

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ELC APPEAL NO. E003 OF 2025

REDEMPTA AUMA OMIDO

APPELLANT/APPLICANT

= VERSUS =

SOLOMON WANDERA

RESPONDENT

(Being an appeal from the Judgment delivered by **HON SYMPHIE N. MAKILA PRINCIPAL MAGISTRATE** on **13th February 2025** in **BUSIA CMC ELC CASE NO E031 of 2023**)

R U L I N G

1. **REDEMPTA AUMA OMIDO** (the Applicant) citing **Sections 1A, 1B and 3A** of the **Civil Procedure Act** and **Order 42 Rule 6** of the **Civil Procedure Rules** seeks against **SOLOMON WANDERA** (the Respondent) the following remedies vide her Notice of Motion dated 20th March 2025:

1) Spent

2) Spent

3) Spent

4) The Court be pleased to grant a stay of execution of BUSIA MISC E31 of 2023 pending the hearing and determination of the appeal against the judgment delivered by HON SYMPHIE N. MAKILA PRINCIPAL MAGISTRATE on 13th February 2025.

5) The costs of this application be provided for.

6) Any other orders that meet the end of justice.

2. The Motion is premised on the grounds set out therein and supported by the Applicant's affidavit also dated 20th March 2025. The gravamen of the Motion is that vide a judgment delivered on 13th February 2025, the trial magistrate awarded the land parcel **NO BUKHGAYO/BUGENGI/5159** (the suit land) to the Respondent. That the said judgment is littered with irregularities and she has filed an appeal. That she has a crop of cassava on the suit land through which an access road passes to her home. The Respondent is likely to execute the decree anytime and close the access road.

That her appeal has reasonable chances of success and will be rendered nugatory if the decree is executed.

3. Annexed to the Motion are the following documents:

- 1) Proceedings in **BUSIA ELC CASE NO E031** of **2023**.
- 2) Memorandum of Appeal dated 4th February **2025**.
- 3) Photograph of a crop of cassava and trees.

I should add at this point that the proceedings did not include a copy of the impugned judgement.

4. The Motion is opposed and in the replying affidavit dated 24th April 2025, the Respondent has deposed, inter alia, that the Motion is an abuse of this Court's process and brought in bad faith. That the appeal has no chances of success and the applicant has never used the suit land and neither is there an access road thereon. That the Applicant will not suffer any irreparable harm and has not even made any undertaking for security. The Applicant obtained the suit land through transmission after secretly and unprocedurally removing the caution thereon and has not demonstrated what irreparable loss she will suffer. The Motion should be dismissed.

5. The Court directed that the motion be canvassed by way of written submissions. The same were filed both by **MR OUMA** instructed by the firm of **B. M. OUMA & COMPANY ADVOCATES** for the Applicant and by **MR OTIENO** instructed by the firm of **MASIGA, OTIENO & ASSOCIATES ADVOCATES** for the Respondent.

6. I have considered the Motion, the rival affidavits and the submissions by counsel.

7. **Order 42 Rule 6(2) of Civil Procedure Rules** provides for the circumstances when an order for stay of execution may be granted. It provides:

(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.”

The judgment being appealed was delivered on 13th February 2025 and this Motion was filed on 20th March 2025 just about a month later. I do not consider that delay to be unreasonable in the circumstances.

8. Substantial loss, as was held in the case of **KENYA SHELL -V- KIBIRU & ANOTHER 1986 KLR 410**, as per **PLATT Ag. JA** (as he then was):

“... is the cornerstone of both jurisdiction for granting a stay. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.”

In the same case, **GACHUHI Ag JA** (as he then was) added thus:

“It is not sufficient by merely stating that the sum of Kshs.20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order of stay is not granted. By granting a stay would mean that status quo should remain as it

were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment. The applicant has not given to Court sufficient materials to enable it to exercise its discretion in granting the order of stay.”

In **MACHIRA t/a MACHIRA & COMPANY ADVOCATES - V- EAST AFRICAN STANDARD 2002 KEHC 1167 KLR, KULOBA J** addressed the issue of substantial loss as follows:

“If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the Court, looking at what will happen unless a suspension of stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an

awarded decree or order, before disposal of the applicant's business (e.g. appeal or intended appeal)."

9. What then has the Applicant put forward as the substantial loss she is likely to suffer or to render the appeal nugatory should the motion be declined? In paragraphs 5 and 6 of his supporting affidavit, he has deposed thus:

5: "That I have grown up cassava plantation on the suit land and is likely to be attacked by the Respondent. Attached hereto and marked RAO-2 is a copy of the photographs or cassava plantation."

6: "That I also have a road of access to my home through L.R BUKHAYO/BUGENGI/5159 which is likely to be closed by the Respondent."

The acreage or value of the cassava which the Applicant fears is likely to be destroyed has not been provided. It has also not been suggested that the Respondent is so impecunious as to be unable to compensate him for the loss of the cassava should the appeal succeed. Further, I have looked at the photographs annexed to the Motion

and while they depict a crop of cassava, I did not see any house or a road of access leading to the house and which the Applicant fears the Respondent will close. That can only confirm that infact there is no such road of access on the suit land. Indeed, in paragraph 7 of the replying affidavit, the Respondent has averred thus:

7: “That the Applicant has never used the land and there is no access road on the suit land and therefore there is no loss likely to be occasioned on the part of the applicant.”

That averment was not rebutted by any supplementary affidavit and so this Court must accept it as true as even the photographs availed by the Applicant support the Respondent’s case rather than the Applicant’s case.

10. The up-shot of all the above is that having considered the Notice of Motion dated 20th March 2025, I find that it is devoid of merit. It is accordingly dismissed with costs.

BOAZ N. OLAO

JUDGE

25TH NOVEMBER 2025

**Ruling dated, signed and delivered by way of electronic
mail on this 25th day of November 2025 with notice to
the parties.**

BOAZ N. OLAO

JUDGE

25TH NOVEMBER 2025

ORIGINAL