

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. E013 OF 2025

(CORAM: HON. CHARLES M. KARIUKI – J)

(Being an application for stay of Judgment and Ruling delivered by Daniel Ngayo, Resident Magistrate, on the 30th of April, 2025, in Narok CMCC No. E082 of 2022)

EDWIN MOTARI1ST APPLICANT

DAVID WACHIRA2ND APPLICANT

=VERSUS=

WILFRED METOBO ONSERIO.....1ST RESPONDENT

JOSEPH NDEGE NYABAYO.....2ND RESPONDENT

PLATINUM CREDIT LTD3RD RESPONDENT

SARAH NJOKI T/A SANJOMU AUCTIONEERS4TH RESPONDENT

RULING

11/03/2026

INTRODUCTION

1. The Applicants, Edwin Motari Onguti and David Wachira, have moved this Court by way of Notice of Motion seeking orders of stay of execution pending the hearing and determination of their intended appeal. The application arises from the Judgment and Ruling delivered on 30th April 2025 by Hon. Daniel Ngayo, Chief Magistrate, in Narok CMCC Civil Suit No. E082 of 2022, namely, Edwin Motari & Another v Wilfred Metobo Onserio & 2 Others.

2. The Applicants were the Plaintiffs in the subordinate court suit, while the Respondents herein were the Defendants.

The Application

3. The application is expressed to be brought under Sections 1A, 1B, 3A, 22, 23, and 24 of the Civil Procedure Act and Order 51 of the Civil Procedure Rules. The substantive prayers sought are:

- i. An order of temporary stay of execution of the Judgment delivered on 30th April 2025 pending the hearing and determination of the intended appeal.
- ii. Issuance of summons to one Grace Sunkatet, the landlady of the disputed premises, to clarify the nature of the tenancy granted to the 1st and 2nd Respondents and whether the premises were leased vacant or together with the Applicants' chattels.
- iii. An order directing the 3rd Respondent to file an account of storage costs and the condition of the attached chattels.
- iv. Such further orders as the Court may deem just.

4. The application is premised on the grounds that the learned Magistrate dismissed the Applicants' application dated 25th April 2024 and the Plaint, thereby allegedly failing to properly determine the nature of the tenancy agreement between the landlady and the 1st and 2nd Respondents. The Applicants contend that the refusal to allow the landlady to testify prejudiced their case and curtailed their right to a fair hearing. They assert that unless stay is granted, the intended appeal will be rendered nugatory.

Supporting Affidavit

5. The application is supported by the affidavit of Edwin Motari, the 1st Applicant. He demonstrates that he is both an advocate and a party to the proceedings and is conversant with

the facts of the matter. He states that in the lower court, he had sought to summon the landlady, Grace Sunkatet, to clarify whether the 1st and 2nd Respondents took possession of the suit premises under vacant possession or together with the Applicants' chattels, including chairs, tables, and cookers.

6. He avers that the 1st and 2nd Respondents allegedly took possession of the premises and thereafter charged the said chattels to the 3rd Respondent to secure a loan facility. He contends that the trial court erred in declining to allow the landlady's testimony, thereby failing to ascertain the true nature of the tenancy agreement and ownership of the chattels.
7. The 1st Applicant further deposes that he is aggrieved by the dismissal of his application and the subsequent Judgment, and that he has instructed the filing of an appeal. He maintains that the intended appeal raises arguable and triable issues with high chances of success, and that unless stay is granted, the appeal will be rendered academic. He urges that it is in the interest of justice that the application be certified urgent and the orders sought be granted to preserve the subject matter pending appeal.
8. In summary, the Applicants seek to stay execution of the impugned Judgment and to preserve the disputed chattels pending the hearing and determination of their intended appeal.

Directions of the Court

9. On 15th May 2025, upon hearing the parties, the Court issued the following directions:
 - i. The Applicant was directed to amend the application so as to clearly particularize and enlist the properties that are the subject of the dispute, as well as to properly reference the trial court matter.

- ii. In the interim, the Court ordered that the properties currently in the possession of the auctioneers shall not be altered, sold, or otherwise disposed of pending further orders of the Court.
- iii. Prayer 3 of the application, which seeks the issuance of summons to the landlady, was deferred to await the filing of the parties' respective responses.

The Respondents' Replying Affidavit

10. The 2nd Respondent, Joseph Ndege Nyabayo, swore a Replying Affidavit on his own behalf and with the authority of the 1st Respondent opposing the Notice of Motion dated 9th May 2025.
11. He deposes that the application is frivolous, incompetent, and an abuse of the court process and ought to be dismissed with costs.
12. On prayer No. 2 seeking stay of execution of the Judgment delivered on 30th April 2025 in Narok CMCC No. E082 of 2022, the Respondent avers that the said Judgment dismissed the Plaintiffs' suit with costs. He contends that an order dismissing a suit is negative in nature and incapable of execution, and therefore incapable of being stayed. Consequently, he argues that the prayer for stay cannot issue in law.
13. With regard to prayer No. 3 seeking issuance of summons to Grace Sunkatet (the landlady) to clarify the nature of the tenancy, the Respondent deposes that a similar application dated 25th April 2024 had been filed before the trial court seeking comparable orders. He states that the said application was heard on merit and dismissed in a ruling delivered on 30th October 2024. He further avers that the Appellants neither appealed against nor sought review of that ruling. It is therefore contended that the present appeal, which arises from the Judgment delivered on 30th April 2025, cannot be used to challenge or revisit orders arising from the earlier ruling of 30th October 2024.

14. The Respondent further argues that by seeking to summon a new witness and introduce new information at the appellate stage, the Appellants are improperly attempting to introduce fresh evidence after determination of the suit, contrary to established appellate procedure. He contends that this would be prejudicial to the Respondents and amounts to seeking a retrial under the guise of an appeal.
15. In respect of prayer No. 4 seeking an order directing the 3rd Respondent to file an account of storage costs and the condition of the attached items, the Respondent avers that this issue did not form part of the matters in controversy before the trial court and does not arise from the grounds of appeal. He contends that the Appellants are attempting to introduce a new cause of action at the appellate stage, which an appellate court ought not to entertain.
16. The Respondent concludes that an appellate court is confined to issues that arose in the trial court and cannot entertain new issues or evidence. He therefore urges the Court to dismiss the application dated 9th May 2025 with costs to the Respondents.

The Applicants' Submissions

17. The Applicants filed written submissions in support of the Notice of Motion dated 9th May 2025 seeking stay of the Judgment and Ruling delivered on 30th April 2025 by the resident Magistrate in Narok CMCC No. E082 of 2022.
18. Counsel for the Applicants submits that unless stay is granted, the intended appeal will be rendered nugatory, and any success therein will amount to a mere academic exercise or a pyrrhic victory. It is argued that the central issue in dispute concerns the nature of the lease granted to the 1st and 2nd Respondents and whether the suit premises were leased vacant or together with the Applicants' chattels, namely chairs, tables, and sofas. The

Applicants contend that the evidence of the landlady, one Grace Sunkatet, is crucial to the just determination of that question.

19. The Applicants fault the trial court for dismissing their Notice of Motion dated 25th April 2024, in which they had sought to summon the said landlady to testify on the nature of the tenancy. It is submitted that the learned magistrate erred in law and fact by declining to allow the introduction of the landlady as a witness and by holding that the application was intended to seal loopholes in the Applicants' case. The Applicants argue that this finding was contrary to Article 50(1) of the Constitution, which guarantees the right to a fair hearing, and Sections 22, 23, and 24 of the Civil Procedure Act, which empower the court to issue summons for the attendance of witnesses and production of documents.
20. The Applicants further rely on Article 159(2)(d) of the Constitution and Sections 1A and 1B of the Civil Procedure Act on the overriding objective (the "oxygen principle"), submitting that the Court ought to administer justice without undue regard to procedural technicalities and facilitate the just, expeditious and proportionate resolution of disputes. They contend that allowing the landlady to testify, whether physically or virtually (she being resident in the United States of America), would enable the Court to reach a fair and rational determination on ownership of the disputed chattels.
21. On the issue of preservation of the chattels, the Applicants submit that the items are currently held by the 3rd Respondent following distress and are incurring storage charges at a daily rate, thereby exposing them to financial prejudice and risk of loss through auction. It is argued that pending appeal, the Court should stay execution and preserve the subject matter.
22. The Applicants also cite the decision of the Supreme Court **in Raila Odinga & others v IEBC & 3 Others, Presidential Petitions Nos. 3, 4 and 5 of 2013 [2013] eKLR**, for the

principles governing the admission of additional evidence. They submit that where additional material is limited and capable of response by the opposing party, the Court should exercise its discretion in favor of allowing it, particularly where it serves the interests of justice.

23. In conclusion, the Applicants pray that the Court grants leave for Grace Sunkatet to testify (including virtually), that the matter be transferred for retrial before the lower court if necessary, and that pending such retrial or determination of the appeal, there be a stay of the Judgment delivered on 30th April 2025.

The 1st and 2nd Respondents' Submissions

24. The 1st and 2nd Respondents oppose the Notice of Motion dated 9th May 2025 seeking, inter alia, stay of the judgment delivered on 30th April 2025 in Narok CMCC No. E082 of 2022, issuance of summons to one Grace Sunkatet, and an order compelling the 3rd Respondent to file accounts of storage costs and the condition of attached goods.

25. On whether the judgment is capable of being stayed, the Respondents submit that the impugned judgment merely dismissed the Appellants' suit with costs and did not issue any positive or executable order. They argue that such a dismissal constitutes a negative order incapable of execution and therefore incapable of being stayed. Reliance is placed on **Thuo v Kimani & 2 Others [2025] KLR**, where the court held that a dismissal order is a negative order incapable of stay. Further reliance is placed on **Kanwal Sarjit Singh Dhiman v Keshavji Juvraj Shah**, in which the Court of Appeal held that an order dismissing an application is a negative order as it does not require any party to perform any act, and is therefore incapable of execution. The Respondents also cite **Jeremiah**

M’Njogu v District Land Registrar Meru Central & Others, where the Court of Appeal reiterated that negative orders are incapable of being stayed.

26. On the prayer seeking summons to Grace Sunkatet, the Respondents submit that a similar application was made before the trial court after the close of the hearing and was dismissed in a ruling delivered on 30th October 2024. The trial court found that no explanation had been given for the failure to call the witness during the hearing and that the application was an attempt to fill gaps in the Plaintiffs’ case. The Respondents contend that the said ruling was neither appealed nor reviewed, and that reintroducing the same prayer at the appellate stage amounts to an abuse of process and an attempt to reopen a concluded matter, which would prejudice the Respondents.
27. Regarding the prayer compelling the 3rd Respondent to file an account of storage costs and the condition of attached goods, the Respondents submit that the issue was neither pleaded nor canvassed before the trial court. They argue that the Appellants are improperly introducing a new issue on appeal. In support of this position, they rely on **Kenya Hotels Limited v Oriental Commercial Bank Limited**, where the Court of Appeal emphasized that new issues should not be raised on appeal as this would prejudice the opposing party and effectively convert the appeal into a fresh hearing.
28. On costs, the Respondents urge the Court to dismiss the application with costs pursuant to Section 27 of the Civil Procedure Act, submitting that costs follow the event and that the application is devoid of merit.

ISSUES FOR DETERMINATION

29. Having considered the Notice of Motion dated 9th May 2025, the affidavits on record, and the rival submissions, the following issues arise for determination:

- i. *Whether this Court can grant an order of stay of execution of the Judgment delivered on 30th April 2025 in Narok CMCC No. E082 of 2022.*
- ii. *Whether this Court can issue summons to Grace Sunkatet or otherwise admit her evidence at this stage.*
- iii. *Whether this Court can direct the 3rd Respondent to file an account of storage costs and the condition of the attached chattels.*
- iv. *Who should bear the costs of the application?*

ANALYSIS AND DETERMINATION

1. Whether the Judgment of 30th April 2025 is Capable of Being Stayed

30. The impugned Judgment dismissed the Applicants' suit with costs.
31. The law on stay of execution is anchored under Order 42 Rule 6 of the Civil Procedure Rules. However, before considering the conditions for stay, the Court must first determine whether there exists an executable order capable of being stayed.
32. The Court of Appeal in *Kanwal Sarjit Singh Dhiman v Keshavji Juvraj Shah [2008] eKLR (Court of Appeal at Nairobi)* held:

“By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus a negative order which is incapable of execution.”
33. Similarly, in *Jeremiah M’Njogu v District Land Registrar, Meru Central & 3 Others [2020] eKLR (Court of Appeal at Nyeri, Civil Application No. 34 of 2020)*, the Court of Appeal reaffirmed that a negative order is incapable of execution and therefore incapable of being stayed.

34. More recently, the same position was restated in **Thuo v Kimani & 2 Others [2025] KLR**, where the Court declined to grant stay on the basis that the impugned decision was a dismissal order and therefore negative in nature.
35. In the present case, the subordinate court dismissed the Applicants' suit. It did not issue any positive, mandatory, or executable directive requiring performance of any act other than payment of costs.
36. A dismissal order, by its nature, does not lend itself to execution except as to costs. The Applicants have not demonstrated that there is any positive decree capable of execution that would render the appeal nugatory.
37. Accordingly, the Judgment of 30th April 2025 is a negative order and is incapable of being stayed.
38. The prayer for stay of execution therefore fails.

2. Whether Summons Should Issue to Grace Sunkatet / Admission of Additional Evidence

39. The Applicants seek issuance of summons to Grace Sunkatet to clarify the nature of the tenancy and ownership of the chattels.
40. The record shows that a similar application dated 25th April 2024 was made before the trial court and was dismissed in a ruling delivered on 30th October 2024. That ruling was not appealed against nor reviewed.
41. An appellate court does not ordinarily reopen issues conclusively determined by the trial court unless properly challenged on appeal.
42. Further, the principles governing admission of additional evidence at the appellate stage were authoritatively set out by the Supreme Court in **Raila Odinga & Others v**

Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR. The

Court held that additional evidence may only be admitted where, inter alia:

- a) It could not have been obtained with reasonable diligence for use at trial.
- b) It is relevant and credible.
- c) It would probably influence the result of the case.
- d) It is not intended to fill gaps in evidence.

43. In the present case, the Applicants have not demonstrated that the evidence of the landlady could not, with reasonable diligence, have been procured during the trial. Indeed, the trial court specifically found that no sufficient explanation was offered for the failure to call her earlier.

44. What is sought is effectively a reopening of the trial or a retrial under the guise of an interlocutory application for stay. That is not the function of an appellate court at this stage.

45. Moreover, allowing prayer would prejudice the Respondents by introducing evidence after the final determination of the suit.

46. Accordingly, I decline to issue summons to Grace Sunkatet or to admit her evidence at this stage.

3. Whether the Court Can Direct the 3rd Respondent to File Accounts on Storage Costs and Condition of Goods

47. The Applicants seek an order compelling the 3rd Respondent to file accounts of storage costs and the condition of attached goods.

48. It is not disputed that this issue did not form part of the pleadings or the matters determined by the trial court.

49. The Court of Appeal in *Kenya Hotels Limited v Oriental Commercial Bank Limited* [2018] eKLR (Court of Appeal) held that an appellate court should not entertain new issues not raised before the trial court, as doing so would prejudice the opposing party and effectively convert the appeal into a fresh trial.
50. An appeal is a review of the decision of the lower court based on the record before it. It is not an opportunity to introduce a new cause of action or fresh factual controversies.
51. The prayer seeking accounts of storage charges introduces matters that were neither pleaded nor adjudicated upon in the subordinate court. Granting such an order would amount to litigating an entirely new dispute at the appellate stage.
52. I therefore find that this Court lacks the basis to grant the said prayer.

4. Costs

53. Under Section 27 of the Civil Procedure Act, costs follow the event unless the Court, for good reason, orders otherwise.
54. The Applicants' application has failed on all substantive prayers. I see no reason to depart from the general rule.
55. Accordingly, the Notice of Motion dated 9th May 2025 is hereby dismissed with costs to the Respondents.

FINAL ORDERS

- i. The prayer for stay of execution of the Judgment delivered on 30th April 2025 in Narok CMCC No. E082 of 2022 is declined.**
- ii. The prayer seeking issuance of summons to Grace Sunkatet or admission of additional evidence is declined.**
- iii. The prayer seeking orders compelling the 3rd Respondent to file accounts of storage costs and the condition of goods is declined.**

iv. The Notice of Motion dated 9th May 2025 is dismissed with costs to the Respondents.

56. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS
APPLICATION, THIS 11TH DAY OF MARCH 2026**

.....

CHARLES KARIUKI

JUDGE