

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC SUIT NO. E032 OF 2022**

**BERNARD OUMA SIERO..**  
.....**PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF KISUMU.....1<sup>ST</sup>**  
**DEFENDANT**

**PHILISTER AMOLO OCHIENG.....2<sup>ND</sup>**  
**DEFENDANT**

**RULING**

The Plaintiff brought this suit against the Defendants on 14<sup>th</sup> December 2022, claiming that he was the owner of all that parcel of land known as Kisumu Municipality/Block 5/685 (hereinafter referred to as “the suit property”). The Plaintiff averred that after the suit property was allocated to him by the Municipal Council of Kisumu (the Council) and while he was in possession thereof, the Defendants fraudulently and corruptly caused a title for the suit property to be issued in the name of the 2<sup>nd</sup> Defendant. The Plaintiff averred that the 1<sup>st</sup> Defendant wrote to the National Land Commission (NLC) on 6<sup>th</sup> February 2015 claiming that the suit property had been allocated to the 2<sup>nd</sup> Defendant by the Council and that the 2<sup>nd</sup> Defendant had developed the same and as such should be issued with a title in respect thereof.

The Plaintiff averred that while writing the said letter, the 1<sup>st</sup> Defendant was aware that the suit property had been repossessed by the Council from the 2<sup>nd</sup> Defendant and re-allocated to the Plaintiff, who was the one who had developed it. The Plaintiff sought judgment against the Defendants jointly and/or severally for;

1. A declaration that the Plaintiff was the lawful owner of the suit property;
2. An order that the registration of the 2<sup>nd</sup> Defendant as the proprietor of the suit property be cancelled;
3. A mandatory injunction directing the Kisumu County Land Registrar to rectify the register by registering the Plaintiff as the proprietor of the suit property;
4. A mandatory injunction directing the 1<sup>st</sup> Defendant to cancel and/or close all parallel records held by it in respect of the suit property, purporting that the 2<sup>nd</sup> Defendant was the proprietor of the suit property;
5. A permanent injunction restraining the 2<sup>nd</sup> Defendant from interfering with the Plaintiff's possession and enjoyment of the suit property; and
6. Costs of the suit.

In her defence and counterclaim filed on 30<sup>th</sup> January 2023, the 2<sup>nd</sup> Defendant averred that the suit property was lawfully allocated to her on

19<sup>th</sup> November 2005, after which she was issued with a certificate of lease. The 2<sup>nd</sup> Defendant averred that she was the lawful owner of the suit property and was entitled to exclusive use and possession thereof. The 2<sup>nd</sup> Defendant denied that the suit property was repossessed by the Council and reallocated to the Plaintiff. The 2<sup>nd</sup> Defendant averred that any document held by the Plaintiff purporting to confer upon him ownership of the suit property was obtained by the Plaintiff fraudulently and unlawfully.

In her counterclaim, the 2<sup>nd</sup> Defendant averred that she was holding a certificate of lease for the suit property. The 2<sup>nd</sup> Defendant averred that the Plaintiff entered the suit property without any reasonable cause or lawful excuse and constructed permanent structures thereon. The 2<sup>nd</sup> Defendant averred that the Plaintiff had failed or refused to vacate the suit property despite having been asked to do so. The 2<sup>nd</sup> Defendant reiterated that the documents held by the Plaintiff purporting to confer title in the suit property upon him were fraudulent and illegal. The 2<sup>nd</sup> Defendant sought the following reliefs against the Plaintiff;

1. An order of eviction from the suit property;
2. A permanent injunction restraining the Plaintiff from entering upon, remaining on, taking possession of, carrying out any construction, or

any other activity on the suit property or any part thereof, and from alienating, or interfering with the suit property;

3. A declaration that the suit property lawfully belonged to the 2<sup>nd</sup> Defendant;
4. In the alternative, an order that the Plaintiff compensates the 2<sup>nd</sup> Defendant by paying to the 2<sup>nd</sup> Defendant the market value of the suit property at the date of judgment, subject to the property being valued by a valuer appointed by the court;
5. Costs;
6. Interest on 4 and 5 above; and
7. Any other or further relief the court may deem fit to grant.

The 1<sup>st</sup> Defendant filed a defence to the Plaintiff's claim and the 2<sup>nd</sup> Defendant's counterclaim on 14<sup>th</sup> June 2023, in which it denied the Plaintiff's claim in its entirety. In its defence to the 2<sup>nd</sup> Defendant's counterclaim, the 1<sup>st</sup> Defendant admitted that the 2<sup>nd</sup> Defendant was the lawful owner of the suit property and that the Plaintiff was a trespasser on the property. The Plaintiff filed a reply to the 2<sup>nd</sup> Defendant's defence and a defence to the 2<sup>nd</sup> Defendant's counterclaim on 24<sup>th</sup> February 2023.

The court heard the Plaintiff's suit and the 2<sup>nd</sup> Defendant's counterclaim and delivered a judgment on 19<sup>th</sup> December 2024 in favour of the Plaintiff. The court made the following orders:

- 1. "I declare that the Plaintiff is the lawful owner of all that property known as Plot No. 685 Block 5, Kisumu Municipality also known as Title No. Kisumu/ Municipality Block 5 /685.**
- 2. The title held by the 2<sup>nd</sup> Defendant in respect of Title No. Kisumu/ Municipality Block 5 /685(the suit property) is hereby cancelled.**
- 3. An order is issued compelling the 1<sup>st</sup> Defendant to cancel and/or close all parallel records held by it in respect of the suit property indicating that the 2<sup>nd</sup> Defendant is the proprietor of the property.**
- 4. A permanent injunction is issued restraining the 2<sup>nd</sup> Defendant whether by herself, her agents, servants, employees or otherwise whosoever from interfering with the Plaintiff's quiet possession and enjoyment of the suit property.**
- 5. The 2<sup>nd</sup> Defendant's counter-claim is dismissed.**
- 6. The Plaintiff shall have the costs of the suit and the counter-claim."**

What is now before the court is the 2<sup>nd</sup> Defendant's application dated 10<sup>th</sup> March 2025, in which the 2<sup>nd</sup> Defendant has sought a stay of execution of the judgment delivered herein on 19<sup>th</sup> December 2024 pending the hearing and determination of the intended appeal to the Court of Appeal.

The application, which is supported by the affidavit of the 2<sup>nd</sup> Defendant, sworn on 10<sup>th</sup> March 2025, was brought on the grounds that the 2<sup>nd</sup> Defendant was dissatisfied with the judgment delivered by the court on 19<sup>th</sup> December 2024 and had lodged an appeal against the same through a notice of appeal dated 19<sup>th</sup> December 2025. The 2<sup>nd</sup> Defendant averred that the appeal would be rendered nugatory if the stay sought was not granted, thereby subjecting the 2<sup>nd</sup> Defendant to substantial loss. The 2<sup>nd</sup> Defendant averred that if the stay order sought was not granted, the Plaintiff could proceed to sell, transfer, or charge the suit property. The 2<sup>nd</sup> Defendant averred that she had an arguable appeal with overwhelming chances of success. The 2<sup>nd</sup> Defendant averred further that the Plaintiff stood to suffer no prejudice if the orders sought were granted.

The Plaintiff opposed the application through a replying affidavit sworn on 18<sup>th</sup> March 2025. The Plaintiff averred that the judgment of the court delivered on 19<sup>th</sup> December 2024, together with the decree extracted therefrom, was lodged at the Kisumu Land Registry on 10<sup>th</sup> February 2025 and acted upon. The Plaintiff averred that the decree was of such a nature that it could not be stayed.

The 2<sup>nd</sup> Defendant's application was heard on 8<sup>th</sup> April 2025 when Ms. Awuor appeared for the 2<sup>nd</sup> Defendant, Mr. Munuang'o for the 1<sup>st</sup>

Defendant, and Mr. Mungla for the Plaintiff. The 2<sup>nd</sup> Defendant submitted that the Plaintiff was in the process of having the suit property transferred to his name. The 2<sup>nd</sup> Defendant submitted that if the Plaintiff succeeded in that endeavour, the appeal would be rendered nugatory and the 2<sup>nd</sup> Defendant would suffer substantial loss. The 2<sup>nd</sup> Defendant submitted that she was prepared to give security if ordered to do so by the court.

The 1<sup>st</sup> Defendant, on its part, submitted that the 2<sup>nd</sup> Defendant's application was brought timeously and that the 2<sup>nd</sup> Defendant was likely to suffer substantial loss if the stay sought was not granted. The 1<sup>st</sup> Defendant submitted that the Plaintiff could sell the suit property or charge the property as security if the property was transferred to his name. The 1<sup>st</sup> Defendant agreed with the 2<sup>nd</sup> Defendant that the Plaintiff stood to suffer no prejudice if the application were allowed.

In his submissions in reply, the Plaintiff submitted that some of the orders sought to be stayed were declaratory orders, and as such were not capable of being stayed. The Plaintiff submitted that concerning the order for the cancellation of the 2<sup>nd</sup> Defendant's title, the same had been executed. The Plaintiff submitted that the Land Registrar had already acted on the court order, and as such, there was nothing to be stayed. As for the injunction order, the Plaintiff submitted that the same could not be stayed. The Plaintiff submitted further that the 2<sup>nd</sup> Defendant's application

was brought after a delay of 3 months from the date of the judgment, and the 2<sup>nd</sup> Defendant had not offered any security. The Plaintiff urged the court to dismiss the application.

### **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 replying affidavit filed by the Plaintiff in opposition to the application. Finally, I have considered the submissions by the advocates for the parties. The 2<sup>nd</sup> Defendant's 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 2<sup>nd</sup> Defendant would suffer substantial loss if the stay sought is not granted. It is not disputed that the court, among others, ordered that the title held by the 2<sup>nd</sup> Defendant in respect of Title No. Kisumu/ Municipality Block 5 /685 (the suit property) be cancelled, and that the 1<sup>st</sup> Defendant cancel and/or close all parallel records held by it in respect of the suit property, indicating that the 2<sup>nd</sup> Defendant was the proprietor of the property. Once the 2<sup>nd</sup> Defendant's title is cancelled, nothing would stop the Plaintiff from having the property registered in his name, the court having declared him as the lawful owner of the suit property. After the property is registered in the name of the Plaintiff, he would be free to deal with the property as he wishes, including leasing, selling, or charging the property. There is a likelihood that the suit property may be put beyond the reach of the 2<sup>nd</sup> Defendant if the stay sought is not granted. In such an eventuality, there is no doubt that the 2<sup>nd</sup> Defendant would suffer substantial loss should she succeed in her intended appeal to the Court of Appeal.

The 2<sup>nd</sup> Defendant has a right of appeal against the judgment of this court delivered against her on 19<sup>th</sup> December 2024. The court has a duty to protect that right. The court would do this by preserving the subject matter of the suit and the prevailing status quo, so that the 2<sup>nd</sup> Defendant does not suffer substantial loss should she succeed in his appeal to the

Court of Appeal. The 2<sup>nd</sup> Defendant has therefore made a case for the grant of an order staying the cancellation of her title and the records held by the 1<sup>st</sup> Defendant relating thereto. I will also stay the order on costs. The stay would, however, be conditional.

## **Conclusion**

In conclusion, the 2<sup>nd</sup> Defendant's application dated 10<sup>th</sup> March 2025 succeeds in part. The orders made on 19<sup>th</sup> December 2024, for the cancellation of the title held by the 2<sup>nd</sup> Defendant in respect of Title No. Kisumu/ Municipality Block 5 /685 (the suit property), and for the 1<sup>st</sup> Defendant to cancel and/or close all parallel records held by it in respect of the suit property, relating to the 2<sup>nd</sup> Defendant's said title, are stayed pending the hearing and determination of the intended appeal by the 2<sup>nd</sup> Defendant to the Court of Appeal. The order awarding the costs of the suit and the counterclaim to the Plaintiff is also stayed pending the hearing and determination of the intended appeal by the 2<sup>nd</sup> Defendant to the Court of Appeal. The 2<sup>nd</sup> Defendant shall deposit in a joint interest-earning bank account in the names of the advocates on record for the parties 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 the 2<sup>nd</sup> day of October 2025**

**S. OKONG'O  
JUDGE**

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

Mr. Munpla for the Plaintiff

Mr. Omondi for the 1<sup>st</sup> Defendant

Mr. Sala for the 2<sup>nd</sup> Defendant

Ms. J. Omondi-Court Assistant

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