

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELCA CASE NO. E008 OF 2021

**AGNES NAKHUMICHA
LYAMBILA-----PLAINTIFF/APPLICANT**

VERSUS

**DENNIS MAJIMBO-----1ST
DEFENDANT/RESPONDENT**

**ROBERT MASINDE-----2ND
DEFENDANT/RESPONDENT**

**JUSTUS NYONGESA MURUNGA-----3RD
DEFENDANT/RESPONDENT**

**ELIZABETH SIMIYU-----4TH
DEFENDANT/RESPONDENT**

**LEVI KISONGOCHI WASIKE-----5TH
DEFENDANT/RESPONDENT**

**LINA KHAOYA-----6TH
DEFENDANT/RESPONDENT**

**LEONARD JUMA-----7TH
DEFENDANT/RESPONDENT**

**EMMANUEL WEKESA-----8TH
DEFENDANT/RESPONDENT**

**DAVI WAFULA-----9TH
DEFENDANT/RESPONDENT**

RULING

1. The 1st, 2nd, 3rd, 7th & 8th defendants/Applicants vide a Notice of Motion application brought under certificate of urgency dated 3rd July 2025 seeks the following orders;

- (1) (SPENT)
 - (2) THAT pending the hearing and determination of this application there be stay of execution of the decree of this Court and all consequential orders.
 - (3) THAT pending the hearing and determination of Kisumu Court of Appeal Civil Suit COACA NO. E130 of 2025 there be stay of execution of the decree of this Court and all consequential orders.
 - (4) THAT Costs be paid by the plaintiff
2. The application is supported by the affidavit of Robert Masinde, the 2nd Defendant/Applicant sworn on even date and grounds apparent on the face of the application.

APPLICANTS SUMMARY OF FACTS

3. The 2nd Defendant/Applicant in his affidavit in support of the application deposed as follows;
1. THAT we were dissatisfied with the decree of this court and have since filed an appeal at Kisumu Court of Appeal vide Kisumu Civil Suit COACA NO. E130 of 2025
 2. THAT the Appeal raises serious legal issues hence has high chances of success.
 3. THAT the plaintiff has initiated execution in this case as she has filed an application to seek security orders.
 4. THAT unless stay is granted, eviction will ensure.
 5. THAT the appeal will be rendered nugatory.
 6. THAT as Applicants, we shall suffer irreparable harm.

7. THAT we are ready and willing to abide by any security to be set by this Court.
8. THAT the plaintiff will not suffer any harm if orders sought are granted.
4. When the application came up for direction, this Court directed that the same be canvassed by affidavit evidence and written submissions. The parties were given timelines within which to file and exchange their respective affidavits and written submissions. By the time of writing this Ruling, the Plaintiff/Respondent had only filed written submissions
5. I have considered the application, the supporting affidavit and the rival submissions by counsel. The application under consideration is for stay of execution pending appeal. Order 42 Rule 6(2) CPR which is the applicable law provides as follows;

“No order for stay of execution shall be made under sub-rule (1) unless;

- a) The application is brought without undue delay;
 - b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered and;
 - c) 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.
6. Though an application for stay pending appeal is discretionary, it is imperative that all the three elements

must be satisfied cumulatively before an order of stay pending appeal is granted.

7. On the first issue, the court record indicates that the impugned judgment and decree which is the subject of the intended appeal was delivered by this Honourable Court on 12th May, 2025, The application under consideration was filed on 3rd July 2025. It took the Applicant roughly two months after delivery to file the application. A period of two months without explanation in my view is not only unreasonable but also inordinate.
8. The second issue is whether the Applicant will suffer substantial loss unless stay of execution order is granted. In the supporting affidavit, the Applicants asserted that they will suffer irreparable damage if evicted from the suit land and that the appeal will be rendered nugatory. These averments in my view are vague and unsubstantiated. In the case of **James Wangalw & Another-v- Agnes Naliaka Cheseto (2012) eKLR, Gikonyo J.** observed as follows;
“ No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process.”

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail...”

9. The determining factor for the grant of stay pending appeal is demonstrated by what substantial loss the applicant is likely to suffer. Substantial loss is a relative term and can only be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted.
10. Other than merely stating that the intended appeal will be rendered nugatory and that they will suffer irreparable harm due to impending eviction, the applicants have not demonstrated how they will suffer substantial loss unless the application for stay pending appeal is granted.
11. The other condition for the grant of stay pending appeal is for the applicant to offer security. The applicant may offer security but the court will determine whether such security as offered by the applicant is sufficient. In this case, the applicant has given undertaking to abide by such terms and conditions as this court may ask or demand. I find his undertaking sufficient in light of Order 42 Rule 6 (b) CPR which require that it is the court that orders the kind of security the applicant should give. However, for an applicant

to succeed for the grant of stay pending appeal, he must satisfy the court of all the three conditions cumulatively.

12. Having failed to satisfy all the conditions, I find the Notice of Motion application dated 3rd July, 2025 lacking in merit and the same is hereby dismissed with costs.

13. It is so ordered

READ, DELIVERED and **SIGNED** at Bungoma this 6th day of November, 2025.

E.C CHERONO

ELC JUDGE.

In the presence of;

1. Mr. Wamalwa R. for the Applicant,
2. Respondent/Advocate-absent.
3. Bett C/A.