

REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT  
AT KISII  
ELC NO. 1253 OF 2016

ELMELITA NYAKOBOKE MWARANIA ..... PLAINTIFF

VERSUS

SAMWEL MOMANYI ONGAKI & OTHERS ..... DEFENDANTS

RULING

1. The application before me is that dated 9 April 2025 filed by the unsuccessful plaintiff. The substantive prayer is one for stay of execution pending an appeal to the Court of Appeal against the ruling delivered on 25 March 2025. That ruling dismissed an application for review of the judgment which judgment was delivered on 15 May 2024. The applicant fears that unless stay is granted the decree may be executed to her detriment. The application is opposed.
2. To put matters into perspective, through a plaint filed on 13 December 2007, the applicant filed suit on behalf of the estate of her late husband Mwandagani Ongaki. Her contention was that the land parcel Nyaribari Masaba/Bomobea/828 was owned by her deceased husband and his brother, Samwel Momanyi Ongaki, the 1<sup>st</sup> defendant/respondent. She claimed that the 1<sup>st</sup> respondent undertook various fraudulent transactions which led to the subdivision of the suit land and transfer to other individuals despite her late husband owning a half share of it. In the suit she wished to have a revocation of various subdivisions arising from the land parcel No. 828 and for the same to be restored. The 2<sup>nd</sup> – 6<sup>th</sup> defendants/respondents are among those whose titles the applicant wished nullified. There was a defence to the suit and also the 5<sup>th</sup> defendant/respondent (Francisca Moraa Oresi) filed a counterclaim for the eviction of the applicant from the land parcel Nyaribari Masaba/Bomobea/1388 which was one of the subdivisions emanating from the land parcel No. 828.
3. I heard the case and delivered judgment on 15 May 2024. I was not persuaded by the case of the applicant and I dismissed it. I also allowed the counterclaim of the 5<sup>th</sup> respondent and ordered the applicant to give vacant possession of the land parcel No. Nyaribari Masaba/Bomobea/1388 within 14 days of the judgment. I further entered judgment against the applicant in

the sum of Kshs. 1 million in favour of the 5<sup>th</sup> respondent as general damages for trespass together with costs.

4. After the judgment, the applicant filed an application dated 24 September 2024 seeking a review of the judgment. I heard the application and I was not persuaded that there was any basis to seek review. I dismissed that application in my ruling delivered on 25 March 2025. Now the applicant states that she has filed an appeal against that ruling and seeks stay pending appeal.
5. The application was filed under certificate of urgency and interim orders of stay of execution sought. I granted the same but subject to deposit of the sum of Kshs. 300,000/= within 14 days. This money was not deposited.
6. In opposing the motion, the 1<sup>st</sup> and 5<sup>th</sup> respondents have raised issue that the applicant does not deserve the orders of stay as she has failed to make this deposit of Kshs. 300,000/= as directed.
7. I have considered all material issues.
8. This is an application for stay pending appeal and I stand guided by the provisions of Order 42 Rule 6 (2) which is drawn as follows :
  - (2) *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.*
9. The above law informs the court not to make an order of stay of execution unless the court is satisfied of three things, being :
  - (i) That the applicant stands to suffer substantial loss.
  - (ii) That the application has been made without unreasonable delay.
  - (iii) That there is provided such security for the due performance of the decree in the event that the applicant loses the appeal.
10. I do not have any issue with the element of delay and will look into substantive loss and security. The applicant contends that she stands to suffer substantive loss as she may be evicted. I am actually not too sure of her current status because when she failed to abide by the terms of deposit of Kshs. 300,000/= the 5<sup>th</sup> respondent took out warrants for her eviction. It is

highly probable that the warrants have already been executed. If the warrants have already been executed then I regret my inability to issue any order of stay, as the application will be overtaken by events, and the same will have to be considered as dismissed.

11. However, in the event that the warrants have not yet been executed, I am prepared to grant an order of stay of execution pending appeal, but subject to the applicant depositing the sum of Kshs. 1 million ordered as general damages and a further Ksh. 1 million to compensate the 5<sup>th</sup> respondent for not using the land for the duration of the appeal. The monies will need to be deposited within the next 14 days. In other words, if the warrants have not been executed, stay pending appeal is granted subject to the applicant depositing Kshs. 2 million in court within the next 14 days. If this is not done then the applicant will not be entitled to any order of stay of execution pending appeal.

12. In the event that the warrants of eviction have already been executed at the time of delivery of this ruling this application will stand dismissed with costs. If not, and the applicant makes good the conditions for stay, then the costs of this application will be in the appeal. If she does not make good the conditions for stay, the application will also stand dismissed with costs.

13. Orders accordingly.

DATED AND DELIVERED THIS 29 DAY OF OCTOBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in presence of :

Mr. Obado for the plaintiff/applicant

Mr. Sagwe for the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 6<sup>th</sup> defendants/respondent

Mr. Anyona for the 5<sup>th</sup> defendant/respondent

Mr. Wabwire, State Counsel for the 7<sup>th</sup> & 8<sup>th</sup> defendants/respondents

Court Assistant – Michael Oyuko