

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC SUIT NO. 108 OF 2013**

**MOSES OGUTU  
ODONGO.....PLAINTIFF**

**VERSUS**

**JOHNSTONE OTIENO OLONDO.....1<sup>ST</sup>  
DEFENDANT**

**RONALD AMOLLO OLONDO.....2<sup>ND</sup>  
DEFENDANT**

**LOICE AKINYI ONYANGO.....3<sup>RD</sup>  
DEFENDANT**

**DESTINY RECONCILIATION CHURCH.....4<sup>TH</sup>  
DEFENDANT**

**RULING**

The full facts of this case are set out in the judgment of this court delivered herein on 19<sup>th</sup> December 2024. In summary, the plaintiff brought this suit against the defendants through a plaint dated 25<sup>th</sup> April 2013. The plaintiff averred that at all material times, the plaintiff was the registered proprietor of all that parcel of land known as Plot No. 7130-Kakola Adjudication Section (hereinafter referred to as “the suit property”). The plaintiff averred that in or about 2011, the 1<sup>st</sup> and 2<sup>nd</sup> defendants unlawfully entered the suit property and forcibly buried one, Domnic Onyango Olondo, thereon in total disregard of the plaintiff’s rights as the owner of the property. The

plaintiff averred that the 3<sup>rd</sup> and 4<sup>th</sup> defendants, on their part, constructed structures on the suit property which they continued to occupy, purporting to do so with the permission of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The plaintiff averred that the defendants' occupation of the suit property amounted to trespass.

The plaintiff sought judgment against the defendants for;

1. A permanent injunction restraining the defendants jointly and severally from selling, alienating, disposing of, interfering with the plaintiff's interest, or in any other way parting with possession or title of the suit property.
2. An order compelling the 1<sup>st</sup> and 2<sup>nd</sup> defendants to exhume the remains of their deceased brother buried illegally on the suit property.
3. General damages for trespass.
4. Costs of the suit.

The defendants filed a joint statement of defence on 13<sup>th</sup> June 2013. The defendants denied that the plaintiff was the registered owner of the suit property. The 1<sup>st</sup> and 2<sup>nd</sup> defendants denied that they unlawfully entered the suit

property and forcibly buried their deceased brother thereon. The 1<sup>st</sup> and 2<sup>nd</sup> defendants averred that the deceased was not buried on the suit property. The 3<sup>rd</sup> defendant, on her part, denied that she had unlawfully entered the suit property and constructed illegal structures thereon, which she was occupying. The defendants denied that they were trespassers on the suit property. The defendants averred on a without prejudice basis that the plaintiff was registered as the owner of the suit property fraudulently. The defendants urged the court to dismiss the suit with costs.

At the trial, the plaintiff gave evidence as PW1 and called one witness, James Otieno Olondo (PW2). The plaintiff told the court that he was the registered owner of the suit property. The Plaintiff told the court that he purchased the suit property from James Otieno Olondo (PW2). He stated that the 3<sup>rd</sup> defendant had put up a house on the suit property and was occupying the same. He stated that the 3<sup>rd</sup> Defendant had also brought people who had put up kiosks on the property, who were paying her rent. He stated that the 4<sup>th</sup> defendant had also occupied the suit property but vacated soon after the suit was filed against

it. James Otieno Olondo(PW2) corroborated the plaintiff's evidence.

The 2<sup>nd</sup> defendant (DW1) told the court that he was the one who settled the 3<sup>rd</sup> defendant on the suit property which he claimed was family land. The 3<sup>rd</sup> defendant (DW2) told the court that she had occupied the suit property for 14 years together with her children and grandchildren. She stated that she had nowhere to go. She stated that she was taken to the suit property by her mother-in-law.

The court considered the pleadings, the evidence, and the closing submissions and delivered a judgment in favour of the plaintiff on 19<sup>th</sup> December 2024. In the judgment, the court stated as follows in part:

**“I have made a finding that the plaintiff is the lawful owner of the suit property. The 1<sup>st</sup> defendant is deceased and as such not in occupation of the suit property. The 2<sup>nd</sup> and 4<sup>th</sup> defendants from the evidence on record are not in occupation of the suit property. The 3<sup>rd</sup> defendant admitted that she is in occupation of the suit property and that she has put up structures thereon. From the pleadings, the evidence on record and the submissions, I agree with the plaintiff that the 3<sup>rd</sup> defendant entered and occupied the suit property**

**after the death of her husband through the prompting of the 1<sup>st</sup> and 2<sup>nd</sup> defendants who were her brothers-in-law. In the absence of evidence that the defendants were allowed by the plaintiff to enter the suit property and occupy the same, their entry was illegal and amounted to trespass.”**

The court entered judgment for the plaintiff against the defendants for:

- 1. “A permanent injunction restraining the 2<sup>nd</sup> and 3<sup>rd</sup> defendants jointly and severally, their agents, employees, servants or representatives or any person claiming or deriving title from them from selling, alienating, disposing of or interfering in any other manner whatsoever with the plaintiff’s occupation and enjoyment all that parcel of land known as Nyando/Kakola/7130 (formerly Plot No. 7130-Kakola Adjudication Section).**
- 2. The execution of the order granted in 1 above shall be stayed for 90 days from the date hereof to give time to the 3<sup>rd</sup> defendant who is in possession of the suit property to vacate the property.**
- 3. Kshs. 20,000/- as nominal damages for trespass to be paid by the 3<sup>rd</sup> defendant.**
- 4. Interest on 3 above at court rates from the date hereof until payment in full.**
- 5. The costs of the suit.”**

What is now before the court is the 2<sup>nd</sup> defendant's application dated 25<sup>th</sup> March 2025, seeking a stay of execution of the judgment delivered by this court on 19<sup>th</sup> December 2024 against the 2<sup>nd</sup> defendant pending the hearing and determination of the intended appeal by the 2<sup>nd</sup> defendant to the Court of Appeal. The application, which is supported by the affidavit of the 2<sup>nd</sup> defendant, sworn on 25<sup>th</sup> March 2025, was brought on the grounds that the 2<sup>nd</sup> defendant was dissatisfied with the judgment of this court and had filed a notice of his intention to appeal against the same to the Court of Appeal. The 2<sup>nd</sup> defendant averred that his intended appeal was arguable and had high chances of success. The 2<sup>nd</sup> defendant averred that if the stay sought were not granted, the appeal would be rendered nugatory. The 2<sup>nd</sup> defendant averred that if the judgment was not stayed, he stood the risk of being evicted from the suit property, an exercise that would occasion him substantial irreparable loss and damage should he succeed in the intended appeal. The 2<sup>nd</sup> defendant averred that he was ready to provide security for the due performance of the decree as may ultimately bind him.

The plaintiff opposed the application on the grounds of opposition dated 7<sup>th</sup> April 2025. The plaintiff contended that the application had not been brought without unreasonable delay. The plaintiff contended further that the 2<sup>nd</sup> defendant had not demonstrated that he would suffer substantial loss unless the stay sought was granted, as he was not in occupation of the suit property, and as such could not be evicted from the property. The plaintiff averred that the 2<sup>nd</sup> defendant's application did not satisfy the conditions for the grant of a stay of execution.

When the application came up for hearing on 1<sup>st</sup> July 2025, the advocates for the parties relied entirely on the affidavit in support of the application and the grounds of opposition filed in opposition to the application, and left the matter for the court's determination.

### **Analysis and Determination**

I have considered the 2<sup>nd</sup> defendant's application together with the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the plaintiff in opposition to the application. The application seeks a stay of execution pending

appeal. The application was brought principally under Order 42 Rule 6 of the Civil Procedure Rules. 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 not persuaded that the 2<sup>nd</sup> defendant would suffer substantial loss if the stay sought is not granted. In the judgment delivered on 19<sup>th</sup> December 2024, the court found

that the 2<sup>nd</sup> defendant was not in occupation of the suit property, and the court did not order his eviction from the property. I am therefore unable to see how the 2<sup>nd</sup> defendant would suffer substantial loss if the stay of execution is not granted pending the hearing of his intended appeal to the Court of Appeal. The 2<sup>nd</sup> defendant, having failed to demonstrate that he will suffer a substantial loss if the stay is not granted, is not entitled to the order sought in the application.

### **Conclusion**

In conclusion, I find no merit in the Notice of Motion application dated 25<sup>th</sup> March 2025. The application is dismissed with costs to the plaintiff.

**Delivered and dated at Kisumu on this 16<sup>th</sup> day of October 2025**

**S. OKONG'O  
JUDGE**

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

N/A for the Plaintiff

Mr. Odah h/b for Mr. Ngala for the 2<sup>nd</sup> Defendant

Ms. J. Omondi-Court Assistant

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