



**Mbogo & another v Kimani (Environment and Land Appeal E019 of 2025)
[2026] KEELC 175 (KLR) (Environment and Land) (22 January 2026) (Ruling)**

Neutral citation: [2026] KEELC 175 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E019 OF 2025**

**MC OUNDO, J
JANUARY 22, 2026**

BETWEEN

**MOSES NDUNG’U MBOGO 1ST APPELLANT
ROSE WANJIKU NDUNGU 2ND APPELLANT**

AND

MOSES NG’ANG’A KIMANI RESPONDENT

RULING

1. Vide a Notice of Motion Application dated 3rd October, 2025 brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules and Sections 1A and 3A of the *Civil Procedure Act*, the Appellants have sought that pending the hearing and determination of the Applicants intended appeal, the Honourable court be pleased to grant stay of execution of the judgement delivered by the trial court in Naivasha CMCC No. 157 of 2016, Moses Ng’ang’a Kimani vs Moses Ndung’u Mbogo & Rose Wanjiku Ndung’u, on 4th September, 2025 together with all the consequential orders thereof. That the costs of the Application be provided for.
2. The said application was supported by the grounds therein as well as the supporting Affidavit of equal date, sworn by Moses Ndung’u Mbogo, the 1st Appellant herein who deponed that by a Plaint dated 3rd March, 2016, the Respondent herein instituted a suit against them seeking among other orders, specific performance of an agreement for the sale of a portion of land LR No. Nyandarua/ Olaragwai/ 7746.
3. That despite them having filed their defence and compliance documents in compliance, they discovered that the matter had proceeded *ex parte* wherein judgement in favour of the Respondent had been rendered on the 21st June 2016.



4. . That their application dated 12th July 2016 to set the said *ex parte* judgement aside, had been dismissed vide a ruling delivered by Hon. E. Kimiliu. That dissatisfied with the decision, they appealed the said ruling vide Nakuru ELC Appeal No. 4 of 2019 and simultaneously sought stay of execution vide an application dated 17th May, 2018. In its Ruling of 22nd May 2019, the court granted a conditional stay of execution of the summary judgement.
5. That it had been in the process of complying with the court's orders, that the then advocate for the Respondent, Kairu Kimani & Co. Advocates approached their advocates with a consent stipulating that instead of depositing the security in a joint interest earning account, that the same be deposited with them. The consent was subsequently duly signed and adopted as an order of the court.
6. That security therein deposited was the purchase price which the Respondent herein had paid to the 1st Appellant and which was paid to his then advocates.
7. That their appeal was heard and determined and by a judgement delivered on 30th June, 2020, wherein the court had directed that Naivasha CMCC No. 157 of 2016 be heard on merit.
8. That subsequently, the said suit was re-heard wherein the trial court entered judgement in favour of the Respondent on 4th September, 2025. That dissatisfied with the terms of the impugned judgement they had instructed their advocates on record to file an appeal against the said decision who then sought for the typed copy of the proceedings and made payment for the same.
9. He deponed that their appeal raises substantial and meritorious grounds for determination by the court hence it was only fair and just that a stay of execution be granted pending its hearing and determination.
10. That the subject property was in the name of one Janet Wairimu Mbogo, a deceased person wherein no succession cause had been filed.
11. That in any case, the Respondent's purchase price had been returned to him through his former advocates thus it was clear that if execution proceeds, the Appellants will suffer loss and damages as the Respondent would now be self-enriching himself at their expense.
12. That in any case, the subject parcel of land was in occupation by third parties hence any such execution could cause a lot of havoc. That the instant Application is made in good faith thus it was in the interest of justice that the same be allowed as prayed.
13. In response and in opposition to the Appellants' Application, the Respondent, through his Replying Affidavit of 20th October, 2025 deponed that the instant application was a blatant attempt by the Appellants to deny him the fruits of judgement after successfully prosecuting his claim as against them. That the intended appeal does not raise any triable issues nor were there any substantive grounds for determination by the honorable court in any way, shape, form and/or construction of the word.
14. That pursuant to the conditional stay of execution order in its ruling in Nakuru High Court in ELC Appeal No. 4 of 2019- Moses Ndung'u Mbogo and another vs Moses Ng'ang'a Kimani, the same was to the effect that the stay of execution would automatically lapse should the Appellants fail to deposit Ksh. 320,000/= into a joint account held by the advocates on record then, to wit, Messrs. Waiganjo & Co. and Kairu Kimani & Co. Advocates as security. That those orders did not in any way, shape, form and/or construction of the word designate the deposit of the security held by Messrs. Kairu Kimani & Co. Advocates as a refund of the purchase price nor did it authorize its release to himself. That the Appellants herein were clutching straws by claiming that the security had been released to him, without any iota of evidence to that effect.



15. He deponed that the application for stay of execution is made in bad faith, against the interests of justice, against the dictates of natural justice and is meant to deny him the fruits of judgement therein. He thus vehemently objected to the granting of prayers sought in the present application both in scope and in substance.
16. The Application was canvassed by way of written submissions wherein the Appellants/Applicants, vide their submissions dated 7th November, 2025 founded their submissions on the decision in *Butt v Rent Restriction Tribunal* [1982] KLR 417 and the provisions of Order 42 Rule 6 of the Civil Procedure Rules stating that to succeed on an application for stay of execution, one must prove three main pillars:
 - i. Substantial Loss: Evidence that they will suffer irreparable harm if the judgment is enforced.
 - ii. No Unreasonable Delay: The application must be filed promptly.
 - iii. Security for Costs: A willingness to provide security to guarantee the performance of the eventual decree.
17. The Applicants argue that the property in question being LR No. Nyandarua/Olaragwai/7746 is their family home. That were the judgment—which orders specific performance/transfer of the land—is executed, they will be evicted, and their appeal will be rendered nugatory.
18. They claimed that a previous consent had been recorded where Ksh 320,000/= was paid to the Respondent's former advocates and argue that the trial court ignored this evidence. That executing the impugned judgment therefore would now allow the Respondent to benefit twice.
19. That the judgment was delivered on 4th September 2025, wherein they filed their application on 3rd October 2025 thus constituting no unreasonable delay.
20. That they were ready to comply with any security conditions that the court would impose, to safeguard the Respondent's interests.
21. They cited the decision in *Consolidated Marine v Nampijja & Another*, Civil App. No. 93 of 1989 (Nairobi) arguing that the court's primary duty was to preserve the subject matter of the dispute. That by staying the execution, the court would ensure that if the Applicants eventually win their appeal, the land wouldn't have been transferred or the family evicted.

Respondent's Submissions

22. On the other hand, the Respondent vide his Written Submissions dated 17th November 2025, summarized the factual background of the matter as well as the affidavit evidence in details and then framed one issue for determination to wit; whether the stay of execution orders sought in the current Application should be granted.
23. The Respondent's primary argument was that the Appellants have failed to meet the legal threshold for a stay, specifically failing to prove substantial loss. He strongly denied receiving a refund of the purchase price of Ksh. 320,000/=, clarifying that the money was deposited with his former advocates as security for the Nakuru ELC Appeal No. 4 of 2019 and was therefore not a refund. The Respondent argued that the Appellants provided no evidence that this money was ever transferred from the advocates to him.
24. That the trial court had already ruled that the parties should have sought directions from the High Court regarding that deposit and therefore it could not now be unilaterally treated as a refund.



25. The Respondent also dismissed the claim that the land was unidentifiable pointing to the Land Sale Agreement and mutation forms signed by the 1st Appellant to the effect that the original parcel (No. 2237) was subdivided into two: 7745 and 7746 and that he lay to No. 7746.
26. The Respondent argued the trial court had already debunked the claim that the land belonged to the Appellants' late mother stating that 1st Appellant was the registered owner and thus had the capacity to sell.
27. He argued that the claim of eviction was a tactic to win sympathy, the land having already been subdivided for which the Appellants could continue occupying parcel No. 7745.
28. Citing the decision in Charles Wahome Gethi vs Angela Wairimu Gethi [2008] eKLR, the Respondent argued that by merely stating that one resides on the land was not enough to prove substantial loss— one ought to provide specific details of the loss, which the Appellants failed to do.
29. In conclusion, the Respondent urged the court to apply the principle from *Macharia t/a Macharia & Co. Advocates vs East African Standard (No.2) (2002) KLR 63* where a successful party is entitled to the fruits of their judgment. He contended that the Appellants only met one of the three legal requirements which was the filing of their application without delay, but failed on the other two conditions on the "substantial loss" and "security." That granting a stay based on "mere sentiments" rather than evidence would, in his view, be an abuse of the court process and an injustice to him.

Determination.

30. Having considered the application before the court herein, the opposition thereto, the submissions by both parties, the authorities cited and the applicable law, the Applicants bring their application seeking an order from the court to stop the execution of a judgment delivered by the trial court in Naivasha CMCC No. 157 of 2016, *Moses Ng'ang'a Kimani vs Moses Ndung'u Mbogo & Rose Wanjiku Ndung'u*, on 4th September, 2025 together with all the consequential orders thereof.
31. That they were aggrieved by this judgment and have lodged the current Appeal. That the subject property was in the name of one Janet Wairimu Mbogo, a deceased person wherein no succession cause had been filed. And in any case, the Respondent's purchase price had been returned to him through his former Advocates thus it was clear that if execution proceeds, the Appellants will suffer loss and damages as the Respondent would now be self-enriching himself at their expense. They believe that their Appeal has high chances of success.
32. That their application was filed timelessly and they were willing to tender security for the due performance of the decree that may ultimately be binding upon them.
33. The Respondent's argument is that there is no evidence the money as claimed by the Applicants, was ever moved from the law firm's account to the Respondent himself. That despite the Appellants argument that the trial court ordered specific performance for a property No. 7746 which was not actually the subject of the original Sale Agreement, that the land was clearly identifiable through mutation forms and subdivision records signed by the 1st Appellant himself.
34. That the claim that the land belonged to the Appellants' late mother/mother-in-law and was their only home, the trial court had already found the 1st Appellant to be the registered owner, and therefore the eviction claim was a "veiled attempt" to win sympathy.



35. The Court of Appeal in *Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya)* [2015] eKLR held as follows: -

“An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.”

36. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates 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 orders set aside. Prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

2. 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.”

37. Subsequently, I find two issues arising for determination, namely:

i. Whether the Applicants have satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.

ii. What orders should this Court make.

38. What amounts to a substantial loss was clearly explained by the Court of Appeal in *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] KECA 94 (KLR) held as follows: -

“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”



39. On the first condition of proving that substantial loss may result unless stay order is made, it was incumbent upon the Applicants to demonstrate the kind of substantial loss they would suffer were the stay order not granted. I have gained sight of the Applicants/Appellants draft Memorandum of Appeal and find that they have an arguable appeal. I am further satisfied that even though the Respondent has strongly argued that the Applicants have not provided "particulars" of the loss since the land was subdivided, and they can simply move to the other portion of land being No 7745, yet the Courts usually lean toward staying evictions from residential property to preserve the status quo until the higher court speaks.
40. Further I have also considered the hotly contested issue that Ksh. 320,000/= was either paid as a refund and therefore the Respondent might unjustly be enriched viz a viz the contention that the money was just security for costs and is still sitting with the lawyers, the Applicants may be ordered to provide fresh/additional security as a condition for the stay.
41. Either way, I find that the Applicants will suffer substantial loss if the decree is executed against them as they might either be evicted from the suit premises thereby rendering their appeal nugatory, or the Respondent may unjustly be enriched were the application not allowed.
42. As to whether the instant Application has been brought without undue delay, it is not contested that judgment was delivered on 4th September 2025, wherein the Applicants filed their application on 3rd October 2025. I find that the appeal and the present application for stay of execution had been filed without undue delay.
43. On the last condition as to provision of security, I find that Order 42 Rule 6 (2)(b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he, must furnish security to guarantee the due performance of such decree or order as may ultimately be binding on them. It is not to punish the judgment debtor. The Applicants herein have pledged their readiness to furnish the court with such security for the due performance of the Decree that may ultimately be binding upon them.
44. In Consolidated Marine. v Nampijja & Another, Civil App.No.93 of 1989 (Nairobi), the Court held that: -
- “The purpose of the application for stay of execution pending Appeal is to preserve the subject matter in dispute so that the right of the Appellant who is exercising his undoubted right of Appeal are safeguarded and the Appeal if successful is not rendered nugatory”.
45. Since the grant of stay orders is discretionary wherein the court is expected to balance out the interests of the successful litigant and the Applicants’ unfettered right to file an appeal to fully ventilate their grievances, I shall allow the Applicant’s Application dated the 3rd October, 2025 on the following terms;
- i. Stay of the execution of the judgement delivered by the trial court in Naivasha CMCC No. 157 of 2016, Moses Ng’ang’a Kimani vs Moses Ndung’u Mbogo & Rose Wanjiku Ndung’u, on 4th September, 2025 together with all the consequential orders thereof is herein granted pending hearing and determination of the Applicant’s intended Appeal.
 - ii. The Appellants/Applicants do deposit a sum of Kshs. 500,000/= in court as security for due performance of the decree herein within 45 days from the date of this Ruling.
 - iii. The Appellants/Applicants to compile, file and serve a record of appeal upon the Respondent within 45 days from the date hereof.



- iv. In the event of default of any of the aforementioned conditions, the stay hereby granted shall lapse and the Respondent shall be at liberty to execute without further reference to the court.
- v. The costs of this application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIVASHA VIA TEAMS MICROSOFT THIS 22ND DAY OF JANUARY 2026.

M.C. OUNDO

ENVIRONMENT & LAND COURT – JUDGE

