



REPUBLIC OF KENYA



**KENYA LAW**  
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**Naliaka & another v Otula & 4 others (Environment and Land Appeal  
E085 of 2025) [2026] KEELC 305 (KLR) (26 January 2026) (Ruling)**

Neutral citation: [2026] KEELC 305 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E085 OF 2025**

**A NYUKURI, J**

**JANUARY 26, 2026**

**BETWEEN**

**ROSEMARY NALIAKA & ANOTHER & ANOTHER ..... APPELLANT**

**AND**

**STANLEY KEFA OFULA & 4 OTHERS & 4 OTHERS ..... RESPONDENT**

**RULING**

**Introduction**

1. Before court is a notice of motion dated 22<sup>nd</sup> October 2025 filed by the appellants seeking orders of stay of execution of the ruling and consequential orders issued by Honourable L. Simiyu (SPM) dated 11<sup>th</sup> September 2025 in Mumias Chief Magistrates Court Misc. Application No. 48 of 2010 pending the hearing and determination of this appeal.
2. The application is anchored on the affidavit sworn by the 1<sup>st</sup> applicant dated 22<sup>nd</sup> October 2025. The applicant's case is that on 11<sup>th</sup> September 2025, the trial court made a ruling ordering inter alia, his forceful eviction from land parcel No. South Wanga/Bungasi/418, which decision provoked the instant appeal. That if eviction proceeds, the appeal shall be rendered nugatory.
3. Further that the applicants have lived on the suit property since 1968 where they have homes and that the land is their ancestral land. That this matter began with South Wanga Land Disputes Tribunal Case No. 5 of 2010. That the parties are related and no reallocation was made hence eviction will render them homeless and that demolition of their homes cannot be remedied by damages. That they have an arguable appeal with chances of success.
4. The application was opposed. The 1<sup>st</sup> respondent filed a replying affidavit dated 9<sup>th</sup> December 2025. He stated that the appeal does not raise triable issues. That orders for eviction were made on 28<sup>th</sup> October 2010 and enforcement was made in Misc 48 of 2010 on 25<sup>th</sup> January 2021. That the applicants were ordered to vacate the suit property and settle on their land parcel No. South Wanga/Bungasi/412. That



the applicants have sought to delay the matter by filing many cases including petitions, applications and appeals, which were all dismissed. That they encroached on the suit property in 1988. That in 1969 during demarcation one Stephen Opondo Mulitani, the village Chair, without the consent of the owner one Apollo Ofula, made a joint registration of the suit property to include his late son Augustine Oduor. He confirmed that the parties were relatives. That the applicants will not suffer substantial loss as they have an alternative place to live.

5. In a rejoinder, the applicant filed further affidavit dated 8<sup>th</sup> January 2026. She stated that the other matters filed were dismissed on technicalities and that it is them who are in occupation of the suit property and so they stand to suffer prejudice if orders sought are not granted.
6. The application was disposed by way of submissions. Parties also made oral submissions in court on 26/01/2026; which the court has duly considered.

### **Analysis and determination.**

7. The court has carefully considered the application, response thereto and parties' rival submissions. The sole issue for the court's determination is whether the applicants have met the threshold for grant of orders of stay of execution pending appeal.
8. This court has jurisdiction to grant stay of execution pending appeal. Order 42 Rule 6 of the Civil Procedure Rules provides for the jurisdiction of the court to grant orders of stay of execution pending appeal thus;

Stay in case of appeal [Order 42, rule 6]

- (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 order set aside.
- (2) No order for stay of execution shall be made under subrule (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.
9. Therefore, to obtain stay of execution pending appeal, an applicant must demonstrate that they stand to suffer substantial loss; that they have sought stay without unreasonable delay and show willingness to provide security for the due performance of the decree that may issue against them.
10. In *Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 the court discussed the element of substantial loss as follows;

“Substantial loss does not represent 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.”



11. In the instant matter, the applicant stated that they are in occupation of the suit property since 1969. The respondents denied that allegation and stated that they encroached on the land in 1988. Therefore, the fact that the appellants are in possession of the suit property where they have their homes is not denied. They have maintained that if their homes are demolished, they may not be fully compensated by damages should they succeed on appeal. While the respondents provided search for parcel No. 418, they did not provide a search for parcel No. 412. Besides, the applicants have stated that the demolition of their home will not be adequately compensated. It is not denied that they have homes on the suit property. The possibility of an alternative land will not of itself provide an alternative home and negate the fact that demolition may not be adequately compensated. I therefore find and hold that the appellants have demonstrated substantial loss and an arguable appeal. It is also clear that they moved the court without delay.
12. Ultimately, I find and hold that the application dated 22<sup>nd</sup> October 2025 is merited and the same is allowed. I hereby grant orders of stay of execution of the ruling and consequential orders issued by Honourable L. Simiyu (SPM) dated 11<sup>th</sup> September 2025 in Mumias Chief Magistrates Court Misc. Application No. 48 of 2010, pending the hearing and determination of this appeal. Costs shall abide the outcome of the appeal.
13. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 26<sup>TH</sup> DAY OF JANUARY 2026**

**A. NYUKURI**

**JUDGE**

In the presence of;

Mr. Ndolo for the appellant/applicant

Ms Obware for the respondent

Court Assistant: Delphine

