

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ELC APPEAL NO. E037 OF 2025

**PILISTA AWINO ANGIRA 1ST
APPLICANT**

**ROBERT OTIENO 2ND
APPLICANT**

VERSUS

**EVANS CHRISTOPHER ODHIAMBO OMBAJO
RESPONDENT**

RULING

1. By way of a Notice of Motion dated 2nd September 2025 the applicant herein, Pilista Awino Angira, seeks in substance that this Court issues an order of stay of execution pending the hearing and determination of this appeal.
2. The Application is anchored on the grounds on its face and the depositions in the supporting affidavit dated 2nd September 2025 sworn by the first Applicant.
3. On the said affidavit, the deponent avers that the trial court issued a judgment that is averse to the rights of the applicant on the suit land where she has lived for over 40 years, built houses and even has burial sites.

4. That the stay period granted by the trial court has since lapsed and the Applicant is now exposed as the Respondent may go ahead and execute the trial court decree and evict her.
5. That if the stay is not granted and the appeal already filed succeeds the orders on appeal will be rendered nugatory.
6. That the Applicant is ready and willing to abide by any conditions given by the court for the stay order.
7. The court issued directions on 19/09/2025 extending the time for the respondent to respond to the application and issued orders for disposal of the application by way of written submissions. The respondent on 29/09/2025 filed a replying affidavit sworn on 26/09/2025 together with submissions dated 26/09/2025. The applicant filed submissions on 1/10/2025.
8. The matter was scheduled for ruling on the application on 3/10/2025 when the replying affidavit above was brought to the attention of the applicant who indicated she had not been served. Counsel for the applicant indicated she was desirous of responding further to the same. Recognizing the right of reply I granted the applicant time to file a supplementary affidavit alongside supplementary submissions on new issues of law that may have been raised by the respondents.

9. The applicant referring to the provisions of Order 42 Rule 6 and the case of **Kenya Shell Limited Vs Karuga (1982-1988) 1KAR** submits that the applicant will suffer irreparable loss as she will be evicted from the home where she has lived for 40 years if the orders of stay of execution are not granted. That she has a good appeal which will be rendered nugatory. It is urged that the applicant is ready to comply with any orders as to security as may be issued by the court.
10. In the supplementary submissions dated 9/10/2025 it is emphasized that the appeal is already in force and the application is not seeking leave to file the appeal out of time as the Memorandum of Appeal was filed three days after the judgement. That the applicants were still exposed to eviction upon the lapse of 30 days granted by the trial court. Reliance is also placed on **Mariam Warfa & 2 Others Vs. Maalim Ibrahim Mohamed(2011)eKLR**. On the invitation for security for costs of Kshs.5,000,000/- the court is referred to the annexed photos which show the applicant as a person of humble background and the same would be punitive.
11. The respondent avers that the applicant wants to have another bite at her cherry when the matter has been fully heard and judgement rendered and that there must be an end to litigation. That there is no appeal and in any event the applicant will not be homeless because she has other

pieces of land whose particulars were disclosed. It is asserted that the applicant was granted 30 days stay by the trial court which she exhausted but failed to move the honourable court appropriately.

12. The submissions have also been noted and specifically on extension of time. It is urged that the time for stay lapsed on 31/08/2025 and which is outside the prescribed timelines under section 79G. That no reasons have been given as to why the applicant has failed to file memorandum of appeal out of time or at all. It is submitted that the applicant willfully trespassed into the respondent's parcel. Further that the applicant was abusing the court process by filing multiple applications. Counsel urges that the applicant should be compelled to deposit a security of Kshs. 5 million to compensate the respondent herein for loss and use and mesne profits.
13. The applicant filed a further affidavit sworn on 8/10/2025 and supplementary submissions of even date.
14. The applicant in rejoinder, further averred that it is her right to appeal a decision she is aggrieved with. That the respondent was already arguing his appeal when what is before court is an application for stay of execution against eviction. That her Memorandum of appeal instituting the present appeal is on record and which was duly served via email. Thereafter certified copies of proceedings were

applied for vide letter dated 5/8/2025 and typing of the same was not within her control. That the delay in filing the appeal is not inordinate and time for applying the stay had lapsed only by 3 days. That if the applicant were indolent no application to dismiss the appeal for want of prosecution has been filed. That the application has been brought in good faith since the applicant is the most affected.

ANALYSIS AND DETERMINATION

15. I have carefully considered the Application, its Supporting Affidavit, the Replying Affidavit of the Respondent and submission. The only issue for determination is whether the Appellant has met the prerequisite for grant of orders of stay of execution pending appeal.
16. However I note from the submissions it is alleged the appeal has been filed out of time. Section 79G of the Civil Procedure Act provides for an appeal to the High court from the subordinate court to be filed within 30 days. Power to extend time is also given.
17. This appeal was filed on 4/08/2025 through a Memorandum of Appeal of even date. I have seen a copy of the judgement which has been annexed by both parties which reveals it was delivered on 1/08/2025. Based on the foregoing provisions of the law therefore the appeal has been filed within the 30 days prescribed by law. I agree with the applicants in this

regard. Having resolved this then I will proceed to consider the application.

18. Stay of execution pending appeal is governed by **Order 42 Rule 6 of the Civil Procedure Rules** which stipulates; -
“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.

19. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the applicant that substantial loss may result to the applicant if the orders are denied; However the application should also be made without undue delay and the court will impose such security for the due performance of any decree or order as may ultimately be binding on the Applicant. See **Amal Hauliers Limited Vs Abdulnasi Abukar Hassan (2017) eKLR & Butt Vs Rent Tribunal (1982) KLR 417.**

20. The Court of Appeal in **Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] EKLR** summarized the principles for granting an order of stay of execution thus;- Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory.
21. The first requirement to be established is whether substantial loss may result to the applicant unless stay of execution is granted. On substantial loss the applicant has deponed that the subject property was matrimonial home of the Applicant for over 40 years and where she has buried her husband. That if the orders of stay of execution are not issued, the subject property may be dealt with in a manner that could not be compensated by money.
22. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma vs Abuoga (1988) KLR 645** where their Lordships stated that “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
23. The court notes that the final orders issued in the judgement were to the effect that the orders sought in the plaint were

allowed as prayed. One of the orders sought is for vacant possession. From the circumstances of this case, I am satisfied that if an order of stay of execution is not granted to preserve the suit property this would indeed cause irreparable loss to the applicant/appellant. This is also the lower rather than the higher risk of injustice - See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

24. Moreover if the property is dealt with in an adverse manner, the substratum of the appeal will have been lost and the intended appeal shall have been rendered nugatory. The applicant urged that she has an arguable appeal. I have seen the Memorandum of Appeal.
25. It has been urged that there must be an end to litigation the matter having been fully heard where the applicant failed to prove her case. I think a party has a right to appeal a decision they are not happy with provided that they have an arguable appeal. I'm also cognizant of the fact that at this juncture I must not delve into the merits of the appeal.
26. I'm aware that an arguable appeal need not be one that must necessarily succeed. See -**Kenya Commercial Bank Limited Vs Nicholas Ombija (2009) eKLR** where it was held that "an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court" that was also the position in Stanley Kangethe Kinyanjui Vs Tony Ketter & others (2013) eKLR

where the court held that "on whether the appeal is arguable, it is sufficient if a single bonafide ground of appeal is raised, .. an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court: one which is not frivolous.'

27. Guided by the above I am satisfied that the applicant has an arguable appeal.
28. On the issue of security for costs, this is at the discretion of the court. The applicant has not made a concrete proposal as to what she intends to deposit as security for costs. Counsel for the respondent urges that the applicant should be compelled to deposit a security of Kshs. 5 million to compensate the respondent herein for loss of use and mesne profits. I think this is misplaced at this stage. This is not the purpose for security as clearly set out under order 42.
29. The Court of Appeal commenting on security in **Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100** expressed itself thus;-
"The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security.

30. As to the timelines within which the application has been filed, I do not see any inordinate delay as the judgement was delivered on 01/08/2025 and the present application was filed 2nd September 2025. The respondent seems to have a problem with the orders of stay that lapsed in the lower court. I think from the provisions of order 42 hereinabove a party has two alternatives. To make the application at the trial court or at the court where the appeal has been lodged.
31. Considering all relevant factors, and in order not to render the intended appeal illusory, I do grant stay of execution of the decree herein pending the hearing and determination of this appeal.
32. Costs shall abide the outcome of the appeal.

Delivered and Dated at Siaya This 16th Day of October 2025

**HON. LADY JUSTICE A.E. DENA
JUDGE**

16/10/2025

**Ruling delivered virtually through Microsoft teams
Video Conferencing Platform in the presence of:**

Ms. Nyangano for the Applicant/Appellant

Mr. Obado for the Respondent

Court Assistant: Ishmael Orwa

ORIGINAL