

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ELC (LA) E036 OF 2025

JAMES OLE KIU.....1ST

APPLICANT

LILIAN SENEYIO KONCHORY.....2ND

APPLICANT

VERSUS

JOSEPH TABULA KONCHORY.....

.....RESPONDENT

RULING

1. The Notice of Motion Application dated 21st August 2025 subject of this ruling, seeks the substantive order of stay of execution of the judgment delivered on 31st July 2025 in ELC case No. E081/2024 pending determination of the Appeal herein.
2. In support of the applications, the following grounds were penned *interalia* that;
 - (i) That vide a judgement delivered on 31st July 2025, the Appellants/Applicants were the unsuccessful litigants and have lodge an appeal against the said judgement.
 - (ii) There is imminent danger of eviction of the 2nd Applicants in execution of the judgement and the decree against her, which will render the Appeal nugatory and the Applicant will suffer irreparably.
3. The application is supported by supporting affidavit of the 2nd Applicant/Appellant who reiterates in her depositions the grounds in support of the application has annexed an authority to plead, the impugned judgment, the memorandum of Appeal, a photograph of the Applicants and the Respondent are occupying.

4. The Application is opposed by the Replying affidavit of Joseph Tubula Konchory who deposes *inter alia*;
 - (i) That he has been in occupation of Plot No. 4 Nkararo Market while the Applicant has never been in occupation of the same.
 - (ii) That there are no eviction orders issued by the trial court, hence the application for stay is misconceived.
 - (iii) That the applicant has not satisfied the conditions for grant of stay of execution as provided for under Order 42 Rule 6(2) of the Civil Procedure Rules.
5. No prejudice will be occasioned to the 2nd Applicant, as she admitted not having visited the suit property.
6. The court directed the application to be canvassed by way of oral submissions.
7. Miss Bosibori Oganga argued the Application on behalf of the Applicants. It was her submissions that the Applicant had met the threshold for grant of a stay of execution pending appeal in that the application was made without unreasonable delay.
8. She submitted that both the Applicant and Respondent reside on the suit property and the orders are meant to preserve the suit property. She placed reliance on the decisions in the cases of Butt vs. Rent Restriction Tribunal as well as RWW and EKW and the Court of Appeal decision in Vishram Lalgi vs. Thorton and another. She submitted that the intended Appeal is arguable as per the Memorandum of Appeal.
9. She urged the court thus to allow the application.
10. On her part Miss Mireri Learned counsel for the Respondent submitted that there were no orders of eviction granted by the trial court in its judgment and that the issue of who was in possession was settled at paragraph 37 of the impugned judgment.
11. The Respondent submitted that execution is lawful process, and that the prayer for the OCS to enforce the stay orders was misplaced.

That here can be no substantial loss since execution process is a lawful process.

12. Ms. Mireri placed reliance on the decisions in James Wangalwa vs Agnes Chesoto as well as RWW vs EKW.
13. The Respondent submitted that security must be provided as a condition for grant of stay for the performance of the decree, including costs and interests on Judgment.
14. She thus argued the court to dismiss the application.
15. In a brief rejoinder Ms. Bosibori submitted that Order 42 Rule 6 emphasized stay of execution to issue.

Issues for determination

16. The issues for determination are;
 - (i) Whether or not the application is merited.
 - (ii) What reliefs ought to issue.
 - (iii) Who bears the costs of the application.

Analysis and determination

17. For an application for orders of stay of execution, grounded under Order 42 Rule 6, the Applicant must satisfy the conditions provided therein to wit
 - (i) The application must be made timeously.
 - (ii) Must satisfy issue of occurrence of substantial loss.
 - (iii) Security for performance of the decree.
18. The court shall now consider whether the application satisfies the above conditions.
19. On the first condition, the Applicant filed the application on 23rd August 2025, the impugned judgment having been delivered on 12th August 2025 and a Memorandum of Appeal was filed on the same date. It follows that the application herein was filed timeously.

20. On substantial loss, the Applicant exhibited photographs indicating that she was in occupation of a portion of the suit property.
21. The trial court did not issue any eviction orders in its judgment, but issued declaratory orders as well as an injunction permanent in nature barring the Respondents from laying any claim to the suit property as well as entering thereon.
22. In view of the said judgment, and given that the Applicant is stated to be living on the suit property, the decree having barred the 2nd Appellant from entering the suit property shall cause substantial loss, and the Applicant has thus demonstrated substantial loss.
23. Miss Bosibori argued that the Memo of Appeal raises arguable points, this however is not a consideration for stay of execution under order 42 Rule 6, of the Civil Procedure Rule but is consideration for stay of execution under Rule 5(2) B of the Court of Appeal Rules, hence that limb of submissions is not relevant in these proceedings.
24. Indeed, execution is a lawful process as submitted by Ms. Mireri and the Applicant ought to have offered security for the satisfaction of the decree, including costs, which the Applicant has not offered.
25. In order to preserve the suit property, the Applicant having satisfied the two conditions for grant of stay of execution the court allows the application in terms that; -
 - (i) There shall be a stay of execution of the judgment delivered on 12th August 2025 by Hon. W.C. Waswa in Kilgoris E054/2024 pending hearing and determination of the Appeal.
 - (ii) The Applicant shall deposit Kshs. 80,000 as security in court within 2 weeks from today, in default the stay of execution orders shall lapse.

(iii) Costs of this application are awarded to the Respondent.

Dated at Kilgoris this 15th day of December 2025.

Hon. M. N. Mwanyale
Judge.

In the presence of:

CA - Emmanuel/Sylvia/Sandra

Ms. Mireri for Respondents

Ms. Bosibori for Appellants