

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ELC LC NO 231 OF 2012

JOHN KIMANI MAINA,

JOHN MAINA,

JAMES WAMBUGU MAINA,

STEPHEN NGATIA MAINA

VERONICA WANJIKU MAINA

(Suing as legal representatives of

JOSEPH MAINA KIMANI)
PLAINTIFFS

VERSUS

HARRISON NJUGUNA ITHAGU (Sued as the legal administrator of the Estate of the
late HEZEKIAH IGHAGU MWANGI)
DEFENDANT

RULING

1. This ruling is in respect of the Defendant/Applicant’s Notice of Motion dated 20th November, 2025, seeking the following orders:

a) Spent

b) Spent

c) That pending the hearing and determination of the Applicant's intended appeal to the Court of Appeal, this Honourable Court be pleased to grant a stay of execution of the judgment issued on 13th October 2025 with all the consequential orders thereof.

d) That the costs of this application be provided for.

2. The application was supported by the annexed affidavit of Harisson Njuguna Ithagu, the Legal Administrator of the Estate of Hezekia Ithagu Mwangi, who deponed that he was dissatisfied with the judgment of the court and has filed an Appeal which has high chances of success.
3. He further deponed that unless the order sought for stay of execution is granted, the appeal will be rendered nugatory, and that the Plaintiff will not suffer any prejudice if the order sought is granted.
4. In opposition to the application, the Defendant filed a replying affidavit sworn by John Kimani Maina, one of the administrators of the estate of Joseph Maina Kimani, and deponed that the delay in filing this application has not been explained as Judgment was delivered on 13th October 2025.
5. The Respondent further deponed that the Notice of Appeal was filed out of time and that they have since moved to the Court of Appeal to strike out the same. It was his deposition that this is an old matter which has been in court since 2009, and that the Applicant has not offered any security for the due performance of the decree.
6. Additionally, the Respondent stated that the Applicant will suffer no prejudice if the execution proceeds and that the filing of the appeal is an afterthought, hence should be dismissed with costs.

APPLICANT'S SUBMISSIONS

7. Counsel for the Applicants filed submissions dated 17th February 2026, and submitted that the Applicants were dissatisfied with the judgment of the court and filed a Notice of Appeal as well as a Memorandum of Appeal on 5th December 2025 vide Civil Appeal No. E217 of 2025.
8. Counsel submitted that the Applicants have satisfied the conditions set out in law for stay pending appeal, as they filed the application without delay and that if the order is not granted the appeal shall be rendered nugatory.
9. Ms. Njoroge cited the case of **MUGO VS MACHARIA (2024) KEHC 2130_KLR**, where the court reiterated that the stay exists to preserve the subject matter of the appeal and guard against the appeal being rendered nugatory while balancing the interests of both parties.
10. Additionally, counsel submitted that the Applicant and the Respondent are jointly using the suit premises conducting their businesses therein, hence the respondent will not suffer any prejudice if the orders of stay are granted.
11. Counsel urged the court to exercise its inherent powers to preserve the *status quo* otherwise, if no orders of stay are granted, the subject matter LR No 14246/4 Lanet Nakuru Municipality, shall be subdivided and this will change the substratum of the appeal and render it nugatory. Counsel relied on the cases of **Butt v Rent Restriction Tribunal 119791 KECA 22 (KLR)** and **RWW vs. EKW (2019) eKLR**
12. Counsel urged the court to allow the application as prayed.

PLAINTIFF/RESPONDENTS'SUBMISSIONS

13. Counsel for the Plaintiff/Respondents filed submissions dated 9th February 2026, and submitted that the orders sought by the Applicant are discretionary, and the court must balance the competing rights of the parties and relied on the case of **Tabro Transporters Ltd V Absalom Dova Lumbasi [2012] eKLR**.
14. Mr. Waiganjo also relied on Order 42 rule 6 (1) of the Civil Procedure Rules, which provides for the conditions to be met before an order of stay of execution is issued and submitted that the Applicant has not explained the delay in filing the application for stay of execution as the judgment was delivered on 13th October 2025 and the application was filed more than a month after the delivery of the judgment. Counsel relied on the case of **Jaber Mohsen Ali & another v Priscillah Boit & another [2014] eKLR**, and stated that there was an unexplained unreasonable delay.
15. On the issue of substantial loss, counsel submitted that the Applicant herein has not satisfactorily established the loss that he is going to suffer, as the Honourable Court, in its judgment found that the Defendant held half of LR No 14246/4 Lanet Nakuru Municipality in trust for the Plaintiff and directed that the same be transferred to the estate.

16. Mr. Waiganjo submitted that during the hearing, there was evidence that on the ground, the parties have been in occupation of the property for years, and are still running the businesses in the suit property. At paragraph 8 of the supporting affidavit, the Defendant/Applicant has also confirmed that the Respondents are on the suit land. There is hence no evidence of any prejudice that the Defendant/Applicant stands to suffer, as all that he has to do is transfer half the portion that he is not even in occupation of.
17. Counsel relied on the case of **Portreitz Maternity -Vs- James Karanga Kabia Civil Appeal No. 63 of 1997**, where the court observed that the right to appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgement delivered in his favour and there must be a just cause for depriving the Plaintiff of that right.
18. Additionally, counsel relied on the case **Carter & Sons Ltd vs Deposit Protection Fund Board & g others Civil Appeal No. 291 of 1997**, where the court held that, the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay of execution.
19. Counsel further submitted that the Plaintiffs have challenged the legality of the said Notice of Appeal, and that the manner and time of filing a Notice of Appeal are set out under Rule 77 of the Court of Appeal Rules, 2022.
20. Counsel relied on Rules 77 (1) and (2) of the Court of Appeal Rules which provide as follows:

(1) A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the Registrar of the superior court.

(2) Each notice under subrule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.

21. Mr. Waiganjo stated that the Judgment was delivered on 13th October 2025, while the Notice of Appeal, which the Applicant is relying upon was lodged in court on 12th November 2025, and submitted that there is no appeal before the Court of Appeal to warrant the grant of the orders sought.
22. Additionally, that the Plaintiff/Respondents have demonstrated that they have already moved the Appellate Court by way of an application in Nakuru Civil Application No. E133 of 2025, seeks the striking out of the Notice of Appeal lodged on 12th November 2025, which is pending before the court.
23. Counsel further submitted that the Applicant has not offered any security and urged the court to dismiss the application with costs to the Respondents.

ANALYSIS AND DETERMINATION

24. The issue for determination is whether the Applicant has met the threshold for the grant of a stay of execution pending the hearing and

determination of the Appeal in the Court of Appeal as provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules.

25. Therefore, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant must satisfy the court that:

a) Substantial loss may result to him/her unless the order is made;

b) That the application has been made without unreasonable delay; and

c) The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

26. The Applicant stated that he would suffer substantial loss if execution of the judgment is enforced as the Plaintiffs, might subdivide the suit land as per the decree. It should be noted that execution is a lawful process and thus not a ground for the grant of a stay of execution. The Applicant has to show how execution shall irreparably affect him or will alter the *status quo* to his. He must show how he will suffer substantial loss if the order is not granted.

27. Counsel for the Respondent raised an issue whether there is a valid appeal before the Court of Appeal; however, counsel for the Applicant submitted that the issue is not before this court. Counsel for the Applicant admitted that the Applicant filed a Notice of Appeal out of time and the Respondent's counsel has filed an application to strike out

the Notice of Appeal. Even, though the court is not seized of the matter of a Notice of Appeal filed out of time, it takes judicial notice of that fact which may or may not terminate the proceedings at the superior court.

28. On the issue of whether the Application was filed without undue delay, the judgment was delivered on 13th October 2025 and this application was filed on 20th November 2025, which is more than one month after the delivery of the Judgment. No explanation has been given for the delay in filing this application.

29. The issue of security for the due performance of the decree that will ultimately be binding on the parties is discretionary and it is upon the court to determine the same. The applicant has stated that he is ready and willing to furnish security for the performance of the decree.

30. In the case of **Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR** the court stated:

“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 the 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.”

31. Similarly, in the case of **Absalom Dova vs. Tarbo Transporters [2013] eKLR**, the court held that:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse or by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal, which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree, which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

32. I have considered the application, the submissions by counsel and in the interest of justice, order that the Applicant deposits Kshs. 200,000/= in a joint interest earning account of the Advocates on record within 30 days failure to which the stay of execution lapses.

33. Each party to bear their own costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 24TH
DAY OF MARCH 2026.**

**M. A. ODENY
JUDGE**