



# THE JUDICIARY



## **REPUBLIC OF KENYA**

### **IN THE ENVIRONMENT AND LAND COURT AT NAROK**

#### **ELC APPEAL NO. E002 OF 2025**

**ERASTUS GEORGE MANYAGI NDEKELE (Suing as the administrator of the Estate of Daniel Mugo Ole Kimelok - Deceased).....APPELLANT/RESPONDENT**

#### **VERSUS**

**ANDREW MWAURA KUNGU.....1<sup>ST</sup> RESPONDENT/APPLICANT**

**REGISTRAR FOR LAND-NAROK.....2<sup>ND</sup> RESPONDENT**

**HON.ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

#### **RULING**

1. The 1<sup>st</sup> Respondent/Applicant brought this **Notice of Motion** Application dated **1<sup>st</sup> October 2025**, brought under **Order 42 rule 6 of the Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**, wherein he has sought for the following orders;

- i) That pending the hearing and determination of the Appeal, this court be pleased to issue an order of stay of the**

***judgment delivered on the 11<sup>th</sup> September 2025, and the consequent decree and any other orders emanating therefrom;***

***ii) That costs of the application be provided for.***

2. The application is premised on the following grounds; that Judgment in this matter has already been delivered in favour of the appellant/respondent; that pursuant to the said judgment, title for plot No **Narok Cis Mara/Nkareta/591**, is to revert back to the estate of **Tentemu Ole Kimelok** (deceased) from the 1<sup>st</sup> Respondent; that the 1<sup>st</sup> Respondent/Applicant has filed a **notice of appeal** against the entire decision, but the preparation of the appeal may take time, hence, there is a likelihood that the decree will be executed; that should the decree be executed and the land revert back to the estate of **Tentemu Ole Kimelok(deceased)**, there is a real likelihood that the **deceased's estate** will have been **distributed** rendering the appeal **nugatory**, and the 1<sup>st</sup> Respondent /applicant will suffer irreparably.
3. The application is further supported by the Affidavit of the 1<sup>st</sup> Respondent, **Andrew Mwaura Kungu**, who reiterated most of the grounds in support of the Application, and also averred that the Appellant/Respondent had filed a suit against the 1<sup>st</sup> Respondent and others before **Narok Chief Magistrate's Court**, being **Case No CMELC 06 of 2019**, alleging fraud over the transfer of land parcel **No Narok Cis Mara/Nkareta/591**, which suit was dismissed by the trial court.

4. Further, that the appellant/respondent filed the instant Appeal which was decided in favour of the appellant, as the court held that the suit land (**Cis Mara/Nkareta/591**) should revert back to estate of **Tentemu Ole Kimelok**(deceased).
5. It was his averments that being dissatisfied with the said Judgment, the Respondent/Applicant intends to appeal at the Court of Appeal, has filed a Notice of Appeal, which was filed in good time, and has also sought for typed proceedings to prepare the Record of Appeal.
6. He claimed that since the judgment directed that the suit land do revert to the estate of **Tentemu Ole Kimelok (deceased)**, then he is apprehensive that the Appellant/Respondent may proceed with haste and execute the said decree. Further, that his advocate has informed him that an **Appeal** before the Court of Appeal may take long before being determined, and by then the **Succession proceedings** may have commenced and determined.
7. Therefore, he is apprehensive that by the time his Appeal is heard and determined, the estate of **Tentemu Ole Kimelok (deceased)** will have been **distributed**, the suit land included, and even changed hands, making recovery impossible, in the event the appeal is determined in his favour, thus making it a mere academic exercise.

8. The deponent claimed that the stay order sought will not prejudice any party, and it will be in the interest of justice that the orders sought should be granted.
9. The Application is opposed by the Appellant/Respondent through the Grounds of Opposition dated **9<sup>th</sup> October 2025**. These grounds of opposition are;
- i) That the 1<sup>st</sup> Respondent's Notice of Motion dated 1<sup>st</sup> October 2025, is an abuse of the court process;**
  - ii) That the 1<sup>st</sup> Respondent's Notice of Motion dated 1<sup>st</sup> October 2025, has no leg to stand on and should crumble as proceedings to appeal pending appeal in Court of Appeal should be taken under the Court of Appeal Rules 2022.**
10. The Application was canvassed by way of written submissions. The 1<sup>st</sup> Respondent/Applicant filed his submissions dated **26<sup>th</sup> November 2025**, through **J. Martim & Co Advocates**, and submitted that the Appellant/Respondent's suit had been dismissed before the trial court, but after an appeal to this court, the court ruled in his favour, and directed that the Respondent/Applicant's title for the suit land be **cancelled**, and revert back to the estate of **Tentemu Ole Kimelok (deceased)**.
11. It was his further submissions that the Respondent/Applicant is aggrieved and intends to appeal

before the Court of Appeal, and thus the reasons for **stay of execution** of the judgment of this court.

12. In his submissions, he set out five issues for determination being;

*i) Whether it is necessary to stay the decision of this court pending the hearing and determination of the appeal;*

*ii) Whether granting of the orders sought will prejudice the appellant/respondent)*

*iii) Whether the court has jurisdiction to entertain this application.*

*iv) Whether the delay in bringing this application is inordinate;*

*v) Who should bear costs of this application.*

13. On whether it is necessary to stay the decision of this court pending the hearing and determination of the appeal to protect the interest of the 1<sup>st</sup> Respondent on the suit land, he submitted that the judgment of this court decreed that the suit land **Narok Cis Mara/Nkareta/591**, held by the 1<sup>st</sup> respondent /applicant should be cancelled and ownership revert to the previous owner **Tentemu Ole Kimelok**, now deceased, and the same should be distributed according to the law of succession.

14. Further, that since the appeal before the **Court of Appeal** might take long, then stay of execution is necessary to preserve the **status** of the suit land, which would be impossible to reverse if the Court of Appeal judgment would be in his favour.
15. On whether the granting of orders sought will prejudice the Appellant/Respondent, it was his submissions that the orders will not prejudice the appellant herein, because the appellant/respondent is not an outright beneficiary of the estate of **Tentemu Ole Kimelok (deceased)**, who is expected to hold the title after the cancellation. Further, that being a beneficiary of the estate of **Mugo Ole Kimelok**, does not mean that he is an automatic beneficiary of the estate of **Tentemu Ole Kimelok**, and hence a stay of Judgment will not prejudice the appellant /respondent in any way.
16. Whether the delay in bringing this application is inordinate, it was submitted that there is no delay in bringing this application since after the delivering of the judgment on **11<sup>th</sup> September 2025**, the Respondent/Applicant filed a Notice of Appeal on **19<sup>th</sup> September 2025**, and served it upon the other parties. That this application dated **1<sup>st</sup> October 2025** was filed only **20 days** after delivery of the said judgment, and therefore, there was no inordinate delay.
17. On whether the court has jurisdiction to entertain the application, the 1<sup>st</sup> Respondent submitted that the

application is meant to **preserve the suit property**, and it is not an issue of jurisdiction as the court is not called to examine the merit of the appeal before the appellant court, but to preserve the suit property through stay of execution of the Judgment.

18. On who should bear costs of the application, the 1<sup>st</sup> Respondent submitted that the court should go by the doctrine that costs follow the event, and grants the 1<sup>st</sup> Respondent/Applicant costs, since stay of execution is necessary and should be granted, thus making the 1<sup>st</sup> Respondent/Applicant, the successful litigant.
19. In response to the application the Appellant/Respondent through the Law Firm of **Ojienda & Co. Advocates** filed a **case law digest** dated **11<sup>th</sup> November 2025** and relied on the following cases;
20. On **inherent power of Court of Appeal**, the Appellant/Respondent relied on the cases of; **Samuel Kamau Macharia & another vs KCB Ltd & 2 others (2012) Eklr and Owners of the Motor Vessel Lilian 'S' V Caltex Oil (K) Ltd (1989) 1 KLR.**
21. On **Appeals to be handled by Court of Appeal** in line with Court of Appeal Rules 2022, the Appellant/Respondent relied on the cases of; **Teachers Service Commission vs Kenya National Union of Teachers, Sup. Ct. Appl No.16 of 2015, Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others [2013] KECA 378(KLR) and**

**Bellevue Development Company Ltd vs Francis Gikonyo & 7 others [2018] eKLR.**

22. The Respondent /Applicant **Andrew Mwaura Kungu**, has sought for orders of stay of execution under **Order 42 Rule 6** of the **Civil Procedure Rules**, which states;

***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.”***

23. Further, the application is anchored under **section 3A** of the **Civil Procedure Act**, which states;

***3A. Saving of inherent powers of court.***

***“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make***

***such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”***

24. It is evident that after this court delivered its judgment on **11<sup>th</sup> September 2025**, the 1<sup>st</sup> Respondent/Applicant filed a Notice of Appeal, dated **19<sup>th</sup> September 2025**, expressing intention to appeal against the whole judgment of this Court to the Court of Appeal.
25. After filing the **Notice of Appeal**, and applying for typed proceedings, he filed this **Notice of Motion Application** seeking to stay execution of the said judgment.
26. **Order 42** of the Civil Procedure Rules is clear that filing an appeal is not an automatic grant of stay orders. The stay order is sought under order **42 Rule 6** of **Civil Procedure Rules**, which order grants discretion to the court to stay execution of the judgment pending appeal. This provision of law provides;

**“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except.....the court appealed from may for sufficient cause order stay of execution of such decree or order”**

27. Grant of stay of execution is a **discretionary measures** granted with conditions, that must be met. As stated by the above provisions of law, an appeal is not an automatic guarantee of stay of execution, since the applicants must

satisfy certain conditions. See the case of ***Khaki & 28 others v Juma & 5 others (Environment & Land Case 35 of 2019 & Environment and Land Miscellaneous Application E063 of 2020 (Consolidated)) [2025] KEELC 333 (KLR) (5 February 2025) (Ruling)***.

28. Under ***Order 42 Rule 6*** of the ***Civil Procedure Rules*** the applicant must prove that he will ***suffer substantial loss*** if the ***stay is not granted***, the application must be made ***without unreasonable delay***, and the applicant should be willing to provide security for the due performance of the decree.
29. Whether to grant the stay or not is a discretion of the court. As the court exercises this discretionary power, it has a duty to balance the rights of the appellant to appeal. with the rights of the decree-holder, to enjoy the fruits of his/her judgment. The court will also bear in mind that by simply filing an appeal, that does not automatically stay the execution of a decree, and thus an appeal is ***not Automatic Stay***.
30. Further, in the case of ***Muchiri versus Rutere (Environment & Land Case 319 & 316 of 2017 (Consolidated)) [2023] KEELC 22377 (KLR) (14 December 2023) (Ruling)***, the court held;
- Stay of execution pending appeal is a discretionary power bestowed upon this court by law. In Butt v Rent Restriction Tribunal (1982) KLR 417, the Court of Appeal gave***

**guidance on how a court should exercise the said discretion and held that -;**

- i). The power of the court to grant or refuse an application for a stay of execution is discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**
- ii). The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reserve the judge's decision.**
- iii). A Judge should not refuse a stay if there are good grounds for it granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**
- iv). The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances in this case were that there was a larger amount of rent in dispute and the appellant had an undoubted right of appeal.**
- v). The court in exercising its power under order XLI rule 4(2) (b) of the Civil Procedure Rules, can Order Security upon application by either party or on its own**

***motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."***

31. The 1<sup>st</sup> Respondent /Applicant is required to satisfy the above conditions to justify the grant of an order for stay of execution pending appeal; that is to establish **sufficient cause**; demonstrate that he will **suffer substantial loss** unless a stay is granted; **offer security** and apply for the stay order **without unreasonable delay**. See the case of ***Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR***.
32. There is no dispute, and the record has confirmed that the judgement intended to be appealed against was delivered on **11<sup>th</sup> September 2025**, while the instant application was filed on **1<sup>st</sup> October 2025**, Therefore this court finds and holds that there was **no unreasonable delay** in filing the instant application.
33. On the requirement for the 1<sup>st</sup> Respondent /Applicant to show that he will **suffer substantial loss** unless the order for stay is granted, the Applicant has alleged and deposed that he stands to suffer significant loss and prejudice as the Court directed that the title to the suit property revert back to the estate of ***Tentemu Ole Kimelok (Deceased)***, and that since appeals before the Court of Appeal takes long, then he stands to suffer if **succession proceedings** will go on before the Appeal is heard and determined.
34. However, the court was categorical that the 1<sup>st</sup> Respondent/Applicant can apply to be joined in the

intended Succession proceedings, and stake his claim as a purchaser. Further, it is not automatic that an appeal before the Court of Appeal will take long to be determined. The 1<sup>st</sup> Respondent/Applicant has only filed the **Notice of Appeal**, and not the appeal itself. This court should balance the right of the Applicant with the right of a judgment creditor, who is entitled to enjoy the fruits of his judgment. See the case of **Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007 KLR, b.**

35. Given that the Respondent/Applicant has an opportunity to lodge his claim as a purchaser in the intended Succession proceedings, he cannot be heard to say that he will suffer **substantial loss**, which cannot be compensated by an award of damages.
36. In the case of **China City Construction Company Limited & another versus Karisa (Suing as the Administrator and Legal Representative of the Estate of the Late Didlora Mwaka Mwangala) (Civil Appeal 105 of 2023) [2024] KEHC 3323 (KLR) (8 April 2024) (Ruling)**, the court had this to say on substantial loss;

***“On substantial loss, it was the Appellant’s allegation that the decretal amount is substantial, if paid to the Respondent and the appeal succeeds, they may not be able to recover the same. On this principle, Platt, Ag. JA (as he then was) in Kenya Shell Limited v Kibiru [1986]***

**KLR 410, at page 416 expressed himself as follows:**

***“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.***

**On his part Gachuhi, Ag.JA (as he then was) at 417 held:**

***“It is not sufficient by merely stating that the sum of Kshs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”***

37. This court finds and holds that the 1<sup>st</sup> Respondent/Applicant herein did show or **substantiate**

the nature of the loss he would suffer, given that if he has a genuine claim as a purchaser, he can stake it in the succession proceedings... The 1<sup>st</sup> Respondent/Applicant was found by the court to have been registered as the owner of the suit land, long after **Tentemu Ole Kimelok (deceased)** had passed on, and he did not produce the signed transfer forms.

38. Further, the 1<sup>st</sup> Respondent /Applicant has not shown how after the proper succession is done, then the beneficiary/ries of the estate of **Tentemu Ole Kimelok(deceased)** would be unable or incapable of giving him his alleged portion of land, should he emerge successful on appeal.

39. In the case of **Machira t/a Machira & Co Advocates versus East African Standard [2002] KEHC 1167 (KLR)**, the court held as follows; “

***“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 judgment or of any decision of the court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is***

***acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution, pending appeal.....***

***So, in justice and fairness, when a party has been found by a court to be in the right at whatever stage in the litigation, he should ordinarily have access to the consequences of that judicial finding and decision and enjoy his rights as so found and determined. Any subsequent decision of the court which tends to impede the normal flow of justice, by suspending the enjoyment of the consequential benefits of one's success can only be rendered in exceptional circumstances after an exercise of great caution and finding that suspension is necessary in justice and fairness.***

***In this regard, this process means that in order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavit or on some other proper evidential material, that substantial loss may result to him out of all proportions in relation to the interests of justice and fairness, unless suspension or stay is ordered and the parties' positions so regulated and ordered that injustice is averted."***

40. This court is tasked with a duty to balance the rights of the 1<sup>st</sup> Respondent/ applicant of filing an appeal at the Court of Appeal, which would call for suspension of execution, which is a lawful process, with the corresponding right of the Appellant/ Respondent to enjoy the fruits of his judgment. For this court to grant stay of execution, the Respondent/ Applicant ought to have shown that he will suffer **substantial loss** if execution is to take took.
41. However, the court has found that the 1<sup>st</sup> Respondent/Applicant failed to do so. This responsibility of balancing the two rights is done through allowing **justice and fairness to prevail**, which in this application dictates for the dismissal of this application.
42. No **substantial loss** has been proved, and consequently, this court finds it not necessary to consider the requirement of security for due performance. Prove of substantial loss, on the part of the applicant is the cornerstone of issuance of stay of execution orders, and without such prove, the application fails. Since such **substantial loss** was not proved, the instant application fails.
43. The court having found that the 1<sup>st</sup> Respondent/Applicant was registered as the owner of the suit land without proof of purchase or payment of purchase price; without involving the administrators of the estate of **Tentemu Ole Kimelok (deceased)**, and without production of transfer documents; and transfer done long after **Tentemu**

**Kimelok (deceased)** had passed on the 1<sup>st</sup> Respondent/Applicant is in the eyes of this court is without any legal or beneficial rights, over the suit property, and in balancing the rights herein, the judgment creditor should enjoy the fruits of his judgment.

44. Having carefully considered the instant Notice of Motion dated **1<sup>st</sup> October 2025**, the court finds and holds that it is **not merited**, and the same is **dismissed** entirely with costs to the Appellant/Respondent.

***It is so ordered.***

***Dated, signed and delivered virtually at Narok this 19<sup>th</sup> Day of February 2026.***

***L. Gacheru  
Judge***

***Delivered online in the presence of***

***Elijah Meyoki - Court Assistant***

***N/A - Appellant/Respondent***

***Mr. Naimodu holding brief for M/S. Maritim for 1<sup>st</sup> Respondent/Applicant***

***N/A - 2<sup>nd</sup> Respondent***

***N/A - 3<sup>rd</sup> Respondent***

***L. Gacheru  
Judge  
19/02/2026***