



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC ENVIRONMENT AND PLANNING APPEAL NO. E001 OF
2025

STEPHEN APPELLANT	MUTUA.....	1ST
KYALO APPELLANT	KATHINZI.....	2ND
KASIVU APPELLANT	KILONZO.....	3RD
MICHAEL APPELLANT	MBITHI.....	4TH
PETER APPELLANT	MUATHE.....	5TH
MUTHAMA APPELLANT	KAAMBI.....	6TH
KIOKO APPELLANT	MUTINDA alias MWANGA.....	7TH
PATRICK APPELLANT	KITAVI.....	8TH
COSMAS APPELLANT	MUTHAMA.....	9TH

MUSEE	MUTHAMA.....	10TH
APPELLANT		
MUTUNGA	MUTHAMA.....	11TH
APPELLANT		
MWAKA	KITONGA.....	12TH
APPELLANT		
KATHANZU	MUTINDA.....	13TH
APPELLANT		
MUENDU	KILONZO.....	14TH
APPELLANT		
MARY	MUSEMBI.....	15TH
APPELLANT		

VERSUS

SHADRACK	MUTHINI	KIOKO.....
.....RESPONDENT		

RULING

1. Since the appellants were dissatisfied with the judgment given by the lower court on 30/12/2024 in **Kithimani ELC Case No. E002 of 2023**, they filed a notice of motion along with a memorandum of appeal. This motion, which is the focus of this ruling, is dated 29/01/2025 and is made in accordance with the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules**, as well as **Sections 1A, 1B, and 3A** of the **Civil Procedure Act**. In this motion, the appellants seek the following orders: -

a. Spent.

b. Spent.

c. That there be a stay of execution of the orders contained in the judgment delivered on 30/12/2024 pending the hearing and determination of the appeal herein.

d. That the costs of this motion be in the cause.

2. The motion is supported by the grounds contained therein as well as the affidavit sworn on 29/01/2025 by the 1st appellant. In summary, he states that the impugned judgment permits the respondent to begin harvesting, selling, and transporting river sand, which he argues will significantly degrade the River Inyanzaa and deprive several villages of water. He further contends that without a stay of execution, the appellants will suffer irreparable harm and a violation of their rights.
3. Additionally, he maintains the balance of convenience favours granting the reliefs sought to protect their rights and community welfare while preventing environmental damage. He states that the appeal presents arguable grounds with a high chance of success. Finally, he affirms that the impugned judgment contradicts government policies on environmental preservation, and the motion has been made without unreasonable delay.
4. The motion is strongly contested through a replying affidavit sworn by the respondent on 17/03/2025. In short, he asserts

that the motion is based on a misrepresentation of facts, intended to deceive this court, and should be treated with the contempt it merits. Furthermore, he asserts his claim before the trial court against the appellant was regarding their interference with his peaceful occupation and use of his parcel of land.

5. Upon court directions on 24/4/2025, the motion was considered through well-argued submissions filed by **Ms Mutua Mboya & Nzissi Advocates** for the appellants, dated 29/05/2025, and by **Ms J.M. Kathili Advocates** for the respondent, dated 12/05/2025. As a result, this court has carefully examined the motion, its grounds, affidavits, and detailed submissions by the parties, including the relevant provisions of law and judicial precedents relied upon. It arises that the singular issue for determination is **whether the appellants have met the legal threshold to warrant a stay of execution pending appeal.**
6. Concerning the relevant law and as posited on the face of the motion, **Order 42 Rule 6** of the **Civil Procedure Rules** empowers this court to entertain the instant motion. The long-standing principles contained in this provision are that an applicant in this case, the appellants, must demonstrate that the motion is brought without undue delay, satisfy the court that substantial loss may result to them unless a stay of execution is granted, and provide security as ordered by the

court for the proper performance of any decree or order that may ultimately be binding upon them.

7. Furthermore, since this is the court to which an appeal has been lodged, the other principles it must consider are that the applicants have demonstrated that the appeal or intended appeal is arguable; and that, unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. When entertaining motions such as this, this court exercises judicious discretion and, in doing so, it is guided by the aforementioned tests. When determining whether the appellants have met the legal threshold, this court will sequentially examine the tests and, in doing so, consider the prevailing jurisprudence it aligns with.
8. The first test concerns delay. In this instance, it is clear that the appellants filed their motion promptly, as it was filed on 29/01/2025, which is within a month of the date the impugned judgment was delivered.
9. As regards the second test of substantial loss and the appeal being rendered nugatory, the long cited **Ugandan** decision of **Tropical Commodities Suppliers Ltd and Others vs. International Credit Bank Limited (in liquidation) (2004) E.A. LR 331** outlined what amounts to substantial loss in **paragraph 16** onwards of its decision by stating: -

“...Hence, the question needs to be asked as to what in law constitutes “substantial loss”. In my view, substantial loss need not be determined by a mathematical formula whose computation yields any particular amount. Indeed, Jowitt’s Dictionary of English Law (2’ Edn.) Vol. 2, p.1713, carefully defines the analogous concept of “substantial damages” as: “damages which represent actual loss, whether great or small, as opposed to nominal damages. “[emphasis added]

17. In similar vein, Black’s Law Dictionary (6th Edn.) at p.1428, defines the word “substantial” as, inter alia:

“of real worth and importance, not seeming or imaginary or illusive - Seglem v Skelly Oil Co., 145 Kan. 216 P.2d 553, 554. Something worthwhile as distinguished from something without value or merely nominal – In Re Krause’s Estate, 173 Wash. 1, 21 P. 2d 268.”

The conclusion is inescapable. Substantial loss does not represent any particular amount or size. It cannot be quantified by any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that

is of real worth or value, as distinguished from a loss without value or a loss that is merely nominal.”

10. In their arguments regarding this test of loss, the appellants contend that executing the impugned judgment will cause significant and irreversible environmental damage to the area's only natural water source. They have cited the decision of **Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] KEELC 1967 (KLR)**, which summarised environmental governance principles, including the precautionary principle.
11. However, after reviewing the impugned judgment and the respondent's submissions, it appears that the case presented by the respondent before the trial court was a claim of trespass over **Kithyoko/Kithyoko/1614 (“suit property”)** against the appellants. This claim was successful, and an order of permanent injunction was granted in his favour. In agreement with the respondent, the appellants have not shown how this order of permanent injunction, which restrains them from trespassing on the suit property, causes them any loss. Significantly, as seen from the impugned judgment, the appellants' counterclaim concerning environmental issues was dismissed by the trial court due to a lack of jurisdiction. In other words, no enforceable positive orders resulted from the counterclaim that either party could execute, as alluded in the

appellants. Therefore, this court finds the appellants fail on this limb.

12. We will now turn to the third test of the appeal being rendered nugatory, and respecting this, the decision of **Stanley Kangethe Kinyanjui V Tony Ketter & 5 others [2013] KECA 378 (KLR)** weighed in on this test and stated as follows:-

“x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

13. While bearing in mind the finding of this court on the test of substantial loss, it was incumbent upon the appellants to demonstrate to this court how the grant of the positive order of permanent injunction on the claim of trespass that denied them entry into the suit property would cause them irreversible damage, to which they failed to discharge as their submissions dwelt on their claim of environmental degradation which as earlier stated, the trial court declined to exercise jurisdiction over it.

14. Turning to the fourth test of security, the appellants merely asserted they were willing to pay for security. Having

considered this test, this court finds that the mere fact that the appellants have not presented a particular sum does not divest this court of jurisdiction to exercise its discretion in considering the amount of security that the appellants shall tender.

15. On the final criterion regarding the arguability of the appeal, and as affirmed in the decision of **APA Homes (K) Limited v Omar & another [2025] KECA 1035 (KLR)**, the principle is that an arguable appeal is not necessarily one that will succeed, but rather one that is worthy of consideration by the court. Having examined the grounds of appeal, which challenge the alleged findings of the learned trial magistrate, particularly concerning the location of the sand dam, this court finds that the appeal presents arguable grounds.
16. However, it is trite that all conditions for granting a stay of execution pending appeal must be met simultaneously and conjunctively, not disjunctively. Having failed to meet some of these tests, this court finds that the notice of motion dated 29/12/2024 is not merited and dismisses it. Costs shall abide by the outcome of the appeal. Ultimately, this court hereby issues the following disposal orders: -

a) The notice of motion dated 19/12/2024 is hereby dismissed with costs abiding by the outcome of the appeal.

- b) THAT the appellants shall file and serve the record of appeal within 45 days from the date hereof.***
- c) THAT the appeal is hereby admitted and the lower court record is to be called for.***
- d) THAT costs shall abide by the outcome of the appeal.***
- e) THAT a mention date shall be issued before the deputy registrar.***

Orders accordingly.

Delivered and Dated at Machakos this 8th day of December, 2025.

**HON. A. Y. KOROSS
JUDGE
8.12.2025**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms Kanja Court Assistant.

Mr Kitanga for applicant.

Mr. Kathili for respondent.

ORIGINAL