

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC APPEAL NO. E006 OF 2025**

**JOYCE NDUKU MBITI:.....:APPELLANT**

**AND**

**JOSHUA**

**NGUYO**

**WAMBUA:.....:RESPONDENT**

**RULING**

The application is dated 21<sup>st</sup> January 2025 and is brought under Article 159 of the Constitution of Kenya, 2010; Sections 3 and 19 of the Environment and Land Court Act, 2011; Sections 1A, 1B, 3A 63 (e) and of the Civil Procedure Act, Cap 21, Laws of Kenya; Order 42 Rule (6) of the Civil Procedure Rules 2010 seeking the following orders;

1. That this Honourable Court do certify this application as urgent and the same be heard *ex parte* in the first instance.
2. That pending the hearing of this application *inter partes* this Honourable Court be pleased to grant a temporary order of stay of execution of the Judgment delivered by Hon. Khapoya S. Benson, Senior Principal Magistrate on 30<sup>th</sup> December, 2024 in Kithimani Senior Principal Magistrate’s Court Environment and Land Case No. E048 of 2025 Joshua

Nguyo Wambua vs. Syovili Kitabi & 4 Others and all the consequential orders arising therefrom.

3. That pending the hearing and determination of the Appeal herein, this Honourable Court be pleased to grant a temporary order of stay of execution of the Judgment delivered by Hon. Khapoya S. Benson, Senior Principal Magistrate on 30<sup>th</sup> December, 2024 in Kithimani Senior Principal Magistrate's Court Environment and Land Case No. E048 of 2024 – Joshua Nguyo Wambua vs. Syovili Kitabi & 4 others and all the consequential orders arising therefrom.
4. That costs of this Application be provided for.

It is based on the following grounds that the matter giving rise to the present appeal was heard and determined and the Honourable Court, Hon. Khapoya S. Benson, Senior Principal Magistrate on 30<sup>th</sup> December, 2024 rendered its Judgment and directed the Appellant/Applicant's title deed to Masinga/Kangonde/10103 be cancelled and the same be rectified and issued to Respondent. That the trial court issued an eviction order against the Appellant/Applicant and directed the Officer Commanding Station (OCS) Masinga Police Station to assist in execution of the eviction order. That the Appellant/Applicant's only homestead is located on land parcel number Masinga/Kangonde/10103 and she stands to be rendered destitute if eviction does not ensue. That Land parcel number Masinga/Kangonde/10103 is the

Appellant/Applicant's only source of livelihood as she depends on farming. That Eviction and demolition of the Appellant/Applicant's homestead established on Masinga/Kangonde/10103 will create a state of affairs that will irreparably affect or negate the very essential core of the Appellant/Applicant as the successful party in the Appeal. That execution of the eviction order is imminent and the Appellant/Applicant will suffer substantial loss unless the orders sought herein are granted. The instant appeal is highly meritorious in law and has high chances of success. If this court does not intervene urgently and grant the orders sought, the substratum of the Appeal will be lost and both the Appeal and this application will be rendered nugatory. The Appellant/Applicant has filed this application without unreasonable delay and in good faith. The Applicant/Appellant is ready, willing and able to furnish the court with such security as this Honourable Court may deem fit and just owing to the particular circumstance of this case. The orders of stay sought are the only way to ensure that justice is met pending the hearing and determination of the Appeal on its merits. Should execution of the impugned Judgment of the trial court be allowed to proceed as directed, the Respondent is likely to transfer the suit property to third parties in a bid to defeat and/or frustrate the Appellant/Applicant's claim over the same.

The Respondent raised a preliminary objection that the counsel on record offended order 9 rule 9 of the Civil Procedure rules in that the consent to take over the matter was by hand delivery and not through the CTS and was not on any letterhead. This raises the question of the authenticity of the said consent. Respondent has raised the issue that Mwenda Mwinzi & Associates Advocates is not properly on record for the Appellant, having come on record post-judgment without complying with the mandatory requirements of Order 9 Rule 9 of the Civil Procedure Rules, 2010, which govern change of advocates after judgment has been delivered. Specifically, Order 9 Rule 9 of the Civil Procedure Rules provides as follows:

*“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-*

*(a) upon an application with notice to all the parties; or*

*(b) upon consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”*

The clear import of this provision is that once judgment has been delivered, an advocate seeking to come on record for a party must either obtain leave of the court through a formal application served upon all parties or file a consent

executed between the outgoing and incoming advocates. This requirement is mandatory and non-compliance renders all pleadings filed by the incoming firm irregular and incompetent.

The provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that for any change of Advocates after judgment has been entered to be effected, there must be an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. The reasoning behind the provision was well articulated in the case of *S. K. Tarwadi vs Veronica Muehlmann* (2019) eKLR where the Learned judge observed as follows:

*“...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him...”*

I have perused the court record and find that indeed there is a consent dated 9<sup>th</sup> January 2025 signed by the outgoing advocate Soita Siundu & Co Advocates and the current Advocates Mwendwa Mwinzi & Associates, duly filed on the CTS and in the physical court file. I find no contravention of order 9 rule 9 and find that the Advocate is properly on record. I find the preliminary objection has no merit and I dismiss it with no orders as to costs.

Moving on to the instant application I have considered the same and the submissions therein. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the Civil Procedure Rules as follows;

*“No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”*

Order 42, rule 6 states:

*“No order for stay of execution shall 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.”*

The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

The principles governing the exercise of the court’s jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicant must show that they have an arguable appeal and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of Reliance Bank Ltd (In Liquidation) vs Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR), thus;

*“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-*

- 1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,*
- 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”*

The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in *Chris Munga N. Bichange vs Richard Nyagaka Tongi & 2 Others* eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus;

*“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs*

*must both be demonstrated and it would not be enough that only one is demonstrated.....”*

In the case of Mohamed Salim T/A Choice Butchery vs Nasserpuria Memon Jamat (2013) eKLR, the court stated that;

*“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right .....*”

We are further guided by the court’s decision in Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997, at Page 4 as follows:

*“ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”*

I find that the applicant is not guilty of laches as judgement was delivered on 30<sup>th</sup> December 2024 and this application is dated 21<sup>st</sup> January 2025. The

Appellant/Applicant submitted that the rendered Judgment and directed the Appellant/Applicant's title deed to Masinga/Kangonde/10103 be cancelled and the same be rectified and issued to Respondent. That the trial court issued an eviction order against the Appellant/Applicant. That the Appellant/Applicant's only homestead is located on land parcel number Masinga/Kangonde/10103 and she stands to be rendered destitute if evicted. That the Appellant is in possession of the suit land. I find that the draft memorandum attached to the application on the grounds of appeal does raise an arguable appeal and I find that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicant has fulfilled the above grounds mentioned to enable me grant the stay. I find that the application is merited and order that status quo be maintained pending the hearing and determination of the appeal. Costs to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 16<sup>TH</sup> DAY OF  
DECEMBER 2025.**

**N.A. MATHEKA**

**JUDGE**