

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ELCC No. 61 OF 2021

HELLEN NYABOKE NYABIOSI
PLAINTIFF

VERSUS

GEORGE NYARIKI MONDA
1ST DEFENDANT

PHILES MORAA ONGORI
2ND DEFENDANT

ISAIAH OCHANDA ONGERA
3RD DEFENDANT

LAND REGISTRAR
4TH DEFENDANT

ATTORNEY GENERAL
5TH DEFENDANT

RULING

1. Judgment was delivered in this matter on 10th July 2025 by Mugo Kamau, J. as follows:

The Court therefore finds merit in the Plaintiff's claim and grants the Plaintiff Judgment against the 1st and 2nd Defendants in terms of prayers (1) and (2) of the Amended Plaint dated 27th September 2022 and dismissed the 1st Defendant's Counter-claim.

Unless the Plaintiff on one hand and 1st and 2nd Defendants on the other would come into

agreement over the latters' purchase of the suit properties from the Plaintiff within 60 days of the issuance of this Judgment (which is only advisory and not binding on any of the parties), prayer (3) that the 1st and 2nd Defendants be forcefully evicted and the illegal structures built upon land parcels No. Keroka Township/147 and Keroka Township/148 be demolished at the expense of the Defendants will certainly take effect.

Prayer 4 on mesne profits was not proved and is therefore dismissed.

I note that Nyamira ELC case No. 807 of 2016 and Kisii ELC case No. 21 of 2018 are related to this suit and have been placed together before the Court. I have not found any formal consolidation order on record. However, this Judgment conclusively determines the aforesaid two suits.

2. For better context, it is worth noting that prayers (1) and (2) of the Amended Plaint dated 27th September 2022 were reproduced in the judgment thus:

1.A Declaration that land parcel No. Keroka Township/147 and Keroka Township/148 is and has been the property of the Plaintiff.

2. A permanent injunction restraining the 1st, 2nd and the 3rd Defendants either by themselves, assistants or agents from continuing to forcefully retain, occupy, use of develop upon land parcels No. Keroka Township/147 and Keroka Township/148.

3. Following delivery of the judgment, the Second Defendant filed Notice of Motion dated 25th July 2025 while the First Defendant filed Notice of Motion dated 7th August 2025. This ruling is in respect both applications.

4. The following orders are sought in Notice of Motion dated 25th July 2025:

1. The Instant Application be certified urgent and same be heard Ex-parte in the first instance.

2. Pending the hearing and determination of the instant Application, the Honourable court be pleased to grant interim orders of stay of execution and/or Decree issued on 10th day of July 2025 together with all consequential orders arising therefrom and/or attendant thereto.

3. The Honourable court be pleased to grant an order of stay of execution and/or enforcement of the Judgement and decree issued on 10th day of July 2025 together with consequential orders arising therefrom and/or attendant therein Pending the

hearing and determination of the appeal in terms of the Notice of Appeal dated 22nd day of July 2025.

4. Costs of this Application do abide the Appeal.

5. Such other and/or further orders as this Honourable court may deem just and expedient be granted.

5. The application is supported by an affidavit sworn by the Second Defendant. She deposed that she is aggrieved by the judgment and that she had filed Notice of Appeal, a copy of which she annexed. She added that the Plaintiff is keen to execute the decree, that execution will cause her substantial loss and that she is ready to offer such security as the court may deem just.

6. On the other hand, the following orders are sought in Notice of Motion dated 7th August 2025:

i. THAT this Application be certified as urgent and heard ex parte in the first instance.

ii. THAT the Honorable Court be pleased to issue an order of stay of execution of the Decree and Order of the Honorable Court, Hon. Justice Mugo Kamau issued in Nyamira E.L.C Case No. 61 of 2021, pending the hearing and determination of this application inter partes.

- iii. *THAT the Honorable Court do issue a temporary injunction restraining the Respondent, her servants and or agents from selling, charging, disposing off and or otherwise interfering with the suit property Nyamira E.L.C Case No. 61 of 2021 and/or evicting the Applicant therefrom, pending the hearing and determination of this Application.*
- iv. *THAT the Honourable Court be pleased to issue an order of stay of execution of the Decree and Order of the Honourable Court, Hon. Justice Mugo Kamau issued in Nyamira E.L.C Case No.61 of 2021, pending the hearing and determination of the intended Appeal.*
- v. *THAT the Honourable Court do issue a temporary injunction restraining the Respondent, his servants and or agents from selling, charging, disposing off and or otherwise interfering with the suit property Nyamira E.L.C Case No. 61 of 2021 and or evicting the Applicant therefrom, pending the hearing and determination of the intended Appeal.*
- vi. *THAT the costs of this application be provided for.*

7. Notice of Motion dated 7th August 2025 is supported by an affidavit sworn by the First Defendant. He too deposed that he is aggrieved by the judgment and that he had filed Notice of

Appeal, a copy of which he also annexed. He added that there is imminent threat of execution of the decree and that he would suffer irreparably if he was evicted.

8. Counsel for the Third Defendant told the court that the Third Defendant does not oppose both applications.
9. The Plaintiff opposed both applications through a replying affidavit which she swore on 29th September 2025. She deposed that the court had given the parties a period of 60 days to explore the options of reimbursing her or making an offer of purchasing the suit properties from her, but they squandered the opportunity and instead chose to appeal. That the Defendants were warned against investing further in the suit properties, but they disregarded and that they cannot continue occupation despite reaping immense profits from the suit properties for over a decade. She further deposed that litigation must end and urged the court to dismiss the applications.
10. The applications were canvassed through written submissions. The Second Defendant filed submissions dated 3rd October 2025, the First Defendant filed submissions dated 23rd September 2025, and the Plaintiff filed submissions dated 29th September 2025.
11. I have carefully considered the applications, the affidavits and the submissions. The issues that emerge for determination are

whether the court is *functus officio* and whether stay of execution pending appeal should be granted.

12. The Plaintiff argued that the court is *functus officio* once it delivers judgment and that the Court with jurisdiction to hear and determine an application for stay of execution of final orders is the Court of Appeal. The doctrine of *functus officio* was discussed by the Supreme Court in **Raila Odinga & Others vs. IEBC & Others [2013] eKLR**, where the Court cited, with approval, a paper by **Daniel Malan Pretorius**, titled **The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,** (2005) 122 SALJ 832. The author discussed the concept as follows:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

13. The power that this court is called upon to exercise as regards Notice of Motion dated 25th July 2025 and Notice of Motion dated 7th August 2025 is to determine whether stay of execution of the decree herein pending hearing and determination of appeals to the Court of Appeal should be granted. I have diligently scoured through the record herein and I have not seen anything to show that this court has previously considered an application such as the present ones. The Plaintiff has not referred the court to any specific proceedings and order of that nature. The court is not *functus officio*.

14. I now turn to the issue of whether stay of execution pending appeal should be granted. Applications for execution pending appeal are, as the Court of Appeal stated in **Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR**, everyday fare and the principles on which the court exercises the jurisdiction is old hat.

15. This court's power to grant stay pending appeal is guided by **Order 42 rule 6 (1) and (2)** of the **Civil Procedure Rules, 2010** which provide as follows:

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 may ultimately be binding on him has been given by the applicant.

16. The essence of the foregoing provisions is that an applicant seeking stay pending appeal must demonstrate that substantial loss will result to him if stay is not granted, and

that the application has been made without unreasonable delay. Such an applicant is further required to give such security as the court may order for the due performance of the decree. See **Kenya Power & Lighting Co. Ltd v Kigaita Ngare Unduthu & 36 others [2020] eKLR** and **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**. As Platt Ag JA (as he then was) stated in **Kenya Shell Limited v Benjamin Karuga Kibiru & another** (supra), substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is virtually impossible for such an application to succeed if an applicant fails to demonstrate that he will suffer substantial loss if stay is not granted.

17.A perusal of the record shows that the First Defendant filed Notice of Appeal dated 15th July 2025 while the Second Defendant filed Notice of Appeal dated 21st July 2025. Both notices were filed within the Fourteen days specified under **Rule 77 (2)** of the **Court of Appeal Rules**. Pursuant to **Order 42 rule 6 (4)** of the **Civil Procedure Rules**, an appeal to the Court of Appeal is deemed to have been filed when under the Rules of the Court of Appeal, Notice of Appeal has been given. There is therefore an appeal against the decree, and this court can consider the applications for stay.

18.Among the orders made in the decree appealed against is an injunction restraining the First to the Third Defendants from

retaining, occupying, using or developing the suit properties. In essence, execution of the decree will result in the said Defendants being evicted and suffering loss of use of the suit properties prior to the hearing and determination of their appeals. I am satisfied that the applicants have satisfied the test of substantial loss. Further, both applications were filed within a month of the judgment being delivered. Consequently, there was no unreasonable delay.

19. In view of the foregoing, I am persuaded that the applicants have satisfied the requirements for granting an order of stay of execution pending hearing and determination of their appeals. I will limit the lifespan of the stay orders with a view to encouraging the applicants to be proactive in prosecuting their appeals.

20. In the end, I make the following orders:

a) I grant stay of execution of the judgment and decree herein together with all consequential orders arising therefrom pending hearing and determination of the First and Second Defendants' appeal to the Court of Appeal.

b) The stay orders shall remain in force until the determination of the appeal or for a period of only 2 (two) years from the date of delivery of this ruling, whichever occurs first.

c) The First and Second Defendants shall have costs of the application.

Dated, signed, and delivered at Nyamira, this 12th day of November 2025.

**D. O. OHUNGO
JUDGE**

Delivered in the presence of:

Mr Ombongi for the Plaintiff

No appearance for the First Defendant

Mr Ochwangi for the Second Defendant

Ms Kebungo for the Third Defendant

No appearance for the Fourth and Fifth Defendants

Court Assistant: B Kerubo