



REPUBLIC OF KENYA



KENYA LAW
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**Achochi v Bonuke & another (Land Case Appeal E002 of 2024)
[2025] KEELC 4587 (KLR) (18 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4587 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
LAND CASE APPEAL E002 OF 2024**

**M SILA, J
JUNE 18, 2025**

BETWEEN

JASON ACHOCHI APPELLANT

AND

WILFRED NYAMWANGE BONUKE 1ST RESPONDENT

JAMES BONUKE GESICHO 2ND RESPONDENT

RULING

(Application for stay pending appeal; stay granted subject to deposit of some money as security)

1. The application before me is that dated 15 April 2015 filed by the unsuccessful appellant. It is an application seeking stay of execution of the judgment herein pending hearing and determination of an appeal that he has preferred to the Court of Appeal. The application is opposed.
2. The land in dispute is the land parcel Nyaribari Chache/Nyanturago/2151. The history of this land is that it was carved out of the land parcel Nyaribari Chache/Nyanturago/783 which was owned by the 2nd respondent. The 2nd respondent subdivided this land parcel No. 783 into two, i.e the parcels No. 2150 and 2151. He transferred the parcel No. 2150 to one of his sons, and transferred the parcel No. 2151 to his other son, the 1st respondent.
3. Through a plaint filed on 8 December 2020, the 1st respondent sued the appellant before the Chief Magistrates' Court at Kisii seeking orders to have the appellant evicted from the land parcel Nyaribari Chache/Nyanturago/2151. He asserted that he has title to the suit land and that the applicant had invaded it. The applicant filed defence and counterclaim wherein he joined the 2nd respondent as 2nd defendant in the counterclaim. In that counterclaim, the applicant claimed to also be a son of the 2nd respondent. He alleged that the 2nd respondent fraudulently subdivided his land parcel No. 783 and transferred the subdivisions in order to disinherit him.



4. The case was heard culminating in a judgment in favour of the 1st respondent and the counterclaim was dismissed. Aggrieved the applicant filed this appeal. I heard the appeal but I was not persuaded to find in favour of the appellant and I dismissed the appeal. In my judgment, I gave the applicant 14 days to give vacant possession. Aggrieved, the applicant filed a notice of appeal and has followed it up with this application for stay pending appeal.
5. In the supporting affidavit sworn by himself, the applicant has deposed that if stay is not granted his appeal will be rendered nugatory. He adds that he also stands to suffer substantial loss if stay is not granted.
6. The 1st respondent has opposed the motion through a replying affidavit sworn by himself and in which he has also deposed that he has authority to swear it on behalf of the 2nd respondent. He deposes that he is the registered proprietor of the suit land and entitled to enjoy its quiet possession. He has contended that the applicant has not demonstrated the substantial loss that he stands to suffer and that this application is just a ploy to frustrate him from enjoying the suit property. He deposes that he continues to incur loss of income from the suit property which he had leased out to a 3rd party. He has deposed that the applicant is making clay bricks in the suit property at his expense.
7. I have taken note of the submissions made by both counsel for the applicant and respondents.
8. In his submissions, counsel for the applicant urged that no authority was annexed to show that the 1st respondent has the authority of the 2nd respondent to depose the affidavit and therefore the affidavit should be struck out. There is no substance in this argument. It is true that there is no authority annexed but that is no reason to strike out the affidavit. At worst, it can only be held that the affidavit only binds the 1st respondent.
9. To the substance of the application, this is an application for stay pending appeal and I stand guided by Order 42 Rule 6 (2) which provides as follows :
 - (2) No order for stay of execution shall be made under subrule (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.
10. From the above, it will be seen that an applicant needs to move the court without unreasonable delay; demonstrate that he stands to suffer substantial loss if the application is denied; and offer security for the due performance of the decree.
11. In our case, I am persuaded that the application was made timeously as it was made within 2 weeks of the judgment. I observe that the decree is inter alia for eviction and vacant possession. I am prepared to hold that if the applicant is evicted and he succeeds on appeal, then he stands to suffer substantial loss. However, if he fails to succeed, it means that he will have enjoyed the suit property at the expense of the 1st respondent. In his affidavit, the 1st respondent averred that he had leased out the land and is thus missing out on the income thereof. When he filed suit, he did aver that he was leasing out the land at Kshs. 20,000/= per year. He had annexed a lease dated 2 January 2017 leasing the land at Kshs. 20,000/= per year for five years. We can assume that now that it is 8 years later, the cost of leasing has gone up. Doing the best I can, I will assume a figure of Kshs. 30,000/=. I will further assume that the



appeal may take three years to be heard, meaning that the 1st respondent may lose out on about Kshs. 90,000/= or so. I will round this off to Kshs. 100,000/=.

12. I am thus prepared to grant an order of stay of execution pending appeal subject to the applicant depositing the sum of Kshs. 100,000/= in court or in a joint interest earning account within the next 30 days. In addition to this, the applicant must also deposit the taxed costs within 60 days of taxation. These monies to remain deposited as security to the 1st respondent until the appeal is heard and determined. There was some money that constituted the taxed costs in the lower court which was deposited. That money to remain so deposited until the appeal is concluded. If the appellant succeeds on appeal this amount of money be released to him. If he fails on appeal, this money be released to the 1st respondent.
13. Further in his reply, the 1st respondent deposed that the applicant is making bricks on the suit land. The applicant did not refute this. Such activity has potential to permanently waste the land. I will order the applicant to immediately stop such activity or any other activity that may lead to permanent wastage of the land. The applicant may stay on the suit land but he is not to construct any additional structures, or plant any permanent crops, or cut any trees or other permanent plants on the suit land. If he defaults and acts against this order, this court will be at liberty to vacate the orders of stay granted herein and the decree may be executed and the security forfeited to the 1st respondent.
14. In addition, no party should sell, lease, charge, or enter into any disposition over the suit land and there is also issued an order of prohibition, restricting the registration of any disposition in the register thereof.
15. If the applicant abides by the above orders, the costs of this application will be costs in the appeal. If not, then he will shoulder the costs of this application and any stay orders will be vacated.
16. Orders accordingly.

DATED AND DELIVERED THIS 18 DAY OF JUNE 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Mbaka for the appellant/applicant

Mr. Njau for the respondents

Court Assistant – Michael Oyuko

