



Onyando & another v Malala & another (Environment and Land Appeal E073 of 2025) [2025] KEELC 8068 (KLR) (20 November 2025) (Ruling)

Neutral citation: [2025] KEELC 8068 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E073 OF 2025**

**E ASATI, J
NOVEMBER 20, 2025**

BETWEEN

MARIA AUMA ONYANDO 1ST APPELLANT

FRANCIS OTIENO ONYANDO 2ND APPELLANT

AND

LEOTINE MALALA 1ST RESPONDENT

MILICENT MALALA 2ND RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion application dated 8th August, 2025 expressed to be brought pursuant to the provisions of order 42 Rule 6(6) of the Civil Procedure Rules, sections 13, 14, 18 and 19 of the [Environment and Land Court Act](#), 2011 and articles 40 and 48 of [the Constitution](#).

The application seeks for orders that;

- i. pending hearing and determination of this appeal, there be a stay of execution of the judgement in Tamu MC ELC Case No.2 of 2017,
- ii. that pending hearing and determination of the appeal, there be injunction against the Respondents and their agents, servants and hirelings from having any dealing with plot numbers Kisumu/Koru/680 and 280.
- iii. the orders herein be served upon the area OCS and DCIO respectively and that
- iv. the costs of the application be borne by the Respondents.

2. The grounds upon which the application was brought are that the applicants' application was dismissed in a ruling delivered on 7th August, 2025. That the Applicants are not satisfied by the ruling and have thus appealed. That the Respondents will initiate execution of the judgement to have vacant



possession of the plots. That the Respondents have recovered Kshs.550,000/- as per the Land Disputes Award and are therefore not entitled to have the plots at the same time. That it is in the interest of justice that the application be allowed and that the Respondents will not suffer any prejudice if the application is allowed. That appeal is a constitutional right.

3. The application was supported by the averments in the Supporting Affidavit and the annexures thereto and the Further Affidavit.
4. The Respondents filed a Replying Affidavit sworn by the 1st Respondent on 19th August, 2025. The Respondents' case is that the trial court dismissed the Appellants' application for joinder for want of proper and justified reasons. That the Applicants herein are being overly litigious and are abusing the court process with a view to prolonging their inevitable eviction from the suit land. The Respondents also filed a Further Affidavit sworn on 14th October, 2025.

The application was heard by way of written submissions.

5. Written submissions dated 2nd October, 2025 were filed on behalf of the Applicants by the firm of Odhiambo S.E. & Company Advocates. Counsel submitted that the appeal will become nugatory in the event the court does not allow the application. That the Appellants will be evicted should the court not stay execution of the trial Magistrate's judgement which will in effect render the appeal nugatory because the Respondents will have taken possession of the suit property and likely disposed of the same. That the fact that the Respondents have recovered more than Kshs.550,000/- pursuant to the Land Dispute Tribunal Award and are at the same time in possession of the title deeds and want to evict the Appellants is a matter to be determined in the trial.
6. Counsel submitted further that the appeal has merit. That the balance of convenience tilts in favour of the Appellants because the Appellants and their family members who are in occupation use and possession of the suit land will be highly disadvantaged and will suffer irreparable loss and damage if the application is not allowed.

Counsel urged the court to allow the application.

7. On behalf of the Respondents, written submissions dated 14th October, 2025 were filed by the firm of Ben Aduol Nyanga & Company Advocates. Counsel submitted that the first ground that the Applicant needs to demonstrate is that substantial loss may result to the Applicant unless the order of stay is granted. That the bare allegation and disposition by the Applicant that there is a likelihood of execution of the judgement does not amount to proof of substantial loss. That the Applicants have not shown that they are willing to deposit such security as the court orders for the due performance of such decree or order as may ultimately be binding on the Applicant.
8. That the Applicants have not met the conditions set out in law for grant of an order of stay of execution.
9. On the prayers for an order of injunction, Counsel submitted that the legal right over the suit land lies with the Respondents and not the Applicants. That the Applicants have not demonstrated a prima facie case with a probability of success or irreparable injury that may be occasioned to them.

Counsel urged the court to dismiss the application with costs.

10. The grounds for grant of orders of stay of execution of decree/judgement are provided for in Order 42 Rule 6(2) of the Civil Procedure Rules 2010 as follows:

“No order for stay of execution may 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.”

- 11 In the present case, the Applicants seek for an order of stay of execution of the judgement of the trial court pending hearing and determination of the appeal.
12. To demonstrate the existence of the appeal, the Applicants attached to the Supporting Affidavit a copy of Memorandum of Appeal dated 8th August, 2025. Perusal of the Memorandum of Appeal shows that the appeal is against the ruling dated 7th August, 2025 delivered by the trial court. There is no appeal against the judgement of the trial court.
13. From the Memorandum of Appeal, it is clear that the order of the trial court appealed against was a dismissal of the Applicants’ application. The Applicants stated in paragraphs 2 and 3 of the Supporting Affidavit that they had filed an application to be joined as Interested Parties/Defendants in the suit before the trial court. That the trial court vide the ruling dated 7th August, 2025 dismissed the application.
14. The dismissal order is a negative order which is not capable of execution. In *David Kipruto Chingi & Another vs Director of Public Prosecutions & 2 Others* [2016] eKLR where the Court observed that an application seeking stay of execution of a negative order was bound to fail.
15. The Applicants have not demonstrated the grounds for grant of an order of stay of execution of the ruling pending appeal namely that substantial loss will result to them if the order sought is not granted or that the application was made without unreasonable delay or that they are willing to give such security as the court shall order for the due performance of such decree or order as may ultimately be binding on them.
16. As regards the prayer for temporary injunction, similarly the grounds for grant of the same as laid down in the case of *Giella vs Cassman Brown Co. Ltd* (1973) 358 namely; that the Applicant must establish a prima facie case with a probability of success, an interlocutory injunction will not normally be granted unless the Applicant would suffer irreparable injury which would not adequately be compensated in damages and that when the court is in doubt, it will decide the application on a balance of convenience have not been demonstrated.
17. Execution of the judgement cannot be stayed by way of an order of temporary injunction. A temporary injunction as provided for under Order 40 Rule 1 Civil Procedure Rules is intended to prevent wastage, damage or alienation or the suit property until the disposal of the suit or until further court orders.
18. Although the law provides for grant of interlocutory injunction pending appeal, in Order 42 Rule 6(6) Civil Procedure Rules, the grounds for grant thereof must be demonstrated. It is not intended to stay execution of the judgement as any actions in execution of the judgement are not unlawful actions as envisaged in Order 40 Rule 1 and Order 42 Rule 6(6) Civil Procedure Rules so as to warrant an order of interlocutory injunction.
19. The result is that the court finds that the application lacks merit. It is hereby dismissed. Costs to the Respondents.
Orders accordingly.



RULING READ AND SIGNED AT KISUMU AND DELIVERED VIRTUALLY THIS 20TH DAY OF NOVEMBER, 2025.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Odhiambo for the Applicants.

Nyanga for the Respondents.

