



**Isiye v Kharinda & another (Environment and Land Case  
E017 of 2022) [2026] KEELC 694 (KLR) (4 February 2026) (Ruling)**

Neutral citation: [2026] KEELC 694 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND CASE E017 OF 2022**

**A NYUKURI, J**

**FEBRUARY 4, 2026**

**BETWEEN**

**APOLLO KATAMU ISIYE ..... PLAINTIFF**

**AND**

**NATHAN MUSEVE KHARINDA ..... 1<sup>ST</sup> DEFENDANT**

**ROSA A ELIATI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before court is a notice of motion dated 5<sup>th</sup> May 2025 filed by the 2<sup>nd</sup> defendant seeking orders of stay of execution of the judgment delivered in this matter, pending the hearing and determination of his appeal at the Court of Appeal. He further sought costs.
2. The application is predicated on the affidavit sworn by the applicant. The applicant's case is that judgment was delivered in this matter on 6<sup>th</sup> March 2025 wherein her claim for the suit property on the doctrine of adverse possession and fraud was dismissed and the respondent's case seeking eviction was allowed.
3. That the applicant promptly filed notice of appeal to the court of appeal and is awaiting certified copies of proceedings to file record of appeal. That the applicant has an arguable appeal as the respondent filed her case out of time and admitted never having occupied the suit property. That she demonstrated that his father had been in exclusive and open occupation of the suit property since 1983. Further that orders of status quo should be granted. She attached notice of appeal and application for certified proceedings.
4. The application was opposed. The plaintiff/respondent filed a replying affidavit dated 10<sup>th</sup> June 2025, opposing the application. It was his case that the applicant's affidavit is full of falsehoods. That the applicant has not demonstrated any substantial loss that may result if stay is not granted and that he has not offered any security. That he obtained title of the suit property upon purchase. That her claim



that she lives on the suit property is false as she does not live there, but lives on her matrimonial home at Anditi village far from the suit property. That the application is intended to frustrate him from enjoying his ownership rights.

5. Parties filed submissions in support of their respective positions. On record are the applicant's submissions dated 14<sup>th</sup> May 2025 and the respondent's submissions dated 22<sup>nd</sup> September 2025, both of which the court has duly considered.

### **Analysis and determination.**

6. The court has carefully considered the application, response thereto and submissions. The single issue that arise for the court's determination is whether the applicant has met the threshold for grant of orders of stay of execution pending appeal to the Court of Appeal.
7. Order 42 Rule 6 of the Civil Procedure Rules provides for the jurisdiction of the court to grant orders of stay of execution as follows;

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.
8. Thus, for an application for stay of execution pending appeal to succeed, 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.
9. In the case of *Kenya Shell Ltd v Kibiru* [1986] KLR 410, the court held that substantial loss is the cornerstone of the jurisdiction for granting stay of execution.
10. Execution is a legal process which should not be injudiciously halted. In *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, the court expressed itself thus:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the



issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo Because such loss would render the appeal nugatory.”

11. As stated above, the cornerstone for an application for stay is the demonstration of substantial loss. Allegations that there is an arguable appeal at the Court of Appeal have no bearing on an application such as the one now before court, as this court has already pronounced itself on the rights of the parties herein, having determined the matter on its merits, hence it cannot sit on appeal of its own decision. The question of the arguability of the appeal at the Court of Appeal is a matter that this court has no power to interrogate.
12. In the instant case, the applicant stated that she has been in exclusive occupation of the suit property, an allegation contested and denied by the respondent who maintains that the applicant stays at Anditi in her matrimonial home. The said allegation by the applicant was also made in this matter during trial and which was considered in the judgment of this court where the court rejected the applicant’s claim. Hence that allegation alone does not constitute substantial loss. Imminent eviction in itself is not proof of substantial loss where the court in its judgment has ordered eviction, like in this case. In short, there was no demonstration of substantial loss by the applicant.
13. In the premises, I find no merit in the application dated 5<sup>th</sup> May 2025 which I hereby dismiss with costs to the respondent.
14. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 4<sup>TH</sup> DAY OF FEBRUARY, 2026**

**A. NYUKURI**

**JUDGE**

In the presence of;

Mr. Biketi for the 2<sup>nd</sup> defendant/applicant

Mr. Akwala for the plaintiff

No appearance for 1<sup>st</sup> defendant

Court Assistant: Delphine

