

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ELC APPEAL NO E007 OF 2025

WILLIAM OLOLO.

.....**APPELLANT/APPLICANT**

-VERSUS-

FRANCIS EPHRAIM ONYANGO.

.....**RESPONDENT**

RULING

1. The appellant has filed a Notice of Motion application dated 7/03/2025 seeking the following verbatim orders; -

1) SPENT

2) THAT this Honorable court be pleased to grant an order of stay of execution of judgment and decree issued on 26.02.2025 in Siaya CM.ELC 63/2019 pending the hearing and determination of this application inter partes.

3) THAT this Honorable court be pleased to grant a stay of execution of order pending the hearing and determination of the Appeal.

4) THAT a date for inter-partes hearing of this application be given.

5) THAT the cost of the application be provided for.

2.The application is premised on the grounds on its face and the depositions in the Supporting Affidavit of William Ololo, the appellant. The applicant avers that following the delivery of Judgment on 26/02/2025, he instructed the firm of NANCY

APONDI & COMPANY to file an appeal against the judgment. A memorandum of appeal has been filed in this court and a copy is attached.

3. That the said advocate has requested the Court for typed copies of the proceedings and the Judgment but is yet to be furnished with the same. The copy of letter requesting for proceedings is attached. The deponent states he is apprehensive that in the absence of orders of stay of execution, the Respondent may proceed to execute hence subjecting him to irreparable and/or substantial loss, to wit, loss of his parcel of land.
4. It is also deponed that application has been brought without unreasonable delay. That the applicant is willing to abide by any condition that the court may deem fit. He also believes that the Respondent will not be prejudiced in the event that this application is allowed and that the appeal has high chances of success.
5. The application is opposed vide the replying affidavit of Francis Ephraim Onyango the Respondent. Rehashing the events of March 2019 that necessitated the filing of the suit in the trial court as well as the reliefs sought therein.
6. Rehashing the various proceedings and orders of the court the appellant states that while it is true that his land and the Appellant's land had discrepancy in size both on ground and in the land register, the dispute before the trial court was not a boundary dispute but rather invasion of his land by the Appellant as there was no common boundary between his

land and the Appellant's land. That the Appellant in his application has failed to demonstrate the link between the alleged error in the judgement of trial court and his grounds of appeal thereto to warrant the exercise of discretion in his favour. Further he has failed to demonstrate how he is going to be prejudiced by the implementation of the judgement of the court which only touches on the applicants land and neighbouring land title No.1781.

7. It is further averred the Respondent has also failed to demonstrate how he is going to be prejudiced by the amendment of the land register to reflect the correct acreage of my land on the ground and in title to warrant the issuance of orders sought in his application.
8. It is averred that the application does not meet the mandatory criteria set down in the celebrated case of **Giella Versus Cassman Brown (1973) EA 358** since the Appellant has not established prima facie case and also his failure to demonstrates irreparable injury if a temporary injunction is not granted. That in contrast the respondent will suffer immense loss and damage if orders sought by the Appellant are granted as this will amount to granting the Appellant a licence to illegally remain and/or occupy the respondent's land. The court is urged to dismiss the application with costs.

Submissions

9. The application was heard by way of written submissions. Both parties complied by filing and exchanging submissions.

The court has paid due consideration to the submissions. The applicants' submissions are dated 22/04/2025 and the respondents 12/06/2025.

ANALYSIS AND DETERMINATION

10. Having considered the foregoing, the main issue for determination is whether the orders sought in the application dated 7/03/2025 should be granted by this court.

11. The application is made under the provisions of sections 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules.

12 Order 42 rule 6(2) of the Civil Procedure Rules provides:

“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.

13. Arising from the above provisions of the law, three requirements can be distilled firstly that substantial loss may result to the applicant unless the order is made,

secondly that the application has been made without unreasonable delay, and thirdly such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See **Butt Vs Rent Restriction Tribunal [1982] KLR 417** also cited by the applicant.

14. On whether the application has been made without unreasonable delay both counsel for the applicant and the respondent agree that there is no undue delay in bringing the instant application. Moreover the judgement subject of this Appeal was delivered on 26th February 2025 and the application herein was lodged on 7th March 2025.
15. The main ground to be established is whether substantial loss may result to the applicant unless stay of execution is granted. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma vs Abuoga (1988) KLR 645** where their Lordships stated that “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
16. The applicant referred the court to the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, where the court elucidated on substantial loss 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, it 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...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.”

17. It is submitted on behalf of the applicant that the respondent has since extracted the decree and may execute anytime. Further if the execution takes place,

then the substance of this appeal will have been interfered with as the appellant will have been evicted rendering the appeal nugatory. That the stay is necessary in order to preserve the substratum of the applicants claim in his appeal. He deponed that he would lose his land.

18. The court has been led to several judicial decisions where Courts have elucidated how an applicant must discharge the burden of proof on the requirement to demonstrate they will suffer substantial loss;-

19. In **Machira t/a Machira & Co. Advocates vs. East African Standard (No. 2) (2002) KLR 63**, the court held that;

“In this kind of application for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”

20. In the case **Samvir Trustee Limited vs Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** Warsame J (as he then was) court observed that;

“...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions

of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...'

21. In **Kenya Shell Ltd Limited Vs Benjamin Karuga Kibiru & Ruth Wairimu Karuga Civil Application No. NAI 97 of 1986** the Court of Appeal emphasised that substantial loss in its various forms is the cornerstone of jurisdiction to granting a stay.
22. My review of the decree dated 27/2/2025 arising from the judgement delivered by the trial court and whose stay is the subject of this application reveals the following orders were decreed by consent of the parties

1) THAT since the acreage of the plaintiffs land on the ground and on the title does not tally, the land registrar is hereby ordered to amend the entries in the said title to reflect the correct acreage on the map and in the title of the plaintiff

2) THAT access road between the plaintiff land, Central Alego/Hono/1723 and parcel No. Siaya/Hono/1988 be established and beacons planted clearly

3) THAT an order of permanent injunction be and is hereby issued restraining the defendant from in any way whatsoever interfering with the plaintiffs possession and

***or ownership of the suit property namely
Central Alego/Hono/1723***

4) Cost of the suit is awarded to the plaintiff

23. From the above I would not be in the least be worried that there would be substantial loss to be suffered if the orders in 1 and 2 above are implemented because these deal with records. Even the access road would simply be marked. For me these are orders if implemented can easily be reversible should the appeal herein succeed. Nothing will be rendered nugatory.
24. Moreover, applying the above case law cited, I have not been shown in what manner execution of the decree would cause a state of affairs that would amount to substantial loss to the applicant. All the applicant depones in his supporting affidavit is that *'the respondent may proceed to execute hence subjecting me to irreparable and or substantial loss, to wit loss of my parcel'*. I respectfully agree with the respondents that the applicant has not supplied any details or particulars or led any evidence to demonstrate the substantial loss he will suffer if the application is not granted.
25. The application dated 7/03/2025 lacks merit and is hereby dismissed. Costs shall abide the outcome of the appeal.

It is so ordered.

Dated, signed and delivered at Siaya this 20th day of November 2025

Judge

HON. A. E. DENA

JUDGE

20/11/2025

**Ruling delivered virtually through Microsoft Teams
Video Conferencing Platform in the Presence of:**

Mr. Oyugi Holding Brief for Owiti for the applicant

Mr. Tarus Holding Brief for Kamwara for the respondent

Court assistant: Ishmael Orwa