

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISII
ELC NO. 26 OF 2018

SIMEON ONGONDI NYANTIKA APPLICANT

VERSUS

ORECHI NYANTIKA 1ST RESPONDENT

TERESA KEMUNTO OGEA 2ND RESPONDENT

JOSEPHINE OMBATI ONTIRI 3RD RESPONDENT

BY WAY OF COUNTERCLAIM

TERESA KEMUNTO OGEA 1ST PLAINTIFF

JOSEPHINE OMBATI ONTIRI 2ND PLAINTIFF

VERSUS

SIMEON ONGONDI NYANTIKA 1ST DEFENDANT

NYAKENYANYA NYANTIKA 2ND DEFENDANT

KENNEDY ZAKAYO 3RD DEFENDANT

WILLIAM ZAKAYO 4TH DEFENDANT

RULING

(Application for stay of execution pending appeal; Order 42 Rule 6 (2); applicant having lost a case for adverse possession and trust for the suit land and counterclaim by respondents allowed to evict the applicant; applicant now seeking stay of execution pending appeal; applicant contending that he stands to suffer substantial loss if he is evicted; the nature of that loss not elaborated; court not persuaded that the applicant has demonstrated substantial loss so that his application may be allowed; application dismissed)

1. The application before me is that dated 26 June 2025 filed by the unsuccessful plaintiff. He seeks an order of stay of execution of the judgment delivered on 17 June 2025 pending hearing of an appeal to the Court of Appeal. The application is opposed.

2. To put matters into context, through an Originating Summons filed on 31 August 2018, the applicant contended to have acquired title, through adverse possession, to a portion of land measuring 8 acres, from the land parcels Nyaribari Masaba/Bomobea/397 and 398 (hereinafter simply referred to as parcels No. 397 and No. 398). The parcel No. 397 belonged to the 1st respondent, Orechi Nyantika, whereas the parcel No. 398 belonged to the 2nd and 3rd respondents i.e Teresa Kemunto Ogega and Josephine Ombati Ontiri. The 1st respondent died in 2019 and he was not substituted thus the case against him abated meaning that the claim against the parcel No. 397 fell by the wayside. The 2nd and 3rd respondents opposed the Originating Summons and filed a counterclaim against the applicant and three other persons namely, Nyakenyanya Nyantika, Kennedy Zakayo and William Zakayo, for their eviction from the land parcel No. 398. Save for the applicant, the other three defendants in the counterclaim did not enter appearance nor defend the counterclaim. In opposing the counterclaim, the applicant inter alia contended that the land is being held in trust for him. Upon hearing the suit, I was not persuaded that the applicant had made out any case for the suit land i.e the parcel No. 398 either under adverse possession or under trust. I was persuaded to allow the counterclaim and gave the applicant 60 days to give vacant possession.
3. Aggrieved, the applicant has filed a notice of appeal and has followed it up with this application for stay pending appeal.
4. In his supporting affidavit, he has deposed that if eviction is to ensue, the appeal will be rendered nugatory and he will suffer irreparable loss. He avers that he has been on the suit land for over 40 years and the respondents will not suffer any prejudice waiting until the appeal is heard.
5. The respondents filed grounds of opposition to oppose the motion. Inter alia, it is averred that the application is meant to forestall the right of the respondents to evict the applicant. They also do not believe that the applicant

has any chance of succeeding at the Court of Appeal and neither would the appeal be rendered nugatory if execution was to issue. It is claimed that the applicant has forcefully occupied and benefited from the land of the respondents. Without prejudice, they aver that the applicant should be ordered to provide adequate security.

6. I have considered the application alongside the submissions of Mr. G.J.M Masese for the applicant and Mr. Bigogo for the respondents.
7. What I have before me is an application for stay of execution 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

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(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.

8. From the above, three issues may be distilled which the applicant in such a motion needs to demonstrate; that is :
 - (i) That the application has been made without unreasonable delay;
 - (ii) That the applicant stands to suffer substantial loss;
 - (iii) That there is given due security for the due performance of the decree.
9. In our case, I find that the application was made without delay. The judgment was delivered on 17 June 2025 and the application herein was filed on 25 June 2025.
10. On the second issue, that is whether the applicant has demonstrated substantial loss, I would imagine that every execution of a decree results in some sort of loss to the judgment debtor. However, what the law requires is that the loss be 'substantial' to entitle one to a stay of execution. Mere loss is

not sufficient to warrant a grant of the order of stay of execution pending appeal.

11. In our case, I observe that the applicant avers that he has been in occupation of the suit land for over 40 years. He however has not elaborated the nature of his occupation or use of the land. Without giving any elaboration on how he uses the land, I am unable to discern what loss he stands to suffer and cannot even be able to assess whether this alleged loss is one that meets the threshold of 'substantial loss' which is what is demanded by Order 42 Rule 6 (2) (a) above. I think the applicant needed to be more elaborate and point out exactly the kind of loss that he stands to suffer if he is evicted. I am not persuaded that it is sufficient for one to simply say that he stands to suffer substantial loss without demonstrating what loss that would be. My finding therefore is that the applicant has failed to prove that he will suffer substantial loss if the decree is executed.

12. If I had been persuaded that the applicant stands to suffer substantial loss, I would have assessed what level of security he requires to make for the due performance of the decree. But having not made out a case for substantial loss, I am afraid that the application is a non-starter and one for dismissal.

13. For the above reasons I proceed to dismiss this application with costs to the respondents.

14. Orders accordingly.

DATED AND DELIVERED THIS 9 OCTOBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in presence of :

Mr. G.J.M Masese for the applicant

Mr. Bigogo for the respondents

Court Assistant – Michael Oyuko