

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
SIAYA LAW COURTS
ELCA NO. E001 OF 2025

ALICE JORIM

OGODO.....APPELLANT/APPLICANT

VERSUS

ROBERT AYOO OKOTH.....1ST

RESPONDENT

MOSES OTONO OKOTH2ND

RESPONDENT

DAVID OTHIGO OKOTH.3RD

RESPONDENT

CHRISPINE OMONDI OKOTH4TH

RESPONDENT

RULING

1. The applicant brought the present application seeking the following reliefs;-

1) SPENT

2) SPENT

3) THAT this Honourable Court be pleased to stay execution of Judgment and Decree issued on the 17th December, 2024 in Bondo ELC Case No. E046 of 2023

and all consequential orders thereto pending the hearing and determination of this appeal.

4) THAT this Honourable Court be pleased to grant a stay of proceedings pursuant to the Judgment and Decree issued on the 17th December, 2024 in Bondo ELC Case No. E046 of 2023 pending the hearing and determination of the appeal and or on such other terms as the court may deem fit.

5) That the costs of this application does abide the outcome of the appeal herein.

2. The application is premised on the grounds set out on its face and supported by the depositions in the Replying Affidavit sworn by Alice Jorim Ogodo.
3. The applicant depones states that she is aggrieved by the judgement delivered on the 17th December, 2024 in Bondo, Magistrate's Court, in ELC Case No. E046 of 2023 where the trial court made an eviction order against her and the family from land parcel No. East Yimbo/Nyamonye/1260 within 90 days. A copy of the judgement is annexed.
4. That she instructed her advocates on record to challenge the said judgment and a Memorandum of Appeal has been accordingly filed a copy is annexed. That the counsel has since applied for the certified copies of the proceedings and the judgment as evidenced by correspondence attached.

5. The deponent states that the land parcel No. East Yimbo/ Nyamonye/ 1260 forms part of her homestead where she has lived together with her family since the year 1978. That the suit parcel forms part of the farm wherein her family eke a livelihood and they are now at the verge of being rendered landless/homeless should the Respondents proceed to evict her.
6. The applicant states that the application has been brought without delay and in good faith. That should the orders sought herein be declined, the appeal will be rendered nugatory and a mere academic exercise. Further that it is in the interest of justice and fairness that the orders sought be granted. That the Defendant/ Respondent will not be prejudiced in a manner that cannot be compensated by costs in the event this application is allowed.

Replying Affidavits

7. The application is opposed by the replying affidavit of the respondent MOSES OTONO OKOTH. He avers that the gist of the matter is that the Lower Court heard the parties herein and ordered the eviction of the Appellant and a declaration that the Respondents were the rightful owner of the suit property. That the lower court also exercised its discretionary power to issue ninety (90) days' stay before eviction could issue which was well within its powers. The respondent asserts that the Applicant thus intends to protract the matter unnecessarily by preventing the

Respondents from recovering their property and thereby denying the successful parties from enjoying the fruits of the judgment delivered on 17th December, 2024.

8. The respondent also states on advice of counsel that the appeal herein stands no chance of success as it is filed with ill intention to obstruct and delay the course of justice and with the intent for the applicants to continue to illegally occupying the suit parcel of land. That the Application herein is scandalous and frivolous as it does not demonstrate that there is an arguable appeal with high chances of success nor satisfies the pre-requisites set out in Order 42 Rule 6 of the Civil Procedure Rules to enable grant of stay of proceedings.
9. It is averred that should the orders sought be granted, the Respondents will continue to be prejudiced by the applicant's occupation of the suit property as they are unable to make use of the suit property as the rightful registered owners and enjoy vacant & quiet possession of the same. That the applicants are not deserving of the court's discretion in their favor. That there must be an end to litigation. That however should the court be minded to allow this Application, the same should be on condition of payment of reasonable security.

SUBMISSIONS

10. The application was heard by way of written submissions. The applicants submissions are dated 10/04/2025 and the respondents 27/06/2025.

ANALYSIS AND DETERMINATION

11. The court has considered the application, affidavits in support and opposition of the same together with the party's submissions. The issue for determination is whether the applicant has met the threshold for grant of the orders sought.
12. The main order sought is the stay of execution of the decree of the trial court herein pending the determination of the appeal. The application has been brought under the provisions of sections 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules.
13. Order 42 Rule 6 of the Civil Procedure Rules, provides as follows; -

“(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.

14. This is basically an application for stay of execution and not stay of proceedings. The two must not be confused. The powers granted to the court are discretionary but the discretion must be guided.

15. From the above provisions of law, the principles guiding the grant of stay execution pending appeal can be summed up as;

1. The court is satisfied that substantial loss may result in the absence of the orders

2. The application has been made without unreasonable delay; and

3. Such security as the court orders for the due performance of such decree or order has been

given by the Applicant **See Antoine Ndiaye v African Virtual University [2015] eKLR.**

16. Substantial loss was explained in the case of **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR,** also cited by the respondents that:

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“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.”

17. The applicant states that the result of the judgement of the trial court will lead to her eviction from the suit property wherein she has lived with her kin for a very long time and also eking their living. The respondent submit that this does not prove substantial loss because the applicant has

been in illegal occupation of the land as rightly held by the trial court. It is stated that execution is not a ground for granting stay.

18. The court agrees with the argument that execution is a lawful process. I have also considered the judgement of the trial court and the findings as explained above. At this point the court is not supposed to look at the merits of the appeal and whether or not the trial court was right in its findings. The court must consider the import of the judgement.
19. The action in the lower court was for adverse possession meaning the claimant was claiming under long term occupation. The trial court noted that it was not in dispute that the defendant who is the appellant in the present proceedings was occupying the suit land. This corroborates the applicants deposition that she lives in the suit property.
20. The trial court proceeded to issue an order of eviction within 90 days. Indeed if eviction occurs it will render the applicant homeless in view of the occupation which had even been confirmed by the trial court except for the reasons rendered. This in my view cannot be compensable by way of costs. It does not matter that the applicant had been given 90 days to vacate. Moreover, if the eviction proceeds the appeal shall be rendered nugatory were the judgement of the trial court to be overturned and it would defeat the very essence of stay of execution.

21. As regards the above the court is guided by the Court of Appeal in **RWW vs. EKW (2019) eKLR** where it was stated thus; -

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

22. Applying further the above I must look at the prejudice to be suffered by the respondents. Their main contention is the delay in enjoying the fruits of the judgement of the trial court and the applicants continued illegal occupation. I have already pointed the illegality or otherwise of the appellants occupation has to await the determination of the same on merit. This is not a prejudice that cannot be compensated by way of costs.

23. For the foregoing reason and substantial loss being the main parameter for consideration I would proceed to grant the prayer for stay on this basis alone. 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.
24. It has been urged that the application has been brought with delay the applicant having waited for the 90 days to elapse to bring the application. I agree with the respondents submission that the delay has not been satisfactorily explained. I have already noted that as long there is a demonstration that execution will cause substantial loss and which is the cornerstone of the jurisdiction granted upon this court, then I would look at where the lesser risk of injustice would lie.
25. On security the applicant has not offered security. However, based on the provisions of Order 46 Rule 6 conditions as to security to be offered are set by the court to which the application is made. I'm also aware that the objective of security is not to disadvantage the person who is seeking the orders of stay. The decree herein is also not a monetary decree. I would therefore not impose any terms as to security.
26. The upshot of the foregoing is that the application dated 11/3/2025 is allowed in the following terms

- 1) THAT there be stay execution of Judgment and Decree issued on the 17th December, 2024 in Bondo ELC Case No. E046 of 2023 and all consequential orders thereto pending the hearing and determination of this appeal.**
- 2) THAT costs of this application be granted to the respondent.**
- 3) Orders accordingly**

HON. JUSTICE A. E. DENA

JUDGE

2/12/2025

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

Ms. Nduva Holding Brief for Ms. Mawinda for the applicant

No Appearance for Respondent

Court assistant: Ishmael Orwa