



REPUBLIC OF KENYA



**Kalema v Memus & another (Environment and Land Case
E029 of 2025) [2026] KEELC 739 (KLR) (12 February 2026) (Ruling)**

Neutral citation: [2026] KEELC 739 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND CASE E029 OF 2025
MN MWANYALE, J
FEBRUARY 12, 2026**

BETWEEN

OLESANTIYA KALEMA PLAINTIFF

AND

NKIOSWA MEMUS 1ST DEFENDANT

SHANTILAL K. SHAH COMPANY LTD 2ND DEFENDANT

RULING

1. Before court for determination is the Application by way of Notice of Motion dated 6th of October 2025 seeking the substantial Order IV thereof, being a stay of Execution orders as the first three orders have been spent.
2. The substantial order sought is as follows; -
 - i. Spent.
 - ii. Spent.
 - iii. Spent.
 - iv. The Honourable court be pleased to grant an order of stay of Execution of the judgment and decree dated 14th January, 2025 together with all consequential orders and in particular the limb directory the Land Registrar to register L.R No. Transmara/Moita/218 (hereinafter referred to as the suit property) in the name of the Plaintiff/Respondent, pending the hearing and determination of the Intended Appeal to the Honourable court of Appeal.
 - v. Costs of this Application do abide the outcome of the Intended Appeal.
 - vi. Such further and/or other orders be made as the court may deem fit and expedient.



3. The grounds in support of the application are interalia;
 - i. Pursuant to Judgment in the matter the court found and held that the Land Registrar does proceed to register suit property in nature of Plaintiff/Respondent and that her 2nd Defendant/Applicant to execute all necessary transfer documents within 60 days in default the Deputy Registrar to execute on her behalf.
 - ii. The Applicant being aggrieved by the said decision lodged a Notice of Appeal and if execution is done the Appellant shall suffer substantial loss, and was willing to provide security for the decree.

Application was made timeously and the Appeal is merited.

4. The application is opposed by the Replying affidavit of Ole Santeya Kalema who depones interalia; -
 - i. That the application has been brought with unreasonable delay as judgment was delivered on 14.07.2025 and application filed on 07.10.2025.
 - ii. The application has not satisfied the conditions for grant of stay under Order 42 Rule 6(2) of the Civil Procedure Rules; no substantial loss has been demonstrated and the Appeal mounted is frivolous and not arguable, hence application ought to be dismissed ex debito justicial.
5. The court heard oral submissions in respect of the application from Miss Ochwal Learned Counsel for the Applicant/Defendant and Mr. O.M Otieno for the Plaintiff/Respondents.

Applicant's Submissions

6. Ms. Ochwal Learned Counsel for the Applicant placed reliance on the supporting affidavit and submitted interalia as follows; -
 - i. That the suit property is registered in the name of the 2nd Defendant/Applicant, decree is to transfer suit property to the Plaintiff. If intended Appeal succeeds, there is hardship that will be to recover the suit property.
 - ii. She submitted further that the Appeal is arguable and should not be rendered nugatory.
 - iii. She submitted further that Judgment was delivered on 14.07.2025 and a 60 days stay of execution window was granted, hence time lapsed on 14.09.2025 and application filed on 07.10.2025, hence application was filed timeously. That the Application had offered security. She placed reliance on the List of Authorities in her digest of authorities filed with the application and urged the court to preserve the suit property by allowing the application.
7. In opposition to the application, Mr. O.M. Otieno Learned Counsel for the Respondent placed reliance on the Replying affidavit and submitted that the applicant had not satisfied the conditions found at Order 42 Rule 6. He submitted that the arguability of an Appeal is condition under Rule 5(2) (b) and not of the court of Appeal under order 42 (Rule) (6).
8. He submitted no substantial loss had been demonstrated and no injury was likely to occur.
9. He submitted that the Right of Appeal and right of decree holder must be balanced, and reliance was placed on the decision in Shadrack Musili Vs. Nathan Jonathan Nzioka.
10. In a brief Rejoinder, Ms. Ochwal submitted that there were no depositions on the ability to refund. On arguable appeal the Applicant submitted that the Appeal raises issues that need to be interrogated



by the Court of Appeal. She submitted that the Right of Appeal and the Right of decree holder must be balanced so as to preserve the suit property. She urged the court to allow the application.

Issues for Determination

11. The court frames the following as issues for determination in the present application.
 - i. Whether or not the application is merited? In deciding this limb, the court shall look at whether the Application meets the threshold under Order 42 Rule 6 of the Civil Procedure Rules?
 - ii. Who orders ought to issue?
 - iii. Who bears the costs of the application?

Analysis and Determination

12. It is trite law that an application for stay of execution pending appeal from the decision of the ELC tot eh court of Appeal when such an Application is made before the trial court is made under Order 42 Rule 6 of the Civil Procedure Rules.
13. The said provision of the law sets 3 conditions, to be met before a stay pending appeal can be issued?
14. The conditions set out under Order 42 Rule 6 are as follows; -
 - i. Application must be made timeously.
 - ii. Proof of substantial loss to be made.
 - iii. Security to be offered.
15. Ms. Ochwal submitted on the arguability of the Intended Appeal and that the Appeal ought to be rendered nugatory, to which Mr. O.M Otieno submitted that the said principles do not apply in a stay pending appeal before the trial court, but are principles to be considered under a stay pending appeal before Court of Appeal under Rule 5(2) (b) of that court.
16. I agree with the submissions of Mr. Otieno that Arguability of an Appeal and the Appeal to be rendered nugatory are principles for grant of stay of execution at the court of Appeal and not before a trial court like this one.
17. So the court shall determine whether the application based on the 3 conditions under Order 42 Rule 6 was the application made timeously? the judgment herein was delivered on 14.07.2025 while the application was filed on 07.10.2025, in between the said time there was an informal stay of execution for 60 days which lapsed on 14.09.2025, the application was thus made 21days after the lapse of the informal stay of execution, hence the same was made timeously and the Respondent did not attack this limb of the conditions as the application was indeed made timeously.
18. Was substantial loss demonstrated?
19. The Applicant was under a duty to demonstrate substantial loss if the application is denied.
20. The Applicant submitted that it is the registered proprietor of the suit property, hence substantial loss and/or hardship would occur if the application is denied. The Respondent submitted that no substantial loss would occur.
21. Indeed, there is a valid decree of the court which has been challenged by the Appellate process, substantial loss has not been demonstrated, for if Appeal succeeds, an order for rectifying of the register back to the Applicant would issue.



22. The Applicant has offered security, in his deposition.
23. The decree herein is not a monetary decree so as to invite argument that the Respondent has not deponed capability is not of refunding the same.
24. Th court has found that whereas there is deposition as to substantial loss being occasioned to the Applicant, that substantially loss has not been demonstrated other than the deposition thereto.
25. The Applicant has thus not met the threshold for grant of a stay of execution pending Appeal.
26. The court notes that both the Applicant and Respondents Counsel submitted on the need to balance the interests between the Right to Appeal on the part of the Applicant and the Right to the fruit of the judgment on the part of the Respondent.
27. In the impugned judgment, the court in granting the relief of Adverse possession must have been satisfied of the occupation on the suit property by the Respondent and the registration of the suit property to the Applicant, and that must be deemed to be the prevailing status quo.
28. Though the Applicant has not met the threshold for grant of stay pending Appeal, the court confirms the status quo orders issued on 19.01.2025 pending hearing and determination of the Intended Appeal.
29. The status quo order to be maintained on the ground to mean the Respondent to remain possession but not to undertake any developments and the status quo on the register of Transmara/Moita/2018, to mean the suit property to remain in the name of the registered proprietor to wit the Applicant herein. The status quo orders are issued pursuant to practice direction number 28K gazette issued vide gazette Notice number 5178/2014 which empowers court to issue status quo orders so as to preserve suit properly.
30. Costs of the application are awarded to the Respondent.

DATED AT KILGORIS 12TH DAY OF FEBRUARY, 2026

HON. M.N. MWANYALE

JUDGE

In the presence of

CA – Sylvia/Sandra/Clara

Mr. Otieno for Respondent

Mr. Langat for the Applicant

