REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. E232 OF 2025

PAUL KIPKEMBOI……...……...1ST APPELLANT
HARUN BIWOTT……...……....2ND APPPELLANT
VERSUS
JUDY MUTHONI……...……...1ST RESPONDENT
ABDI JAMA ABDI……2ND RESPONDENT
CHARTLESS AUCTIONEERS……..3RD RESPONDENT

RULING

1. This Appeal emanates from the Ruling delivered on 26/08/2025 in **Eldoret CMCC No. E023 of 2023**, in which the Appellants' Application seeking setting aside of the default Judgment entered against them on 26/08/2025 was dismissed.

2. The Applicants have now moved to this Court by way of the Notice of Motion dated 17/09/2025 the subject hereof, and which is filed through **Messrs Cheruiyot Kirui & Co. Advocates**, seeking an order staying execution of the decree issued in the said case pending hearing and determination of the appeal.

3. The Application is supported by the Affidavit sworn by the 1st Appellant, **Paul Kipkemboi** who deponed that the Ruling by the trial Court has exposed them to execution, and that the 1st Respondent has kick-started the process of executing the decree as she has since obtained Warrant of Attachments, and procured Proclamation of Attachment. He deponed further that in the event execution is effected, the appeal shall be rendered nugatory, pointless and ineffective. He asserted that the appeal is arguable with a high chance of success, and in the event that the decree is executed, they will have been denied a chance to exhaust legal remedies available and condemn them unheard. He then urged that the Appellants are ready and willing to provide security for due performance of decree.

4. In opposing the Application, the Respondent filed the Replying Affidavit sworn on 25/09/2025 by the 1st Respondent, **Judy Muthoni**, filed through **Messrs Ketter Nyolei & Co. Advocates**. She refuted the allegation that the Appellants were not served with Summons and urged that the Request for Judgment before the trial Court was allowed on the strength of an Affidavit of Service which demonstrated that the Appellants were served. She averred that the Appellants were also served with hearing notices on several occasions during the pendency of the case which they chose to ignore. She then contended that the

burden of proving that service was not effected rests on the people who were served with the Summons, namely, the 2nd Appellant and his Secretary, one **Lydiah Sangara**, who have not sworn any Affidavits herein. She also observed that the Summons and the hearing notices were served at the same place and in the same manner as the Warrants of Attachment, which the Appellants have now reacted to. According to her, the Appellants failure to enter appearance was deliberate and inexcusable, and also observed that the Appellants have not offered any security for the decree or shown willingness to pay the already incurred, and also asserted that the Appeal has no chances of success and conditions for granting of stay had also not been met.

5. With leave of the Court, the Appellants filed the Supplementary Affidavit again sworn by **Paul Kipkemboi** on 13/10/2025. He however basically reiterated the contents of his Supporting Affidavit, and denied any knowledge of the alleged Secretary described as **Lydiah Sangara**.

6. The 2nd Respondent, represented by **Messrs Songok & Co. Advocates**, does not however seem to have filed any Replying Affidavit.

7. The parties then filed Written Submissions. The Appellants' Submissions is dated 13/10/2025 while the 1st Respondents' is dated 12/11/2025. I have also come across Submissions dated 18/11/2025 filed on behalf the 2nd Respondent, although as already stated above, no Replying Affidavit seems to have been filed on his behalf.

Appellants' Submissions

8. Counsel for the Appellants restated the principles applicable in determining Applications for stay pending Appeal and cited authorities. He then stated in light of the "**overriding objective"** stipulated in **Sections 1A** and **IB** of the **Civil Procedure Act**, the Court is no longer limited to only the conditions set out in **Order 42 Rule 6(2)**. Counsel urged that the Appellant has met the threshold set as the Appeal is arguable and shall be rendered nugatory if the orders sought are not granted. He thus prayed that it is in the interest of justice that the Appeal be allowed.

1st Respondent's Submissions

9. Counsel for the 1st Respondent similarly restated the applicable principles, cited authorities, and submitted that the Appellant has not met the requirements for granting stay pending

Appeal as it is not enough to just claim that substantial loss shall occur without demonstrating it. He also submitted that the issue of delay has not been addressed, neither has any offer for security been made, and the Respondents being successful litigants, are entitled to fruits of the litigation. He contended that the Appeal is also not arguable and has no chances of success as the trial Court found that the Appellants were properly served with Summons and subsequent hearing notices, and that such indolence cannot be cured by Appeal. He also reiterated the trial Magistrate's findings that neither the Appellant nor the Secretary who was served swore any Affidavits.

2nd Respondent's Submissions

10. Counsel for the 2nd Respondent, too, restated the applicable principles and cited authorities. In respect to merits of the Application, he submitted that regarding "***substantial loss***", none has been demonstrated since execution in itself does not amount to "***substantial loss***", which argument the Appellants have based and overemphasized as being the main reason for the Application. He urged that to the contrary, execution is a lawful part of the legal process, and the Court has the duty to balance the interests of both litigants, and specifically of the successful one. Counsel also contended that there was "***undue delay***" in filing of the Application as it was filed after a period of over 21 days after Judgment was entered, and that the Appellants have not even bothered to advance any substantive reasons for the delay, or to demonstrate what concrete steps they took to establish whether Judgment had been entered. He pointed out that it is also worth pointing out the context in which the Application was filed, which is that the lower Court Ruling was delivered after a period of over 970 days after the suit was filed. Counsel also submitted that the Appellants have not demonstrated any willingness to furnish security for due performance of the decree, which is a mandatory requirement when seeking stay pending appeal. In conclusion, he urged that the Appellants have alleged, but have hardly established bias on the part of the trial Magistrate.

Determination

11. The one issue that calls for determination in this matter is **"whether, pending hearing and determination of this Appeal, an order of stay of execution of the decree issued by the trial Court, arising from the default Judgment entered on 25/11/2024, and also stay of the Ruling delivered by the trial Court on 26/08/2025, should issue"**.

12. The Court's power to grant stay of execution pending Appeal is provided under **Order 42 Rule 6(2)** of the **Civil Procedure Rules** as follows:

"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.

13. An Applicant for stay of execution of a decree or order pending Appeal is therefore required to satisfy the conditions set out above. The first one is that the Application has been made "***without unreasonable delay***", the second is to demonstrate that "***substantial loss***" may result to the Applicant unless the order is granted, and the third is the Applicant's willingness or readiness to "***deposit security***" for due performance of the decree or order.

14. The first condition that I need to consider is therefore whether the Application has been made without "***unreasonable delay***". In determining this limb, I note that the Ruling appealed against was delivered on 26/08/2025, and the instant Application was then filed on 17/09/2025, just about 3 weeks later. There should therefore be no contention that the Application was filed timeously and without delay.

15. The second condition is whether the Appellant would suffer "***substantial loss***" should the order of stay of execution not be granted. As regards what constitutes "***substantial loss***", **F. Gikonyo J** in the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, stated as follows:

"11. 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, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

> ***"… the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."***

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under order 42 Rule 6 of the CPR only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above."

16. Further, **Platt, Ag. JA** (as he then was) in **Kenya Shell Limited vs. Kibiru [1986] KLR**, pronounced himself as follows:

> **"It is usually a good rule to see if Order XLI 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 corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money".**

17. On his part, **Gachuhi, Ag. JA (as he then was)** in the same case, stated as follows:

> **"It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."**

18. In applying the above principles to the facts of this case, regarding "***chances of success***" of the Appeal herein, or an assessment of whether the Appeal "***is not frivolous***", although the Appellants have exhibited a copy of the Ruling delivered by the trial Court, they have not exhibited a copy of the Application that gave rise to the Ruling, which Application is also the basis of this Appeal and also of the instant Application. The Appellant has also not exhibited a copy of the Replying Affidavit that was filed by the 1st Respondent at the trial Court to which, I gather, an Affidavit of Service was exhibited. I therefore do not have sight of the said Affidavit of Service that was relied upon by the trial Magistrate in the impugned Ruling dated 26/08/2025. On his part, the 1st Respondent has exhibited a copy of the Affidavit of Service filed at the trial Court by the 2nd Respondent to demonstrate that, apart from being served with Summons, the Appellant was also served with the notice of his joinder in the Third Party proceedings. In the circumstances, I am unable to gauge the strength of the Appeal, or its "***chances of success***", or carry out an assessment of whether the Appeal "***is not frivolous***". The consequence of this is that, noting that the Appeal is against discretionary orders of the trial Court, the Appellant has failed to establish that the Appeal is, ***prima facie***, arguable and/or "***is not frivolous***" for purposes of determining whether to grant stay pending appeal.

19. On the issue of "***substantial loss***" I note that the Judgment of the trial Court was for a principal sum of Kshs 342, 894/-. The Appellants have not however, in the Supporting Affidavit given any details of the exact "***substantial loss***" that they may suffer if the execution is not stopped pending Appeal. Quoting the case of **James Wangalwa** (**supra**), the Appellants have not explained or established any "***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 Appellants should they succeed in the appeal". As oft-stated, "***it is not enough to merely state that one would suffer substantial loss***", it must be demonstrated. The Appellants have therefore failed to establish that they would suffer "***substantial loss***" if the order for stay is not granted.

20. I also note that there is even no allegation that the 1st Respondent, the successful party (decree-holder), will not be in a position to refund the amount paid to her as decretal sum should the Appeal succeed.

21. Having found as above, it is clear that the Application cannot succeed, and is for dismissal.

22. For the above reasons, the issue of depositing of security for due performance of the decree does not now arise and remains academics.

23. Having considered the pleadings, responses and submissions, I find that the Appellant has failed to satisfy the requirements, or to meet the threshold required in Applications of the nature herein. Balancing the interests of the two sides, I am persuaded that scales of justice tilt in favour of the Respondents. Consequently, I decline to grant stay of execution pending Appeal as prayed.

Final Orders

24. The upshot of my findings above is that the Appellant's Notice of Motion dated 17/09/2025 is hereby dismissed with costs to the 1st and 2nd Respondents.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 30TH DAY OF MARCH 2026

……..……..
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Ms. Kirui for the Appellant

Mr. Keter for the 1st Respondent

Mr. Songok for the 2nd Respondent

Court Assistant: Brian Kimathi

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