

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMABAY
ELC APPEAL CASE NO. E017 OF 2025

PAUL YASHON OGOMA.....
APPELLANT/APPLICANT

VERSUS

JAMES OMOLO
OGOMA.....RESPONDENT

RULING

(On whether the applicant should be granted stay of execution pending appeal)

The application

1. Before this Court is an application filed under certificate of urgency dated 8th may 2025. It is to be brought under Article 50 of the Constitution of Kenya, 2010; Orders 51 Rule 1 and 46 rule 2 of the Civil Procedure Rules, 2010; sections 1A, 1B and 3 A of the Civil Procedure Act.
2. The Applicant seeks **ORDERS THAT:**
 - a) ...Spent
 - b) pending the hearing and determination of this application, this Honourable court be pleased to grant a stay of execution of the ruling and orders of the subordinate court issued on 3rd April 2019 in Homa-Bay ELC case no 35 of 2019
 - c) pending the hearing and determination of the appeal, this Honourable court be pleased to grant a stay of

execution of the ruling and orders of the subordinate court issued on 3rd April 2019 in Homa-Bay ELC case no. 35 of 2019

d) this Honourable court be pleased to grant any other orders/reliefs it deems just and fit to grant;

e) the costs of this application be provided for

3. The application is premised on the grounds outlined on the face of the application as well as the affidavit sworn by Paul Yashon Ogoma, the Applicant herein. In nutshell, the Applicant stated that the court, vide a ruling dated 3rd April 2025 in Homa-Bay ELC Case 35 of 2019, allowed the Respondent's application seeking his eviction from LR.NO. KANYADA/KOTIENO/KATUMA 1415 in execution of the judgment delivered on 24th November 2024. This decision, the applicant argued, was reached based on the court's misguided premise that the applicant had not filed his Response as well as his written submissions.
4. The Applicant maintained that the effect the court's action in allowing the respondent to proceed with the process of execution would be a grave miscarriage of justice and the same would be tantamount to condemning the applicant unheard against the tenets of Article 50 of the Constitution of Kenya, 2010.
5. The Applicant also maintained that the instant Appeal challenges the subordinate court's failure to ascertain that Section 18 and 19 of the Land Registration Act 2012 had

been complied with before issuing eviction orders, more so in a boundary dispute. He further contended that the boundary in question has not been determined by the Land Registrar hence the orders issued by the subordinate court are premature and incapable of execution.

6. Further, the Applicant stated that he has an appeal with high chances of success and that the execution of the ruling in question as well as its consequential orders ought to be stayed pending the hearing and determination of this Appeal. He equally stated that he stands to suffer substantial loss if the stay orders are not granted as the respondent may proceed and demolish his matrimonial home as well as other developments erected on the suit property.
7. Lastly, the Applicant maintained that he is ready and able to provide security for the due performance of the orders of the court as the same may be ultimately binding upon him should his appeal not succeed. He also stated that application was brought timeously and that it would be in the interest of justice that the orders sought in his application be granted.

The Response

8. The Respondent filed his replying affidavit dated 11th May 2025. he deponed that he filed Homa-Bay ELC Case No. 35 of 2019 after the applicant herein encroached into his land, being LR No. KANYADA/KOTIENO/KATUMA 1415 and built thereon. After hearing the matter to its conclusion, the

Respondent stated that court delivered a ruling in his favor on 24th November 2022, which judgment is annexed to the Respondent's Affidavit.

- 9.** The Respondent further deponed that the Applicant herein, being dissatisfied with the court's finding, appealed the decision of the lower court in this court (Homa-Bay ELC Appeal Case No. E004 of 2023). This court delivered its judgment on the said appeal on 15th May 2024.
- 10.** The Respondent deponed that upon the delivery of this latter judgment he made an application dated 24th December 2024 at the lower court seeking to evict the applicant from the suit property. He further stated that the application together with the hearing notice were served upon the applicant's counsel who confirmed the said service.
- 11.** On the issue of demarcation of the boundary which was raised by the applicant, the Respondent maintained that the same was litigated in the lower court and contended that the applicant was attempting to reopen the case by arguing the same issue as he did in Homa-Bay Appeal No. E004 of 2023 which the court determined in favour of the respondent.
- 12.** The Respondent clarified that the issue of demarcation had had already been determined and what he sought to do was to enforce the findings of the court boundary as well as the eviction of the applicant.
- 13.** Finally, the Respondent argued that the applicant should not be allowed to prolong the execution of the

judgment of the court, the same having been rendered in the year 2022. He deponed that the argument that the applicant stands to suffer substantial loss by losing his matrimonial home during eviction does not stand as the applicant has encroached into the respondent's property and should be evicted therefrom.

Submissions

- 14.** The Applicant filed his submissions dated 25th June 2025. He framed two issues for determination, being: Whether the Appellant/Applicant's case has met the threshold for grant of stay of execution pending Appeal and whether the Applicant is entitled to the reliefs he is seeking.
- 15.** On whether the application meets the threshold for grant of stay of execution orders, the applicant relied on the provisions of Order 46 rule 6 (1) and (2) of the Civil Procedure Rules. Accordingly, he argued that an applicant needs to demonstrate that he would suffer substantial loss if the orders sought are not granted; that he has moved the court timeously and that such security as ordered by court has been given by the applicant for the due performance of the order.
- 16.** As to whether he would suffer substantial loss should the orders he seeks from this court not granted, the applicant argued that allowing the respondent to carry on with the eviction would result in the destruction of his matrimonial home. He submitted that he stands to suffer

loss despite the boundary in question remaining unascertained by the Land Registrar to date. The applicant relied on several decisions including **John Nginyi Muchiri - vs- John Kamunya Mutahi [2005] eKLR** and **Patricia Achieng Onyango & Another (suing as the legal rep of Dismas Juma Onyango Kamb) -vs- Meridien Bieo Bank Limited (in liquidation) (2017) eKLR** to support his argument on substantial loss.

17. As to whether the application was brought timeously, the Applicant submitted that, while the ruling which is the subject of the instant appeal was delivered on 3rd April 2024, he filed his memorandum of appeal on 2nd May 2025 and subsequently filed the instant application on 8th May 2025. On this basis, the argued that the application was filed without delay.
18. On the issue of whether the reliefs sought should be granted, the Applicant submitted that he had established the legal threshold for grant of stay orders as mandated by law. He further submitted that the Respondent has not opposed his application as respondent's replying affidavit seems to argue the main appeal as opposed to the instant interlocutory application.
19. The Respondent filed his written submissions dated 1st July 2025. He framed four issues for determination, namely: whether the applicant will suffer substantial loss; whether the applicant has proved his case; whether the applicant's

application is merited; and whether the applicant is entitled to the orders sought.

20. As to whether the applicant would suffer substantial loss if the orders sought are not granted, the respondent submitted that no substantial loss would be borne by the applicant. He submitted that the applicant did not provide evidence to prove that he would suffer substantial loss owing the execution of the court's judgment. He relied on the provisions of Order 42 Rule 6 of the Civil Procedure Rules as well as **Joseph Gachie t/a Joska Metal Works v Simon Ndeti Muema [2012] eKLR** to buttress his submissions. The respondent also placed reliance on **Machira t/a Machira & Company Advocates v Aast African Standard (no 2) eKLR 63** to advance the argument that courts should endeavor to do justice to the parties as well as prevent abuse of the court process.

21. On whether the applicant had proved his case and whether the application was merited, the respondent submitted that applicant had failed to provide evidence on the substantial loss he would suffer and merely seeks the stay orders so as to continue enjoying his unlawful occupation of the respondent's property. As such, the Respondent argued that the application is not merited.

22. Finally, on the issue of whether the applicant should be granted the reliefs sought, the Respondent submitted that

the Applicant has not demonstrated to this court why the orders sought should be granted.

Issues, Analysis and Determination

23. The main issue for determination in the instant application is whether the application has satisfied the conditions for grant of stay of execution pending appeal.

24. **Order 42 Rule 6 (2)** of the **Civil Procedure Rules 2010** provides for the conditions to be established by the court before grant of orders of stay of execution pending appeal in the following terms:

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.*

25. It is now established that a party seeking to be granted stay of execution pending appeal must establish that he has an arguable appeal besides demonstrating that the appeal would be rendered nugatory should the orders sought not be granted by the court. In **Munya v Kithinji & 2 others**

(application 5 of 2014) [2014] KESC 30 (KLR), the supreme court held that:

87. The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

(i) the appeal or intended appeal is arguable and not frivolous; and that

(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

88. These principles continue to hold sway not only at the lower Courts, ` but in this Court as well...''

26. In *Chris Munga Bichage v Richard Nyagaka Tongi & 2 others, Civil application no. 39 of 2013*, the Court of Appeal determined that:

The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is

arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.

27. In determining whether the Applicant has met the conditions for the grant of orders of stay of execution pending appeal, I will be guided by the aforestated conditions, namely: whether the applicant has an arguable appeal, whether the appeal will be rendered nugatory if the orders are not granted and whether the applicant will suffer substantial loss should the orders not be granted.
28. An arguable appeal, as was noted by the Court of Appeal in **Andrew Kiplagat Chemaringo v Paul Kipkporir Kibet, Eldoret Civil Appeal no. 91 of 2017**, does not necessarily mean an appeal that will succeed.
29. I have carefully considered the application, the draft memorandum of appeal, the response as well as the submissions filed by the parties. It is my considered view that the Application does not raise an arguable appeal. The record before me does not show that the response was filed before the determination was given, and even if it was, how it would have changed the fact that the issue of eviction had already been litigated upon and concluded as between the parties. Having found so, it would be pointless for this

court to proceed to analyze whether the remaining conditions necessary for grant of stay of execution pending appeal have been met.

30. This application therefore fails. It is dismissed with costs to the Respondent.

31. Further, the Appellant is directed to file both the Record of Appeal and the order appealed from within then next fourteen (14) days and serve. The appeal shall be placed before this court on 10th December 2025 for consideration on whether to be admitted or not and acted on in terms of Order 42 Rules 2 and 11 of the Civil Procedure Rules, 2010.

32. Orders accordingly.

Ruling dated, signed and delivered virtually via the Teams Platform this 18th Day of November 2025.

Hon. Dr. iur Nyagaka,

Judge

In the presence of,

Ms. Muia Advocate for the Appellant.

Mr. Owino Advocate for the Respondent