



**Ibrahim & another v Muhsin & 2 others (Civil Application
E044 of 2025) [2026] KECA 349 (KLR) (27 February 2026) (Ruling)**

Neutral citation: [2026] KECA 349 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E044 OF 2025
SG KAIRU, AK MURGOR & P NYAMWEYA, JJA
FEBRUARY 27, 2026**

BETWEEN

NEDIM MOHAMED IBRAHIM 1ST APPLICANT

SARA ABDELLA ABDUSEMED 2ND APPLICANT

AND

ABDULKARIM SALEH MUHSIN 1ST RESPONDENT

ZUMZUM INVESTMENTS LIMITED 2ND RESPONDENT

CHIEF LAND REGISTRAR 3RD RESPONDENT

(An application for stay of proceedings and stay of execution of the Decree pending the hearing and determination of the intended appeal against the Ruling and order of the High Court of Kenya at Mombasa (J. Ng'aaah, J.) delivered on 23rd May 2025 in Mombasa HCCC 25 of 2015)

RULING

1. The Applicants Nedim Mohamed Ibrahim and Sara Abdella Abdusemed filed a Notice of Motion dated 11th June 2025 pursuant to Rule 5 (2) (b) of the Court of Appeal rules, and Article 159 of *the Constitution* of Kenya 2010 seeking inter alia; that there be a stay of proceedings as well as stay of execution of the decree in Mombasa HCCC 25 of 2015 pending the hearing and determination of the intended appeal, and for cost of this application to be provided for.
2. The Applicants' Motion is brought on several grounds set out on the face of the Motion that unless stay is granted, this application together with the intended appeal will be rendered nugatory. It was contended that the intended appeal has high chances of success, and that the decree holder in Mombasa HCCC 25 of 2015 has already applied for execution of the decree and seeks arrest of the Applicants and have them committed to civil jail as judgment debtors which process is likely to be concluded before the intended appeal is heard and determined; that the Notice to show cause why the judgment debtors



should not be committed to civil jail was scheduled for hearing on 8th July 2025, yet, the debt was settled between the parties by virtue of a mediation agreement that has been upheld by the High Court in Mombasa High Court Civil Case No. E051 of 2021 Nedim Mohammed Ibrahim vs Abdulkarim Saleh Muhsin.

3. It was further contended that, an application for stay of execution of the Judgment in High Court Civil Case No. E051 of 2021 was heard and dismissed on the 24th May 2024 by this Court sitting in Mombasa in Civil Application No. E109 of 2023 (Murgor, Laibuta, Odunga JJ.A); that thereafter, the J. Ng'aaah, J. refused to recognize that the High Court has allowed the implementation of the mediation agreement in High Court Civil Case No. E051 of 2021; that consequently there are conflicting decisions and actions in this matter, and further, the High Court has now unravelled the settlement between the parties and condemned the dispute between the parties back to litigation, notwithstanding the provisions of Article 159 (2) (c) of *the Constitution* that requires courts to promote alternative forms of dispute resolution including mediation.
4. It was contended that if the stay sought is not granted, the Applicants will suffer irreparably by being arrested and committed to civil jail before their appeal is heard and determined on a debt that is already settled between the parties, which committal would be unjust, unlawful and vindictive.
5. The Application is supported by the affidavit of Nedim Mohammed Ibrahim, the 1st Applicant, in which he reiterates the grounds in the Application and further deposes that the Respondent was at all material times his business partner and co-director in Zumzum Investments Limited, which company was used as their investment vehicle in real estate; that disputes arose between them, culminating in the filing of several suits, namely ELC Nos. 122 of 2014, 248 of 2014, 130 of 2012, 318 of 2014 and 25 of 2015, as well as HCCC Nos. 116 of 2016 and 93 of 2016; that with a view to conclusively settling all disputes, the parties entered into a mediation agreement and resolution dated 7th May 2017, but the Respondent failed to cooperate in the implementation of the mediation agreement, prompting him to file Mombasa High Court Civil Case No. E051 of 2021 seeking specific performance of the mediation agreement.
6. It was further deposed that by a Judgment delivered on 24th November 2023, the High Court upheld the mediation agreement and ordered specific performance of the terms; that the Respondent was aggrieved and lodged an appeal and simultaneously sought for stay of execution, which application was dismissed by this Court on 24th May 2024. The Applicant avers that notwithstanding the Court's decision, the Respondent is proceeding to execute the decree in Mombasa HCCC No. 25 of 2015 by way of arrest and committal of the Applicants to civil jail through a Notice to Show Cause; that he applied to set aside the Notice to Show Cause, but the application was dismissed by a ruling delivered on 23rd May 2025.
7. The Applicant deposed that he was aggrieved by the ruling, and has lodged a Notice of Appeal and requested for proceedings, as he intends to appeal against the ruling; that the appeal has high chances of success and unless a stay is granted, the Application and the intended appeal will be rendered nugatory; that in the interest of justice the Applicants' plea is that the orders sought in the Application be granted.
8. Annexed to the application is a Notice of Appeal dated 23rd May 2025 and a memorandum of appeal raising the grounds that; the learned judge failed, inter alia, to uphold the principles laid out by Article 159 of *the Constitution*, and failed to find that the dispute between the parties was settled by virtue of the mediation agreement entered into by the parties, and in particular, failed to uphold the decision in High Court Case No E051 of 2021 Nedim Mohammed Ibrahim vs Abdulkarim Saleh Muhsin and 3 Others (F. Macharia, J.) that held that the mediation agreement between the parties had compromised all court cases set out in the agreement.



9. In response to the Application, the 1st Respondent filed a Replying Affidavit sworn by Abdulkarim Saleh Muhsin, in which he deposed that the Application is defective, misconceived, incompetent, and an abuse of the court process, as the Applicants have failed to disclose material facts to the Court, particularly the nature, extent, and procedural history of the litigation preceding the impugned Notice of Motion, thereby misleading the Court.
10. It was averred that the execution proceedings complained of arise from a valid decree in Mombasa HCCC No. 25 of 2015 which has never been set aside, vacated, or stayed, and therefore the instant Application is premature and an attempt to appeal through the back door.
11. He further averred that the relationship between the parties has been the subject of numerous disputes, resulting in multiple suits arising out of failed business arrangements and shareholding disagreements in Zumzum Investments Limited; that although the parties engaged in mediation, the process did not resolve all disputes between them; that the mediation agreement relied upon by the Applicants did not compromise all the existing causes of action, as several matters were expressly excluded or left unresolved. It was averred that the Applicants have persistently attempted to misrepresent the scope and effect of the mediation agreement and have used it selectively to avoid lawful obligations arising from court decrees.
12. In particular, he deposed, in Mombasa HCCC No. 25 of 2015 the High Court lawfully issued a decree in his favour, and for which he is entitled to enjoy the fruits of his Judgment. He averred that the Notice to Show Cause and execution proceedings were lawfully initiated after the Applicants failed to satisfy the decretal sum; that the Applicants have had numerous opportunities to comply with the court orders, but have consistently failed to do so, and that therefore the present Application is part of a pattern aimed at delaying execution and avoiding payment of a lawful debt.
13. It was deposed further that the Applicants have not demonstrated any exceptional circumstances warranting the grant of a stay, nor have they shown that the intended appeal is arguable or that it would be rendered nugatory if the orders sought are denied; that the Applicants' alleged fear of committal to civil jail is self-inflicted, arising from their refusal to comply with court orders; that the Applicants have not offered any security for the due performance of the decree, and that the balance of convenience tilts heavily in favour of allowing execution to proceed. He further avers that he is financially capable of refunding any sums paid should the appeal ultimately succeed.
14. The parties filed written submission and when the application came up for hearing, learned counsel Mr. P. Mwangi appeared for the Applicants while learned counsel Mr. Muchoki appeared for the 1st Respondent. Prior to commencing the Applicants' submissions, Mr. Mwangi sought to have the application against the 2nd and 3rd Respondents withdrawn. Since Mr. Muchoki did not object, the application against the 2nd and 3rd Respondents was withdrawn.
15. Submitting on behalf of the Applicants, counsel stated that the application seeks orders for stay of proceedings and stay of execution of the decree in Mombasa HCCC No. 25 of 2015 pending the hearing and determination of the intended appeal against the ruling delivered on 23rd May 2025.
16. Counsel argued that the intended appeal is arguable because the learned Judge failed to appreciate that the dispute in Mombasa HCCC No. 25 of 2015 had been conclusively settled by the mediation agreement and resolution dated 7th May 2017, which was subsequently upheld and enforced by the High Court in Mombasa HCCC No. E051 of 2021. It was submitted that on account of the mediation agreement, the High Court Judgment in HCCC No. E051 of 2021 rendered the proceedings and decree in Mombasa HCCC No. 25 of 2015 moot and ineffective. Counsel further contended that the only lawful avenue for challenging the Judgment in HCCC No. E051 of 2021 is through the



pending appeal in CACA No. E084 of 2024, and that parallel enforcement proceedings undermine the authority of the Court.

17. On the nugatory aspect, counsel argued that the execution proceedings involve arrest and committal to civil jail, which would irreversibly deprive the Applicants of their liberty and cannot be adequately compensated by damages, particularly where the underlying dispute has allegedly already been settled through mediation.
18. In their written submissions, counsel for the 1st Respondent submitted that the Application is a calculated attempt by the Applicants to delay and derail lawful execution proceedings arising from a valid Judgment and decree of the High Court, and that it failed to satisfy the legal threshold for the grant of orders under Rule 5(2)(b) of this Court's Rules; that the Applicants have not demonstrated that the intended appeal is arguable since the issues raised in the draft memorandum of appeal have been conclusively determined by courts of competent jurisdiction and do not raise any bona fide point deserving consideration by this Court. Counsel emphasized that the decree in Mombasa HCCC No. 25 of 2015 entered in 2019 remains valid, as it has never been set aside, vacated, or stayed, and is therefore ripe for execution.
19. On the mediation agreement relied upon by the Applicants, counsel submitted that although a mediation agreement dated 7th May 2017 existed, the parties consciously elected to proceed with the hearing of the dispute before the High Court after the execution of the agreement, culminating in a Judgment delivered on 19th December 2019 in favour of the 1st Respondent; that no consent or settlement in the matter was recorded; that the Applicants fully participated in the proceedings leading to the Judgment and decree now under execution. It was further submitted that subsequent attempts to review or set aside the judgment were dismissed, and a Notice to Show Cause dated 13th September 2024 was lawfully issued following the Applicants' failure to satisfy the decretal sum.
20. It was further submitted that the Applicants have not demonstrated that the appeal would be rendered nugatory if stay is declined, particularly as the decree in issue is a money decree and that the Applicants have not shown any prejudice they would suffer if execution proceeds.
21. On the prayer for stay of proceedings, counsel submitted that such an order is a drastic remedy which should only be granted in exceptional circumstances, which the Applicants have failed to demonstrate.
22. In support of these propositions, counsel relied on the cases of *Watu Credit Ltd vs Geoffrey Mokaaya Aboki & Karen Chepkurui* [2022] eKLR; *Turbo Highway Eldoret Ltd vs Muniu* (Civil Appeal No. E040 of 2021) [2022] KEHC 10197 (KLR), and *David Morton Silverstein vs Atsango Chesoni* [2002] eKLR, for the principle that courts should not readily grant stays that deny a successful litigant the fruits of a lawful judgment and that stay orders should only issue where strict legal thresholds are met.
23. A brief background to the application, is that following a Judgment of 19th December 2019 entered in favour of the 1st Respondent in Mombasa High Court Civil Case No. 25 of 2015, and delivered on 20th December 2019, the Applicants moved the High Court seeking to set aside the Judgment, which application was dismissed on 31st May 2021. Subsequently, the 1st Respondent extracted a decree on 29th September 2023 and proceeded to file a party and party bill of costs, which was taxed at Kshs. 1,861,830.00 on 9th July 2024. Thereafter, the 1st Respondent lodged a Notice to Show Cause to compel the Applicants, as Judgment debtors, to appear and show cause why execution by way of arrest and committal to civil jail should not issue against them.
24. By an application dated 28th January 2025, the Applicants sought orders for stay of execution, a stay of further proceedings, and a declaration that the suit and all consequential orders had been compromised and rendered moot.



25. The application was premised on the contention that the dispute between the parties had been conclusively settled through a mediation agreement and resolution dated 7th May 2017. It was alleged that the mediation agreement had been upheld and enforced by the High Court in Mombasa High Court Civil Case No. E051 of 2021, in which Judgment was delivered on 24th November 2023, thereby rendering the proceedings and decree in Mombasa HCCC No. 25 of 2015 moot and incapable of enforcement.
26. The 1st Respondent opposed the application, maintaining that the Judgment and decree in Mombasa HCCC No. 25 of 2015 had never been set aside, vacated, or stayed, and that the alleged mediation agreement had neither been adopted nor recorded as an order of the court in that suit. It was further contended that the High Court was functus officio and lacked jurisdiction to declare the judgment moot or compromised.
27. By a ruling delivered on 23rd May 2025, the High Court dismissed the Applicants' application, holding that there was no factual or legal basis for declaring the Judgment compromised and that the court was functus officio, the Judgment having been delivered in 2019, hence the instant Application seeking orders for stay of execution and stay of proceedings pending the hearing and determination of an intended appeal.
28. What is before us is an application under Rule 5 (2) (b) of the Rules of this Court seeking for stay of execution and stay of proceedings of Ruling and order of the High Court delivered on 23rd May 2025. The principles that guide this Court in determination of an application under Rule 5 (2)(b) are well settled. These principles are summarised in the case of Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR to wit; an applicant must demonstrate that the appeal or intended appeal is arguable; and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory.
29. And as restated in the case of Trust Bank Limited and Another vs Investech Bank Limited & 3 Others [2000] eKLR:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”
30. In addition, it is settled that granting of stay of proceedings is a discretionary power that should be exercised sparingly as it disrupts the normal court process, and is a serious remedy that should only be granted in exceptional circumstances. See the Supreme Court decision in James Nthuku Kithinji vs The Director of Public Prosecutions & The Chief Magistrate's Court at Nairobi Kibera Law Courts, Petition (Application) No. 29 (E033) of 2022.
31. As to whether the intended appeal is arguable, the Applicant's assertion is that the learned Judge failed to uphold requirements of Article 159 of *the Constitution*, and find that the dispute between the parties was settled for all time by virtue of the mediation agreement dated 7th May 2017 made between the parties, and also failed to uphold the decision in High Court Case No 051 of 2021 Nedim Mohammed Ibrahim vs Abdulkarim Saleh Muhsin And 3 Others (F. Macharia, J. that found that the mediation agreement between the parties had compromised all court cases covered by the mediation agreement.



- 32. As to whether the appeal will succeed on the grounds raised is a matter for determination in an appeal that is currently pending before this Court. So that, rather than preempt the decision of the bench that will hear the appeal, we find it to be arguable, and will rest the matter there.
- 33. As to whether the appeal will be rendered nugatory, the Applicants' apprehension is that the 1st Respondent has proceeded to execute the decree in Mombasa HCCC No. 25 of 2015 by filing a Notice to Show Cause that ultimately seeks to have them arrested and committed to civil jail. Indeed, if stay is not granted and if execution were to proceed in the manner sought, the Applicants will suffer irreparably by being arrested and committed to civil jail, as they will be deprived of their liberty, which incarceration cannot be adequately compensated by damages.
- 34. Accordingly, the Applicants have met the requisite threshold for the grant of the orders of stay of execution and stay of proceedings under Rule 5 (2) (b). The Notice of motion dated 11th June 2025 is merited and is allowed in terms of prayers 2 and 3 thereof. Costs of the application shall be costs in the intended appeal.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF FEBRUARY, 2026.

S. GATEMBU KAIRU, FCIArb, C.Arb.

.....
JUDGE OF APPEAL

A. K. MURGOR

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

