

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**  
**ELC (OS) NO. 96 OF 2018**

**MARWA                      IKANGA**  
**APPELLANT/RESPONDENT**

**MAGIGE.....1<sup>ST</sup>**

**CHRISTOPHER**  
**APPELLANT/RESPONDENT**

**MIKWABE.....2<sup>ND</sup>**

**MWITA                      IKANGA**  
**APPELLANT/RESPONDENT**

**MAGIGE.....3<sup>RD</sup>**

**NYAMUNDA                      IKANGA**  
**APPELLANT/RESPONDENT**

**MAGIGE.....4<sup>TH</sup>**

**VERSUS**

**MARGRET WASONGA W/O**

**SAMUEL**  
**CHACHA.....RESPONDENT/APPLICANT**

**RULING**

**The application**

1. The applicant filed a notice of motion application dated 8<sup>th</sup> November 2025 under a certificate of urgency. The application was brought under Sections **1A, 1B & 3A** of the Civil Procedure Act, Cap 21, Rule 9 of the Auctioneers Rules 2009, Section 152C, D, & G of the Land Act, Cap 280 and the Land

Act Regulations (2017) and Articles, 10, 21, 22, 28, 40, 43, 47 & 50 of the Constitution of Kenya, 2010.

2. The application is filed against the backdrop that the Respondents filed the instant suit against the Applicant, claiming to have acquired her parcel of land, the suit land, by way of adverse possession. After the evidence was tendered, the Court found that they had not proved their case on a balance of probabilities. It dismissed it with costs to the Applicant now. It also ordered that they vacate the land or be evicted.

3. The instant application seeks ORDERS THAT:

1. Eviction herein against the Appellants/Respondent, their Servants, agents or anyone acting under them or under their authority in occupation of be carried out by EKEMWANYA AUCTIONEERS with assistance of the OCS ISIBANIA POLICE STATION overseeing the enforcement of the Order and to provide the Applicant with the necessary assistance in execution of the issued herein.

2. Eviction to be carried out with strict adherence and compliant with Section 152 C, D, E & G of the Land Act, Cap 280 and the Land Act Regulations (2017)
3. The appellants to pay the Auctioneer's charges and all the subsequent costs incurred in the Eviction exercise together with Costs incidental to this Application.
4. Anyone obstructing this lawful Order be arrested.
4. The application is premised on the grounds set out on the face of the application as well as the grounds contained in the affidavit annexed to the application and sworn by Margaret Wesonga, the applicant herein.
5. The applicant's case is that this court issued a decree for eviction of the respondents herein. She maintained that, despite the decree and order of the court, the respondents herein have refused to give vacant possession of land parcel LR. NO. BUGUMBE/MABERA/211 and they have resorted to constructing illegal structures on the said land.
6. The applicant further maintained that she is unable to actualize the directives issued by the court unless the same is implemented or executed by an auctioneer or the police. She

stated that further delays in implementing the orders of the court will cause her prejudice and prevent her from enjoying the fruits of successful litigation. Lastly, the applicant averred that it is in the interest of justice that her application be allowed.

7. The court has considered the supporting affidavit sworn by the applicant. The applicant deposed that she is the registered owner of LR.NO.BUGUMBE/MABERA/211. She annexed a copy of a decree mandating the eviction of the respondents in annexure marked MW-1. She also averred that the court had earlier issued a similar decree which was ignored by the respondents and annexed a copy of the said decree as annexure marked MK-2.

**8. The applicant prayed that this court be pleased to issue eviction orders against the respondent, and further prayed that the said eviction be carried out\_\_by EKEMWANYA AUCTIONEERS with the assistance of the OCS Isibania Police Station or any other nearest Security agencies in conformity with the law.**

9. The applicant drew this court's attention to her advanced age as well as the long duration of time taken in litigating the matter and deponed that she stands to suffer prejudice besides being deprived of the fruits of successful litigation. she also deponed that the application ought to be allowed *ex-debitio justitiae*
10. Finally, the applicant deponed that the eviction orders are within the knowledge of the respondents. Nevertheless, the same was also served upon the said respondents. She urged the court to allow her application as prayed.

### **The response**

11. The respondents swore a replying affidavit dated 19<sup>th</sup> November 2025. They deponed that that they instituted an Appeal against the judgment of this court at the Court of Appeal in Kisumu. In it they sought a stay of execution of the decree of the Court. They also deponed that their said application is yet to be heard, and that the court of appeal is yet to schedule a hearing date for the application. They

annexed a copy of directions from the court of appeal dated 4<sup>th</sup> September 2025.

12. The respondent deponed that the applicant is aware of their appeal as the court's directions were served upon her. They equally deponed that granting the orders sought by the applicant would be detrimental to them as it would defeat the purpose of their appeal. They prayed that the applicant's application be dismissed.

### **Issues, Analysis and Determination**

13. The issue for determination herein is whether the respondents should be evicted from land parcel no LR.NO.BUGUMBE/MABERA/211. Attendant to this issue is the question of costs of the application.

14. The court has considered the both the application and the relying affidavit in their entirety. It is not in dispute that this court ordered the respondents to vacate the suit property. This can be inferred from the decree and order of the court dated 27<sup>th</sup> August 2025 wherein this court directed that the applicants (now respondents) to vacate the suit premises within the next 30 days after the date of the order of the court.

15. The respondents have not vacated the suit premises as directed by this Court. They averred that they have since filed an appeal at the court of appeal in Kisumu as well an application seeking stay of execution pending appeal. They argued that their appeal is yet to be heard. They added that the court directed that parties would be notified of a hearing date as per the court's diary. They annexed a copy of the said directions.

16. The court has examined the said directions. Although the respondents averred that they filed an application seeing stay of execution, it is not clear to this court whether or not the application filed at the court of appeal actually sought a stay of execution pending the appeal allegedly filed in that court. The Respondents did not attach the said application to their response to the instant application. Be that as it may, the Court of Appeal did not issue any directions or orders of stay of execution of the decree herein. Further, the respondents have never moved this court for orders of stay of execution of the decree.

17. The respondents only annexed a copy of directions relating to an unspecified application filed in the Court of Appeal, which application is yet to be heard. The court notes that these directions could relate to any application, not necessarily for staying the execution of this court's decree or even an application seeking enlargement of time to institute the appeal out of time. It is therefore difficult for this Court to ascertain whether the respondents actually filed the alleged stay of execution application or not. This Court does not act on guesswork or conjecture. In any event, under Section 107(1) of the Evidence Act, it is provided that, "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

18. The applicant having moved the court, and actually confirmed, that the Respondents who too admitted that they had not vacated the suit land discharged that burden. Once the Respondents were of the view that the Court should believe that they filed an application to stay the execution of the decree herein, it was incumbent on them to prove two facts,

namely, the existence of the said application, and also the issuance of orders of stay of execution of the said decree either by this or the Court of Appeal. They did not.

19. The law regarding stay of execution of decrees or orders pending appeal is clear. An appeal or a second appeal does not act as an automatic stay of execution. Actually, **Order 42 Rule 6 (1) of the Civil Procedure Rules** enunciates this position as hereunder:

*“(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.”*

20. Thus, where the court has not been furnished with a copy of an order staying execution or at the very least, an application received by the court of appeal seeking the said stay of execution, it has no choice but to allow the applicant to enjoy the fruits of her successful litigation. The applicant wishes to so do. She has moved this court to assist her, through lawful means, by issuance of the orders sought, to enjoy the fruits of her judgment. This court cannot withhold such a prayer from her.

21. In **Macharia t/a Macharia & Co Advocates v East African Standard, No 2 (2002) KLR 63**, the court observed that: -

*“To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any*

*decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”*

22. Granted the above circumstances as persuaded by the decision, this court finds that there is no stay of execution granted by this court or the Court of Appeal. Therefore, the instant application succeeds. This Court hereby grants the following orders:

- a) There be and is hereby issued an order of eviction against the Plaintiffs/ Respondent, their servants, agents or anyone acting under them or under their authority, in and from the occupation of all that parcel of land known as LR. NO.

BUGUMBE/MABERA/211, and this be carried out by M/S EKEMWANYA AUCTIONEERS, with assistance of the OCS ISIBANIA POLICE STATION who is to provide security during the enforcement of the Order, and provide the Defendant/Applicant with the necessary assistance in execution of the issued herein.

- b) The eviction to be carried out under strict adherence and compliance with Section 152 C, D, E & G of the Land Act, Cap 280 and the Land Act Regulations (2017).
- c) The plaintiffs/Respondents to pay the Auctioneer's charges and all the subsequent or incidental costs incurred during the eviction exercise, together with the cost incidental to this Application.
- d) The costs of this application be borne by the Respondents.

23. Orders accordingly.

**RULING Dated, signed and Delivered virtually via the Teams Platform this 16<sup>th</sup> day of February 2026.**

**HON. DR. IUR NYAGAKA  
JUDGE**

**In the presence of,**

Mr. Agure Advocate for the Applicant (absent)

1<sup>st</sup> Respondent (Present, in court)

2<sup>nd</sup> Respondent (present in court)

3<sup>rd</sup> Respondent (present in court)

4<sup>th</sup> Respondent (present in court)