

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT**  
**KAKAMEGA**  
**ELC CASE NO. 178 OF 2016**

**BONFACE ONYANGO.....PLAINTIFF**

**VERSUS**

**WANJALA MAKANYANGA.....1<sup>ST</sup>**

**DEFENDANT**

**JOSEPH SIMIYU.....2<sup>ND</sup>**

**DEFENDANT**

**RULING**

**Introduction**

1. Before court is a Notice of motion dated 21<sup>st</sup> August 2025 filed by the 1<sup>st</sup> defendant seeking orders that there be stay of execution of the judgment delivered on 27<sup>th</sup> March 2025 pending the hearing and determination of Kisumu Court of Appeal Civil Appeal No. E172 of 2025.
2. The application is supported by the annexed affidavit of the applicant. The applicant's case is that he was dissatisfied with the judgment herein whereof he filed an appeal before the Court of Appeal at Kisumu. That his

appeal has high chances of success. That if execution proceeds, he will be evicted from the suit property and will suffer substantial loss. That the court granted 60 days stay period which has lapsed. That proceedings and judgment were not ready until 23<sup>rd</sup> June 2025 and that the applicants are ready to comply with and conditions that may be imposed. He attached a letter seeking proceedings, receipt and certificate of delay.

3. The application was opposed. Boniface Onyango, the plaintiff /respondent swore a replying affidavit dated 28<sup>th</sup> October 2025 opposing the application. He stated that the applicant is in unlawful occupation of the suit property as judgment was delivered on 27<sup>th</sup> March 2025. That this application was brought late in the day as the applicant had 120 days stay of execution. That 120 days lapsed on 25<sup>th</sup> July 2025. That the application is an afterthought and the applicant has not shown the court the substantial loss he will suffer.

4. The respondent also filed a further affidavit in which he stated that the applicant had sold part of the suit

property to a 3<sup>rd</sup> party and was only keen to continue enjoying profits from the suit property.

5. Parties filed submissions in support of their positions. On record are submissions filed by the applicant and respondent both dated 31<sup>st</sup> October 2025; both of which the court has duly considered.

**Analysis and determination.**

6. The court has carefully considered the application, response thereto and parties' rival submissions. The sole issue for the court's determination is whether the applicant has met the threshold for grant of orders of stay of execution pending appeal.

7. Order 42 Rule 6 of the Civil Procedure Rules provides for the jurisdiction of the court to grant orders of stay of execution pending appeal as follows;

**Stay in case of appeal [Order 42, rule 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 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.**

8. Essentially, imminent execution cannot alone cannot form the basis for grant of stay of execution pending appeal, as execution is a lawful process pursuant to grant of an order, judgment or decree by a court. Hence, to succeed in seeking stay pending appeal, an applicant must show imminent substantial loss; that they have sought stay without unreasonable delay and that they are willing to provide security for the due performance of the decree that may issue against them.

9. In the case of **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR**, the court stated 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 CPR. 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo Because such loss would render the appeal nugatory.”**

10. Regarding substantial loss, the court discussed the element of substantial loss in the case of **Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation) [2004] 2 EA 331** as follows;

**“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”**

11. In the instant matter, the applicant stated that if stay is not granted, he will suffer substantial loss as he will be evicted from the suit property. This court in its judgment stated that the applicant herein should be evicted. All that he is saying is that execution will cause

him substantial loss. That loss has neither been expounded nor demonstrated. In addition, the judgment was delivered on 27<sup>th</sup> March 2025 granting the applicant 120 days to vacate. He failed to comply or seek stay within the said period. The excuse that the judgment was unavailable till June 2025 is not plausible as Judgment herein was posted on the CTS on 28<sup>th</sup> March 2025 at 1550 Hours. Therefore, the delay in seeking stay is inordinate with no plausible explanation.

12. In the premises, I find no merit in the application dated 21<sup>st</sup> August 2025, which I hereby dismiss with costs to the respondents.

13. It is so ordered

**DATED, SIGNED AND DELIVERED AT KAKAMEGA  
IN OPEN COURT/VIRTUALLY THROUGH  
MICROSOFT TEAMS VIDEO CONFERENCING  
PLATFORM THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2025**

**A. NYUKURI  
JUDGE**

**In the presence of;**

Ms Adeya holding brief for Mr. Amasakha for the 2<sup>nd</sup>  
defendant

1<sup>st</sup> defendant present

Mr. Mutai holding brief for Mr. Oduor for the plaintiff

Court Assistant: Delphine