

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**  
**ELC LAND APPEAL NO. E027 OF 2025**

**DAVID KIPKENY MELLY .....**  
**APPELLANT/APPLICANT**

**VERSUS**

**ANN NJAYA .....**  
**RESPONDENT**

**RULING:**

1. The Appellant/Applicant herein filed a Notice of Motion dated 28<sup>th</sup> August, 2025; seeking the following orders against the Respondent THAT: -
  - i. Spent.
  - ii. Spent.
  - iii. Spent
  - iv. Spent.
  - v. This honourable court be pleased to grant orders of stay of execution of the judgment delivered on the 20<sup>th</sup> May, 2025 together with its consequential orders thereof pending the hearing and determination of the appeal.
  - vi. This honourable court be pleased to grant an order of interim injunction restraining the respondent, whether by himself, his agents, servants and/or assigns, from interfering, from invading, destruction of property in property known as LANGAS PHASE II/SHEET IV/27 (L.R.

NO. 8500) pending the hearing and determination of the appeal.

vii. The OCS Langas Police Station do guard the suit property from demolition of the developments therein on LANGAS PHASE II/SHEET IV/27 (L.R. NO. 8500) pending the hearing and determination of the Appeal.

viii. Costs of this Application be provided for.

2. The application is premised on 9 grounds on the face thereof and supported by the applicant's affidavit sworn on even date. He deponed that judgment in the matter was delivered on 20.05.2025 whose effect was to dismiss his suit with costs to the respondent.
3. It is his claim that being aggrieved by the said judgment of the trial court, he has since lodged an appeal in this court seeking to challenge and set aside the said decision.
4. He however avers that the respondent has since commenced the process of execution and has moved the trial court for orders of security to enable her enter onto the subject suit, which application was allowed.
5. He is therefore apprehensive that the respondent's entry into the suit land will occasion him irreparable harm which cannot be adequately compensated by damages and may result in permanent loss and destruction of his property.
6. He thus contends that unless the orders sought herein are granted, the respondent shall proceed to execute the decree against him and he stands to suffer substantial loss.

7. It is further his contention that the appeal raises arguable grounds with high probability of success and that the respondent will have an opportunity to ventilate her defence on the appeal.
8. In conclusion, he deponed that this court has inherent jurisdiction, powers and discretion to allow the application and grant the orders sought in the interest of justice and to further preserve the subject matter of the suit.
9. The application was opposed. The Respondent filed an affidavit in reply dated 29<sup>th</sup> September, 2025 claiming that the Judgment of the subordinate court has already been enforced and that there is nothing to stay as she is in possession of the parcel of land. That the records at the Physical Planning Office clearly indicate that the parcel of land belongs to the Respondent.
10. The Respondent argued that the appellant ought to admit and realize that he was conned into purchasing land belonging to the Respondent and who was in possession of.
11. It is also contended by the Respondent that there is no Judgment capable of being stayed as the suit was dismissed, and the Respondent was declared the rightful owner of the suit land. The Respondent claimed that the appellant destroyed the structures that the Respondent had put up on the suit land which structures belonged to her.
12. The Respondent claims that the grounds for the orders sought do not obtain and that the appellant stands to suffer no loss attributable to the Respondent. That the appellant is

attempting to regain entry or access into the suit land and had previously used hooligans to illegally gain entry into the land. The Respondent urged the court to dismiss the application.

13. On 17.09.2025, this court issued directions that the present application be canvassed by way of written submissions. From the court record and CTS, the Applicant filed his submissions dated 3.11.2025 and the Respondent filed submissions dated 28.11.2025 together with authorities, which I have read and considered. I will therefore proceed to render my decision as hereunder.

**Analysis and Determination:**

14. Having carefully considered the Application and the grounds therein, the Supporting Affidavit and the annexures as well as the response and submissions filed in totality, it is my considered view that the issues arising for determination are:-
- i. *Whether an Order for Stay of Execution can issue against judgment issued on 20.05.2025.*
  - ii. *Whether the applicant has met the conditions necessary for the grant of an order of temporary injunction pending the hearing and determination of the appeal.*
  - iii. *Who shall bear the costs of the present Application.*

**Whether an Order for Stay of Execution can issue against judgment issued on 20.05.2025;**

15. It is now well settled that no appeal shall operate as an automatic stay of execution. Order 42 Rule 6 of the Civil Procedure Rules provides as follows: -

**6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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.**

**(emphasis mine)**

16. From the statutory provision above, the three necessary conditions that must be proved to warrant the grant of an order for stay of execution are that; an applicant must demonstrate that he has filed the application without undue/unreasonable delay, that he will suffer substantial loss unless an order for stay of execution is granted and the willingness to offer security as may ultimately be binding for the performance of the decree.
17. However, before delving into the merits of the 3 requisite conditions for the grant of stay of execution orders as outlined above, it is important to first determine/consider whether the orders sought to be stayed are positive or negative orders and thus tenable.
18. I have looked at the judgment of the trial court delivered on 20.05.2025 and it is important to note that the effect of the said judgment was to dismiss the plaintiff's (now appellant/applicant) suit with costs to the defendant (now respondent).
19. In the case of **Western College of Arts and Applied Sciences vs. Oranga & Others [1976] KLR 63**, the court whilst considering whether an order of stay can be granted in respect of a negative order held as follows: -

***“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs...”***

***The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”***

20. This was also the position in the case of **Raymond M. Omboga vs Austine Pyan Maranga Kisii HCCA No. 15 of 2010** where the court in finding that a negative order is one that is incapable of execution, and thus, incapable of being stayed, held as follows: -

***“The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order.***

***The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing***

***the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....”***

21. In the present case, the effect of judgment of the trial court issued on the 20.05.2025 was to dismiss the plaintiff's suit with costs to the defendant. Thus, guided by the decisions above, it is evident that there are no positive orders flowing from the trial court judgment in respect of which an order of stay of execution can be granted. The said decision did not order any of the parties to do or refrain from doing anything or to pay any sum.
22. In essence therefore, the dismissal order sought to be stayed is a negative order incapable of execution. The appellant/applicant's case was dismissed and therefore the issue of substantial loss cannot arise.
23. Thus, having held that the orders sought to be stayed in the present application is a negative order incapable of execution, I find that discussing the merits of the conditions necessary for the grant of stay of execution orders would amount to an academic exercise.
24. Consequently, it is the finding of this court that an order of stay of execution cannot issue against the judgment issued on 20.05.2025 as sought.

**Whether the applicant has met the conditions necessary for the grant of an order of temporary injunction pending the hearing and determination of the appeal;**

25. The applicant herein has also sought the grant of an order of temporary injunction, restraining the respondent, her agents, servants, assigns from interfering, invading or destroying the properties on the suit land pending the hearing and determination of the appeal herein.
26. In response to the applicant's prayer on temporary injunction, the respondent submitted that the same has since been overtaken by events for the reason that she has already assumed possession of the suit land.
27. In determining this issue, this court must bear in mind that the dispute between the parties has already been heard and determined by the trial court 26.09.2025 and the temporary injunction sought is post judgment, whereupon the rights and interests of the parties have been conclusively determined.
28. The law governing injunctions is found under Order 40 Rule (1) and (2) of the Civil Procedure Rules as well as section 13(7) (a) of the Environment and Land Court Act.
29. The principles that govern the grant of temporary injunctions were set out in the celebrated case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358** and has been restated by a long line of authorities. These principles are as follows: -

**a). where he is required to demonstrate that he has a prima facie case with serious triable and arguable issues with a probability of success against the respondent. The test on prima facie case does not mean establishing a case beyond reasonable doubt;**

**b). He will suffer irreparable harm/injury which cannot be adequately compensated by damages;**

**c). Balance of convenience: In granting an injunction under this condition the court must be satisfied that the hardship or inconvenience which is likely to be caused to the applicant by declining the injunction will be greater than that which is likely to be caused to the respondent.**

30. However, before delving into the merits of the said elements and/or conditions, it is important to first determine whether the said orders as sought are tenable or whether the same have been overtaken by events.
31. It is the respondent's claim that she already assumed possession and occupation of the suit land on 26.09.2025 and the orders of temporary injunction sought herein are therefore untenable.
32. The applicant in his supporting affidavit acknowledged that the respondent filed an application in the trial court seeking orders of security to enable her enter onto the suit land and the said application was allowed.

33. It is therefore not in dispute that the prayer for temporary injunction seeking to restrain the respondent from entering and/or invading the suit property and interfering with the same has been overtaken by events since the respondent has already assumed possession and occupation thereof.
34. I therefore find no reason to delve into the merits of the 3 elements to be proved to warrant the grant of orders of temporary injunction in the nature sought.
35. Consequently, it is the finding of this court that the prayer having been overtaken by events. The orders sought of temporary injunction pending the hearing and determination of the suit are not tenable and the said prayer fails.

**Who shall bear the costs of the present Application;**

36. The general rule is that costs shall follow the event in accordance with the proviso to section 27 of the Civil Procedure Act, unless the court is satisfied otherwise.
37. In the present case, having held that the appellant/applicant has failed to prove his claim to the required standard, I find that the respondent is entitled to costs of defending the application.

**Conclusion:**

38. In view of the foregoing, I accordingly find that the Notice of Motion Application dated 28<sup>th</sup> August, 2025 is not merited and is hereby dismissed with costs to the respondent.
39. It is so ordered.

**DATED, SIGNED and DELIVERED at ELDORET this 5<sup>th</sup> day  
of FEBRUARY, 2026.**

**HON. C. K. YANO  
JUDGE**

Ruling delivered in the presence of: -

Mr. Kipngetich holding brief for Mr. Maritim for the Appellant.

No appearance for the Respondent.

Court Assistant - Laban

ORIGINAL