



**Otube v Wanjira & 2 others (Sued as Representatives and Officials of Pave
Counselling & Development Group) & 3 others (Environment and Land
Appeal E74 of 2025) [2026] KEELC 393 (KLR) (3 February 2026) (Ruling)**

Neutral citation: [2026] KEELC 393 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E74 OF 2025
MAO ODENY, J
FEBRUARY 3, 2026**

BETWEEN

BENARD SIMIYU OTUBE APPELLANT

AND

**FAITH WANJIRA, KESSY GATHONI & RUTH WANJIRA (SUED AS
REPRESENTATIVES AND OFFICIALS OF PAVE COUNSELLING &
DEVELOPMENT GROUP) 1ST RESPONDENT**

JOSEPH KINYUA NDIRANGU 2ND RESPONDENT

ESTHER NYOKABI GATIBA 3RD RESPONDENT

THE COUNTY LAND REGISTRAR, NAKURU 4TH RESPONDENT

RULING

1. This ruling is in respect of the Appellant/Applicant's Notice of Motion dated 2nd November 2025, seeking the following Orders:
 - a. Spent.
 - b. That this Honourable Court be pleased to stay execution of the judgment and decree of the Chief Magistrate's court at Nakuru in CMELC/219/2018 delivered on 23rd October 2025, by Hon. C. M. Muhoro SRM, together with all other consequential orders pending the hearing and determination of the instant application.
 - c. That this Honourable Court be pleased to stay execution of the judgment and decree of the Chief Magistrate's court at Nakuru in CMELC/219/2018 delivered on 23rd October 2025 by Hon. C. M. Muhoro SRM, together with all other consequential orders pending the hearing and determination of the Appellant's intended appeal against the said judgment.



- d. That the costs of this application be in the cause.
2. The application is supported by the annexed affidavit of Benard Simiyu Otube, the Appellant/Applicant, sworn on 21st November, 2025, where he deponed that the Court delivered a judgment against him on 23rd October 2025, whereby he was aggrieved by the said judgment and has subsequently filed an appeal vide a Memorandum of Appeal dated 1st November, 2025.
 3. It was his deposition that the 1st Respondent's agents have severally visited the suit property, and he is apprehensive that they are likely to commence execution of the judgment leading to his eviction. Further, unless the court grants an order of stay of execution his appeal will be rendered nugatory
 4. The Applicant further deponed that he is ready and willing to abide by any conditions the court may deem fit to impose for the due performance of the decree, and that his appeal has high chances of success.

Appellant/Applicant's Submissions

5. Ms. Temba, counsel for the Appellant/Applicant filed submissions dated 9th December 2025, and identified two issues for determination as to whether stay of execution of the decree and judgment delivered on 23rd October 2025 should be granted pending the hearing of the Appeal and who should bear the costs of the suit.
6. On the first issue, counsel relied on Order 42 Rule 6 of the Civil Procedure Rules and the case of Republic v Retirement Benefits Appeals Tribunal Ex-parte Heritage A.I.I. Insurance Company Limited Retirement Benefits Scheme [2017] eKLR,) and submitted that the court must be satisfied that there is sufficient cause to grant a stay and that the filing of an appeal does not, ipso facto, guarantee stay of execution of the court's orders.
7. On whether the Applicant will suffer substantial loss if the order sought is not granted, counsel submitted that the Applicant stated that the respondents have threatened to execute the judgment and decree and is apprehensive that the Respondent may go ahead with the execution to his detriment. Further, the Applicant does not have alternative land and unless the order is granted, the appeal will be rendered nugatory.
8. Ms. Temba further submitted that the Applicant is ready and willing to furnish such reasonable security and abide by any conditions that the court may deem fit to impose. Counsel stated that the application was filed without undue delay as the judgment was delivered on 23rd October 2025, the Memorandum of appeal was filed on 1st November 2025 and the application on 11th November 2025. Counsel therefore urged the court to allow the application as prayed as the Applicant has met the ingredients for grant of stay of execution.

1st Respondent's Submissions

9. Mr. Kamau, counsel for the 1st Respondent filed submissions dated 10th December 2025, and relied on the conditions for grant of a stay of execution as provided for under Order 42 rule 6 of the Civil Procedure Rules, and the case of Njoroge v Wambui (Civil Appeal 364 of 2023) [2024] KEHC 8258 (KLR), and submitted that An Applicant must meet the three requirements, failure to meet any one is fatal.
10. Counsel further submitted that the Applicant's allegations of substantial loss are speculative and unsupported as proof of substantial loss is the cornerstone to granting stay of execution. He relied on the case of Obonyo v Achieng & another (Civil Appeal E046 of 2024) [2025] KEHC 7246



(KLR), and submitted that the suit property is intact, well defined and within the jurisdiction, and the 1st respondent has no intention to alienate or interfere with the property as it is meant for orphans, hence the Applicant's fears are unfounded.

11. According to counsel, the Applicant has not offered security for the due performance of the decree hence the failure is fatal to the application and submitted that should the court be inclined to grant an order of a stay of execution, then the 1st respondent proposes reasonable, adequate and proportionate security as follows: a) deposit of the original title deed of the suit property in court or in a court-approved joint escrow arrangement and , b) registration of an inhibition or caution to restrict any dealings with the land during the pendency of the Appeal.
12. Counsel urged the court to dismiss the application with costs and in the alternative if the court is inclined to grant the orders, then it should be conditional on the deposit of security.

Analysis and Determination

13. The issue for determination is whether the court should grant stay of execution of the judgment and decree of the Chief Magistrate's court at Nakuru in CMELC/219/2018 delivered on 23rd October 2025, by Hon. C. M. Muhoro SRM,
14. Order 42 Rule 6 of the Civil Procedure Rules provides as follows:
 - “(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.”
15. The decision whether to grant an order of stay of execution is discretionary, but the court must exercise such discretion judiciously. The judgment in this case was delivered on 23rd October 2025 and the application was filed on 11th November 2025 which shows that it was filed expeditiously.
16. In the case of Jaber Mohsen Ali & another v Priscillah Boit & another [2014] the court held as follows:
 - “The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.”
17. The cornerstone of an application for stay of execution is the demonstration of whether an Applicant will suffer substantial loss if an order of stay is not granted as was held in the case of KENYA SHELL LTD -V- KIBIRU 1980 KLR 410. The Applicant stated that the Respondent's agents have visited the suit land several times with the intention of starting the execution process and that he is apprehensive that they might evict him at any time hence he will suffer substantial loss.
18. The Respondent submitted that they do not have an intention to alienate or interfere with the suit property as it is meant for orphans, hence the Applicant's fears are unfounded. Counsel further submitted that should the court be inclined to grant the orders sought then the court should give a conditional stay to protect the interest of the 1st Respondent and the Applicant by ordering the deposit



of the original title deed to the suit land in court, or the registration of an inhibition or a caution to stop any dealings on the suit land pending the hearing and determination of the Appeal.

19. In the Court of Appeal case of *RWW v EKW* (2019) eKLR the court held as follows:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

20. On the issue of furnishing security for the due performance of the decree, Ms. Temba submitted that the Applicant is ready and willing to furnish security, on reasonable conditions set by the court. In the case of *Noor Said v Mary Mwawasi Manga* [2022] eKLR the court held as follows:

“The critical issues arising in this application are whether the applicant stands to suffer substantial loss if the order of stay is not granted and the question of security. The applicant has of course argued that if she is evicted and the respondent deals with the property, and she subsequently succeeds on appeal, she may find no house to return to. I am persuaded that if this happens then the applicant may suffer substantial loss. However, I think this is one case where the circumstances demand for security to be presented.”

21. Additionally, just like the grant or refusal to grant stay of execution is discretionary, the issue of security is also discretionary and it is upon the court to determine the same.

22. In the case of *Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014] eKLR it was held as follows:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the Judgment debtor...Civil process is quite different because in civil process the Judgment is like a debt hence the 1st applicant become and are Judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the 1st applicant. I presume the security must be one which can serve that purpose.”

23. Counsel for the respondent proposed that the Applicant should furnish reasonable, adequate and proportionate security if the court was inclined to grant stay orders. On the issue of adequacy of security, the Court of Appeal in the case of *Nduhiu Gitahi vs. Warugongo*[1988]KLR 621; 1KAR 100;[1988-92] 2KAR 100, expressed itself as follows:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the



form of it is a matter, which is immaterial. In an application for stay pending appeal, the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason, they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it”

24. The court is cognizant of the duty to balance the rights of the successful litigant and the right of the Appellant to appeal as was held in the case of *M/s Portreitz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1997* that:

“That the right of appeal must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”

25. In the interest of justice, I hereby grant a conditional stay of execution and order that the Applicant deposit Kshs. 200,000/ (Two Hundred Thousand Only) in a joint interest earning account of the advocates on record within 30 days, failure to which the stay lapses.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 3RD DAY OF FEBRUARY 2026.

M. A. ODENY

JUDGE

