

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC APPEAL NO. E072 OF 2024

BASIL WASHINGTON

ACHIENGA.....APPELLANT

VERSUS

LOICE STELLA OKAYA OMOLLO.....1ST

RESPONDENT

THE COUNTY GOVERNMENT OF KISUMU.....2ND

RESPONDENT

RULING

This appeal is against the judgment of Hon. Yalwala SPM delivered on 14th August 2024 in Maseno Chief Magistrate’s Court ELC No. 45 of 2018 (hereinafter referred to as “the lower court suit”). In the lower court, the 1st Respondent claimed that the 2nd Respondent had illegally subdivided her parcel of land, Plot No. 9341/19, Maseno Township (hereinafter referred to as “the suit property”), and created two land parcels from it, Plot No. 9341/19A, Maseno Township, and Plot No.9341/19B, Maseno Township. The 1st Respondent averred that the 2nd Respondent allocated Plot No. 9341/19A, Maseno Township to the Appellant and left her with Plot No.9341/19B, Maseno Township. The 1st Respondent sought, among other reliefs, an order that the suit property be restored to her and that the Appellant be evicted from the portion of the suit property occupied by him. In the judgment of the lower court, the court ordered that the suit property be restored to the 1st Respondent and that the Appellant be

evicted from the portion of the suit property which he occupied as Plot No. 9341/19A, Maseno Township.

The Appellant was dissatisfied with the judgment of the lower court and filed this appeal on 12th September 2024. The Appellant challenged the judgment of the lower court on several grounds. The Appellant applied for a stay of execution of the lower court judgment before that court. The application was dismissed on 13th December 2024.

What is now before the court is the Appellant's application dated 20th December 2024, filed on the same date, seeking a stay of execution of the judgment delivered by the lower court on 14th August 2024, pending the hearing and determination of this appeal. The application, which is supported by the affidavit of the Appellant, sworn on 20th December 2024, was brought on the grounds that the Appellant sought an order for a stay of execution in the lower court but was denied the same. The Appellant averred that his appeal was arguable and had high chances of success. The Appellant averred that if the stay sought was not granted, the substratum of the appeal would be extinguished, thereby rendering the appeal nugatory. The Appellant averred that if the judgment of the lower court was not stayed, he stood the risk of being evicted from the suit property, an exercise that would occasion him substantial and irreparable loss, should he succeed in the appeal. The Appellant averred

that he had constructed a permanent building on the suit property from where he was conducting a hardware business. The Appellant averred that the building would be demolished if the stay sought was not granted. The 1st Respondent opposed the application through a replying affidavit sworn on 7th April 2025 and a Notice of Preliminary Objection that she filed in the lower court. The 1st Respondent averred that the Appellant was the author of his misfortune as he constructed a building on the suit property without any right to do so. The 1st Respondent averred that the Appellant constructed the said building while the lower court suit was pending. The 1st Respondent averred that she would equally suffer substantial loss if the stay sought was granted. The 1st Respondent averred that the Appellant's building was blocking access to her business premises, causing the tenants on her premises to vacate. The 1st Respondent averred that if the court was inclined to grant the stay sought, it should be conditional upon the Appellant depositing a sum of Kshs. 3,000,000/- as security. In her Notice of Preliminary Objection, the 1st Respondent contended that the application for a stay of execution was frivolous, vexatious, and amounted to an abuse of the process of the court in that the appeal on which it was based was filed out of time.

The application was argued through written submissions. The Appellant filed submissions dated 25th March 2025, while the 1st Respondent filed submissions dated 7th April 2025.

Analysis and Determination

I have considered the Appellant's application together with the affidavit filed in support thereof. I have also considered the replying affidavit and the Notice of Preliminary Objection filed by the 1st Respondent in opposition to the application. Finally, I have considered the submissions by the advocates for the parties and the many authorities cited in support thereof. The application seeks a stay of execution pending appeal. The application was brought principally under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, which provides that:

“6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay

made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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 ultimately be binding on him has been given by the applicant.”

In Halai & another v. Thornton & Turpin (1963) Ltd [1990] KECA 65 (KLR), the court stated as follows on this court’s power to grant an order of stay of execution pending appeal:

“Thus, the Superior Court’s discretion is fettered by three conditions. Firstly the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay.”

In Kenya Shell Limited v Karuga (1982 - 1988) I KAR 1018 the court stated that:

“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 cornerstone of both jurisdictions for granting stay.”

I am persuaded that the Appellant would suffer substantial loss if the stay sought is not granted. It is not disputed that the lower court, among others, ordered that the parcel of land whose title is currently being held by the Appellant be restored to the 1st Respondent and that the Appellant be evicted from the suit property. It is also common ground that the Appellant has developed the portion of the suit property under his occupation and is operating a business thereon. It is not disputed that the eviction of the Appellant from the suit property would involve the demolition of the structures that he has constructed, which the 1st Respondent claims are blocking access to her own business premises. I am satisfied that the Appellant would suffer substantial loss should he be evicted from the suit property and his appeal succeeds, and that the present application was brought without unreasonable delay, soon after the dismissal of the stay application in the lower court. I find no merit in the 1st Respondent’s preliminary objection to the appeal. The appeal from the court record was filed on 12th September 2024, within the 30 days allowed for filing appeals from the lower court. The Appellant has made a case for the grant of the stay order sought. The stay would, however, be

conditional, taking into account the unique nature of the dispute between the parties.

Conclusion

In conclusion, the Appellant's application dated 20th December 2024 succeeds. The execution of the judgment delivered on 14th August 2024 by Hon. C.L.Yalwala SPM in Maseno ELC No. 45 of 2018 is stayed pending the hearing and determination of this appeal. The Appellant shall deposit in a joint interest-earning bank account in the names of the advocates on record for the Appellant and the 1st Respondent a sum of Kshs. 500,000/- as security within 60 days from the date hereof, in default of which the stay granted herein shall automatically lapse without any further reference to the court.

Delivered and signed at Kisumu on this 9th day of October 2025

**S. OKONG'O
JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

Mr. Nyangweso for the Appellant
Mr. Obwatinya for the 1st Respondent
Ms. Nyambeki for the 2nd Respondent
Ms. J. Omondi-Court Assistant

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