



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nitawang v Ongwacho (Environment and Land Appeal  
E023 of 2025) [2025] KEELC 4871 (KLR) (1 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 4871 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIRONMENT AND LAND APPEAL E023 OF 2025**

**MN MWANYALE, J**

**JULY 1, 2025**

**BETWEEN**

**PAUL LEMAYIAN NAITAWANG ..... APPELLANT**

**AND**

**ABEL MORANGA ONGWACHO ..... RESPONDENT**

**RULING**

1. This Ruling is in respect of the application by way a Notice of Motion dated 21.05.2025, seeking a stay of execution of the judgment in Kilgoris CME&L 29/2019.
2. Application is premised on grounds that the Appellant/Applicant is the original allottee of Plot No. 192 Lolgorian Town.
3. That the Impugned Judgment decreed that the Appellant to hive out and transfer a portion measuring 108ft by 200ft to the Respondent.
4. The Respondent is on the verge of execution against the Appellant/Applicant yet an Appeal has been lodged challenging the decision of the trial court, and if execution proceeds there is a likelihood of the Applicant suffering substantial loss, Applicant is willing to offer security.
5. A supporting affidavit in respect of the application reiterates the grounds in support of the application annexing a copy of letter requesting typed proceedings was filed.
6. The Application was argued by trial submissions. It was submitted by Ms. Wangui for the Applicant that;
  - i. The application has been filed timeously, filed on 23.05.2025 against judgment delivered on 28.04.2025.
  - ii. That substantial loss is likely to occur as there is a petrol station in site at the said property.



- iii. The Applicant submits willingness to provide security for performance of the decree.
7. In Response, Mr. Jonyo for the Respondent submits, that the Applicant had not established substantial loss and equally not met conditions as set out under Order 42 Rule 6.
8. In opposition to the application, the Respondent filed a Replying affidavit dated 29<sup>th</sup> May 2025, in which he deposes that
  - i. That there is a similar pending application pending before the trial court, and he annexed a print out of the same.
  - ii. That allowing the application would cause substantial injustice as he will be denied from enjoying the fruits of his judgment for an indefinite period of time, that no substantial loss will be occasioned on the Applicant and that no appeal nor second appeal shall operate as a stay of execution of the Civil Procedure Rules.
  - iii. That no security has been offered for due performance of the decree, and that execution being a lawful process will not alter the status quo to the Applicants detriments.
  - iv. He urged the court to dismiss the application.
9. In a Rejoinder Ms. Wangui submitted, that she had filed a Notice of withdrawal in respect of the application for stay that was pending before the trial court.
10. It is common ground that the Appellant has filed an Appeal against the decision of Hon. M.I.G Moranga C.M delivered on 28.04.2025 and it is also common ground that the law provides no appeal or second Appeal shall operate as a stay of execution.

#### **Issues for Determination**

11. The only issue arising for determination is therefore whether or not the application is merited?
12. The grant of a stay of execution pending appeal, is governed by Order 42 Rule 6 of the Civil Procedure Rules. The conditions to be satisfied are;
  - i. That the Application is made timeously.
  - ii. That substantial loss is likely to occur.
  - iii. Provision of security.
13. For the Application to be merited the Applicant must demonstrate having fulfilled the conditions and the court shall now examine whether or not the Applicant has satisfied the above conditions.
14. On the application, being timeously the impugned judgment was delivered on 28.04.2025, the Memorandum of Appeal is dated on 6<sup>th</sup> May 2025 while the Application was filed on 23.05.2025. The Application was thus filed within one month from the date of the impugned judgment and it was hence filed timeously.
15. On substantial loss, the Applicant submitted that the decree involved transfer of a portion of the suit property hence the same would lead to substantial loss. And that application is meant to safeguard the substrum of the intended Appeal. In her submissions, Ms. Wangui submitted of the existence of a petrol station on the suit premises.
16. On substantial loss, the Respondent submitted that no substantial loss was demonstrated by the Applicant.



17. The Applicant relied on the decision in James Wangalwa and Another Vs. Agnes Naliaka (2012) eKLR while the Respondent relied on the definition in the decision in the case of Nicholas Stephen Okaka Vs. Alfred Wanga Wesonga (2022) eKLR.
18. In the Wangalwa decision, the court emphasised the issue of substantial loss in terms that;  

“ the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what is to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
19. In the Nicholas Stephe Okaka and Another Vs. Alfred Wanga Wesonga decision equally quotes the Wangalwa decision on what a substantial loss is.
20. The Nicholas Okaka decision recognises that execution process is a lawful process, and the need to preserve the subject matter so that if the appeal is successful, it is not rendered nugatory.
21. Both decisions cited by the parties herein recognise the need to preserve the subject matter so that the appeal is not rendered nugatory. The Applicant has based his application on the need to preserve the substrum of the intended Appeal at paragraph 13 of his supporting affidavit and the issue of not rendering the appeal nugatory at paragraph 9 of the supporting affidavit thus bringing the application under the ambit of substantial loss resulting from the intended appeal being rendered nugatory as well as the need to preserve the subject matter thus demonstrating the likely substantial loss.
22. On the 3<sup>rd</sup> aspect of the conditions, whereas the decree in the lower court is not a monetary decree, as costs were awarded and the applicant herein has deponed willingness to deposit such security for performance of the decree.
23. Accordingly, the Applicant having satisfied the conditions for grant of a stay pending appeal, his application is merited and the same is allowed in terms that;
  - i. there shall be a stay of execution of the judgment delivered on 28<sup>th</sup> April, 2025 and all the consequential orders pending hearing and determination of the intended Appeal.
  - ii. The Applicant to deposit in court Khs.100,000/= as security within 21 days from today in default the orders of stay herein shall lapse.
  - iii. Costs of the Application to abide by the outcome of the Appeal.

**DATED AT KILGORIS THIS 1<sup>ST</sup> DAY OF JULY, 2025.**

**HON. M.N MWANYALE**

**JUDGE**

In the presence of

CA – Emmanuel/Sylvia/Sandra

Mr. Onyango for Respondent

Ms. Wangui for Appellant

