property for purposes of removing the sewer line and remained at liberty to serve the relevant authorities with the court's decree to facilitate compliance.
- 40.** He added that an existing wayleave provided an alternative route to which the sewer infrastructure could be redirected, and that the Applicants had in fact encroached onto the suit property notwithstanding the availability of that wayleave.
- 41.** He also contended that the Applicants' assertion that removal of the sewer line would require eighteen months was misleading, noting that the same infrastructure had

been installed in less than ninety days and without the Respondent's consent. In his view, the timelines now advanced were therefore exaggerated and did not demonstrate any real prejudice capable of amounting to substantial loss.

- 42.** According to Mr. Thiaine, contrary to the allegations, Meru North Co-operative Union Limited is a reputable and fully operational co-operative union within Meru County representing numerous coffee farmers, maintaining a permanent office at Makiri Union Headquarters and continuing to hold annual general meetings, as evidenced by the minutes of 14<sup>th</sup> May 2025.
- 43.** He added that the union has complied with the Co-operative Societies Act by filing annual returns with the Commissioner for Co-operative Development; that the union owns substantial assets within Nairobi and Meru Counties, including Nyambene House along Tom Mboya Street, developed and undeveloped land, plant and machinery and shares in various companies, collectively valued at over Kshs. 2 billion, and was therefore capable of refunding any sums should the intended appeal succeed.
- 44.** He contrasted this position with that of the 2<sup>nd</sup> Applicant, which he described as a British-based global investment entity headquartered in London and presently in the process of disposing of Garden City Mall, contending that

enforcement of court orders would be rendered difficult were it to relocate beyond the court's jurisdiction.

45. Without prejudice to the foregoing, he proposed that if the court is inclined to grant stay, the 2<sup>nd</sup> Applicant ought to deposit the awarded general damages for trespass of Kshs. 10,000,000 together with accrued interest of Kshs. 13,600,000, totalling Kshs. 23,600,000, into a joint interest-earning account in the names of the parties' advocates as security for due performance of the decree and to file the record of appeal within ninety days, failing which the stay orders should lapse automatically.
46. The parties filed submissions and authorities which I have considered.

#### **Analysis and Determination**

47. Having considered the Motion, Affidavits and submissions, the sole issue that arises for determination is whether the Applicants have satisfactorily demonstrated the conditions warranting the grant of stay of execution pending Appeal?
48. The law with respect to stay of execution pending appeal is found in **Order 42 Rule 6(1) and (2)** of the **Civil Procedure Rules, 2010** 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.”*

**49. 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.”***

50. 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."*

**51.** Further to the above, this court is now enjoined to give effect to the overriding objectives in the exercise of its powers as expressed in **Section 3** of the **Environment and Land Court Act** and **Section 1A** of the **Civil Procedure Act**, to

*wit*, the just, expeditious, proportionate and affordable resolution of disputes.

- 52.** The consolidated suits concerned competing claims to ownership and alleged trespass over L.R. No. 5986/9. In ELC No. 528 of 2014, the Plaintiff sought injunctive relief, restoration of the land and damages, asserting ownership by way of purchase. The 2<sup>nd</sup> Applicant herein was accused of unlawfully constructing a sewer line across an access road during the development of Garden City Mall.
- 53.** In ELC No. 592 of 2014, the Plaintiff challenged the title in the name of the Plaintiff in ELC 528 of 2014, denying any sale or transfer and alleging fraudulent registration.
- 54.** The matter proceeded for hearing and the court found that the Plaintiff in ELC No. 528 of 2014 had not established a lawful root of title, declared Meru North the lawful proprietor, and held that installation of the sewer infrastructure without consent amounted to trespass, awarding damages and ordering its removal.
- 55.** Aggrieved by this decision, the 1<sup>st</sup> and 2<sup>nd</sup> Applicants separately intend to appeal to the Court of Appeal. They ask this court to stay the execution of the aforesaid judgment and the decree arising therefrom pending determination of the appeal.

56. Turning now to the issue of whether the parameters for stay have been satisfied, the court first observes that the Respondent contends that the Applicants have not annexed their draft memorandums of appeal and as such, the arguability of their respective appeal has not been demonstrated. It is important to clarify that the court's jurisdiction to grant a stay of execution pending appeal is anchored in **Order 42 Rule 6** of the **Civil Procedure Rules**.
57. Notably, this provision does not make the arguability of the appeal one of the conditions precedent for the grant of a stay. This position is well-founded. It would be both procedurally improper and logically untenable for this court to assess the arguability of an appeal arising from its own decision. The court will disregard any arguments under this head.
58. Moving to the pre-requisites under **Order 42 Rule 6(2)**, the court will begin with the aspect of sufficient cause. What constitutes the same was explicitly discussed by the court in **Antoine Ndiaye vs. African Virtual University [2015] eKLR**, which persuasively stated:

***“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say,***

*judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:*

*a) The application is brought without undue delay;*

*b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and*

*c) 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.”*

59. The court concurs. In determining whether sufficient cause has been established, the court will examine whether the Applicants have satisfied the three mandatory prerequisites to the grant of stay pending appeal, starting with the question of whether there was unreasonable delay.

60. The question of what constitutes unreasonable delay was discussed in the case of *Jaber Mohsen Ali & another vs*

**Priscillah Boit & another [2014] eKLR** where Munyao J stated:

***“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.”***

- 61.** The judgment sought to be appealed from was delivered on 26<sup>th</sup> June 2025. The 1<sup>st</sup> Applicant lodged its notice of appeal on 7<sup>th</sup> July 2025 and filed the present Motion on 15<sup>th</sup> July 2025, approximately three weeks after judgment. Similarly, the 2<sup>nd</sup> Applicant filed a notice of appeal on 9<sup>th</sup> July 2025, and subsequently lodged the present Motion on 28<sup>th</sup> July 2025, roughly one month after delivery of the judgment. In the court’s view, neither application was brought with inordinate delay.

62. In *Rhoda Mukuma vs John Abuoga [1988] eKLR*, the court proffered the following definition of substantial loss:

***“Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being - (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory...”***

63. Similarly, the court in *Century Oil Trading Company Ltd vs Kenya Shell Limited* as cited in *Muri Mwaniki & Wamiti Advocates vs Wings Engineering Services Limited [2020] eKLR*, held as follows:

**“The word 'substantial' cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words 'substantial**

loss' must mean something in addition to all different from that.”

64. Courts have also held that substantive loss must be demonstrated. This position was articulated by the Court of Appeal in *Kenya Shell Limited vs Benjamin Karuga Kibiru & another [1986] eKLR* thus:

*“It is usually a good rule to see if Order 41 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 stay.”*

65. The court in *James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR* similarly opined that the process of execution alone does not amount to substantial loss. It stated as follows:

*“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss*

***under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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...”***

**66.** The court is also alive to its duty to balance the interests of an Applicant who is seeking to preserve the *status quo* pending the hearing of the appeal so that his/her appeal is not rendered nugatory, and the interests of a Respondent who is seeking to enjoy the fruits of his judgment. As expressed by Kuloba, J in ***Machira T/A Machira & Co Advocates vs East African Standard [2002] eKLR:***

***“To be obsessed with the protection of an Appellant or intending Appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge***

*and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way Applications for stay of further proceedings or execution, pending Appeal are handled. In the Application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court.”*

- 67.** The Applicants contend that they will suffer substantial loss if stay of execution is not granted on several fronts. The 1<sup>st</sup> Applicant argues that following this court’s finding that the Respondent is the lawful proprietor and the consequent cancellation of its title, the Respondent may sell, charge or otherwise dispose of L.R. No. 5986/9, thereby placing the property beyond its reach should the intended appeal succeed.
- 68.** The 2<sup>nd</sup> Applicant contends that execution of the decretal sum of Kshs 10,000,000, together with accruing interest, exposes it to financial prejudice and that recovery would be uncertain should the intended appeal succeed. It further challenges the mandatory injunction requiring removal of the existing sewer line within ninety (90) days, arguing that the

works require extensive regulatory approvals and technical processes for which at least eighteen (18) months had been sought.

- 69.** The court has carefully considered the parties' rival positions in light of the settled principles outlined above. Beginning with the 1<sup>st</sup> Applicant's plea, and notwithstanding the Respondent's assertion that it harbours no present intention to dispose of the property, the court remains cognizant that proprietary rights inherently encompass the liberty to sell, alienate, charge, or otherwise deal with land.
- 70.** In the event that the Respondent were to exercise such rights during the pendency of the intended appeal, the substratum of the dispute, namely the title to L.R. No. 5986/9, may be rendered nugatory or placed beyond the effective reach of the appellate process. To that limited extent, and bearing in mind the centrality of ownership to the issues on appeal, the court is persuaded that preservation of the property is warranted so as to avert the risk of substantial loss.
- 71.** Further, the court also agrees with the 2<sup>nd</sup> Applicant's arguments that the relocation of the sewer line will require coordination with third parties, realign EABLS's compound wall constructed over the wayleave, and would need removal or relocation of internal installations attached to or running

along the wall, including drainage pipes and cable trays, which will lead to substantial loss.

72. Further the demolition of the sewer line without an immediate re-routing plan would disrupt services relied upon by approximately 862 homeowners and Garden City Mall, potentially exposing the Actis and GC Companies to numerous claims arising from breach of lease obligations to provide sewerage services.
73. Moving to the last issue regarding provision of security, its purpose was discussed by the court in **Arun C Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others [2014] eKLR**, thus:

***“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... Civil process is quite different because in 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 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.”***

74. While in ***Focin Motorcycle C. Ltd vs Ann Wambui Wangui [2018] eKLR***, it was stated that:

***“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground of stay.”***

75. The court is so guided. Having carefully weighed the competing interests of the parties, and bearing in mind that the purpose of an order for stay is not to deny a successful litigant the fruits of judgment but to preserve the substratum of an intended appeal where sufficient cause has been shown, the court is satisfied that only limited and conditional relief is warranted in the circumstances of this case, with the deposit of Kshs. 10,000,000 in a joint account by the 2<sup>nd</sup> Applicant

76. Accordingly, the court makes the following orders:

- i. The Notice of Motion dated 15<sup>th</sup> July, 2025 and 28<sup>th</sup> July, 2025 are hereby allowed in the following manner:**
- a) An order of stay of execution of the Judgment in respect of the cancellation of the title does hereby issue unconditionally pending the hearing and determination of the appeal.**
  - b) As a condition for the grant of stay of execution in respect of the removal of the sewer line and payment of damages, the 2<sup>nd</sup> Applicant shall provide unequivocal bank guarantee, within thirty (30) days from the date hereof, of a sum of Kshs. 10,000,000 as security for the due performance of the decree as may ultimately be binding, in default of which the stay granted in respect of the removal of the sewer line and payment of damages by the 2<sup>nd</sup> Applicant herein shall lapse automatically without further reference to the court.**
- ii. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants shall bear the costs of the two Motions respectively.**

**Dated, signed and delivered virtually in Nairobi this 5<sup>th</sup> day of March, 2026.**

**O. A. Angote**  
**Judge**

**In the presence of:**

Ms Abogo for the Plaintiff in ELC 592 of 2014

Ms Munubi for Mr. Mutua (SC) for Plaintiff in ELC 528 of 2014

Mr. Ngoga for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

Court Assistant: Tracy