

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT KAJIADO**  
**ELC CASE NO. 297 OF 2017**  
  
**(Formerly MACHAKOS HCCC NO. 130 of 2012)**

PHILIP MUTISO MAKAU.....PLAINTIFF

VERSUS

KIANDA FOUNDATION EDUCATIONAL TRUST.....1<sup>ST</sup> DEFENDANT

THE CHIEF LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT

THE LAND REGISTRAR KAJIADO.....3<sup>RD</sup> DEFENDANT

THE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT

DANIEL LAIBRE OLE TIRIKOG.....5<sup>TH</sup> DEFENDANT

**RULING**

*(In respect of the 1st Defendant's notice of motion application seeking a stay  
of execution pending appeal pursuant to Order 42 Rule 6 of the Civil  
Procedure Rules)*

**Introduction**

1. Before this court for determination is a notice of motion application dated 25th September 2025 by the 1<sup>st</sup> Defendant/Applicant, in which the Applicant

seeks inter alia a stay of execution in respect of the judgment herein and any subsequent orders delivered by this Honourable Court on 16th September 2025 pending hearing and determination of their appeal by the court of appeal.

2. According to the affidavit sworn by Winfreda Chepkoech on 25th September 2025, the Applicant is aggrieved by the judgment in which the Court ordered, inter alia, the cancellation of the Applicant's title number Kajiado/Kaputiei-Central/496 and dispossession from the suit property. The deponent avers that the Applicant had purchased the suit property from the 5th Defendant at the cost of Kshs. 37,500,000/= and has incurred further costs in fencing the property and engaging in litigation.
3. It is further deposed that the Applicant filed a Notice of Appeal on 23rd September 2025 and applied for certified copies of the judgment, decree, and proceedings, which have not yet been supplied. The Applicant expresses apprehension that, should a stay of execution not be granted pending the determination of the appeal, irreparable losses and damages will be suffered, including loss of the title deed and dispossession from the property. The Applicant asserts that it has a good case on appeal and that the Respondent will not suffer substantial harm should a stay of execution be granted.

4. The matter is brought within the timelines provided by law, and the Applicant prays that this Honourable Court exercises its discretion to grant the orders sought in the application.
5. The application is opposed by the Plaintiff/Respondent through an affidavit sworn by Agnes Nzilani Makau on 7th October 2025. The deponent states that she is the administrator of the estate of the late Philip Makau Mutiso, the Plaintiff in the main suit, and is competent to oppose the application. In the affidavit, the Respondent contends that the application for stay of execution is premature and incompetent, asserting that no notice of appeal has been filed within the prescribed time and that no appeal is currently pending before the Court of Appeal in respect of the judgment and decree, subject of the application.
6. The Respondent further avers that no material has been placed before the Court to justify a stay of execution of a decree that has not yet been extracted and is still under consideration. It is submitted that, in the circumstances, the application is misconceived and constitutes an abuse of the Court process. The Respondent prays that the application be dismissed with costs.

**Directions**

7. The court's directions were that the application be canvassed by way of written submissions. The two parties complied and the court has duly considered them in the writing of this ruling.

### **Analysis and Determination**

8. The primary issue that arises for determination is whether the Applicant has satisfied the requirements entitling it to a stay of execution of the Judgment and Decree delivered on 16th September 2025 pending the hearing and determination of the intended appeal to the court of appeal.

9. The discretion to grant a stay of execution is a cautious exercise aimed at preserving the subject matter of the appeal where the interests of justice warrant such intervention. The principles governing the grant of stay of execution pending appeal are well set out under the provisions of **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. Stay of execution will not be granted 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.”*

10. As to what substantial loss is, it was observed in James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, that:

*“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.”*

11. In the present case, the Applicant avers that it is apprehensive that if stay of execution is not granted pending appeal, it will suffer irreparable losses and

damages as the Respondent is bound to proceed to execute the judgment and cancel the title deed resulting to great losses and damages to the Applicant. Although the Applicant avers that it paid Kshs. 37,500,000 for the land and will suffer grave loss, the affidavit how that will amount to substantial loss in a legal sense such that damages or restitution in case of a successful appeal would not suffice.

**12. The question of substantial loss is not determined by the quantum of the loss, but rather by whether the anticipated loss is of such a nature that it cannot be remedied or reversed.** In circumstances where title cancellation may be reversed if the appeal succeeds, the alleged loss does not automatically meet the “substantial loss” threshold.

13. Having failed to establish substantial loss, the application must fail.

14. In addition, the nature of the decree, involving cancellation of title and dispossession, militates against granting stay in the absence of robust protective conditions. The Court must safeguard the interest of the Respondent as well, who is entitled to have the judgment executed without undue delay, especially when the Applicant has not put forward concrete

assurances. The discretion under Order 42 Rule 6 must be exercised by balancing both parties' interests.

15. Further, the Court observes that the Applicant's intended appeal is not arguable on its merits. The Court has already found that the Applicant did not hold a valid title to the property, as the party from whom it purportedly purchased the land from did not hold a lawful title. He could not lawfully transfer any proprietary interests to the Applicant. In light of this, any appeal predicated on the purported validity of the title is unlikely to succeed. The Court further notes that the appropriate remedy available to the Applicant, should they wish to seek redress, lies against the seller through a claim for restitution under the doctrine of unjust enrichment.

16. In the case at hand, given that the Applicant has failed to satisfy the principal requirement for the grant of stay of execution pending appeal, the Court concludes that the threshold for granting a stay of execution pending appeal is not met.

17. Accordingly, the application dated 25th September 2025 for stay of execution pending appeal is declined. It is dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 11<sup>th</sup> Day of December  
2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Olonde for the Plaintiff/Applicant

N/A by the 1<sup>st</sup> Defendant/Applicant

Court Assistant: Mpoye

M.D. MWANGI

JUDGE