REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ELCLA No. E013 OF 2025

BRISKA NYABOKE ONYANDO ……..... 1ST APPELLANT
HELLEN MORAA ONYANDO ……..... 2ND APPELLANT

VERSUS

ESTHER NYANGENA ……..... 1ST RESPONDENT
FREDRICK OIRA NYANGENA ……..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Nyamira (B. Ondego, Chief Magistrate) delivered on 5th August 2025 in Nyamira CM ELC No. 6 of 2021)

RULING

1. This is an appeal from the judgment and decree of the Chief Magistrate's Court at Nyamira (B. Ondego, Chief Magistrate) delivered on 5th August 2025 in Nyamira CM ELC No. 6 of 2021. The Subordinate Court concluded that the Appellants' suit and the Respondents' counterclaim were improperly before it and proceeded to strike out both with an order that each party to bear own costs.

2. By Notice of Motion dated 25th September 2025, the Appellants seek the following orders:

1. *[Spent]*

2. *[Spent]*

3. *THAT pending the hearing and determination of this appeal, the Honourable court be pleased to stay /or stop any construction by the Respondents either by themselves or through their agents, servants and assigns on I.R North Mugirango/Bomwagamo/2574 and 2573.*

4. *THAT pending the hearing and determination of this appeal, the Honourable court be pleased to restore the appellants/applicants to their L.R. NOs. NORTH MUGIRANGO/BOMAGWAMO/2574 and 2573 respectively and issue injunctive orders restraining the respondents, by themselves, their agents, servants and anybody claiming through them from interfering with their quite occupation and possession of the afore mentioned portions of land.*

5. *THAT the OCS Ekerenyo Police station to ensure compliance of the court orders.*

6. *THAT the costs of this application be provided for*.

3. The application is based on the grounds listed on its face and is supported by a supporting affidavit and further affidavit, both sworn by Briska Nyaboke Onyando, the First Appellant. She deposed that following the striking out of the suit, the Respondents interfered with their quiet possession of the suit

properties by chasing them away, assembling construction materials and commencing construction of a permanent house despite the issue of ownership being raised.

4. The First Appellant further deposed that the Appellants stand to suffer substantial loss if stay of execution is not issued since the suit properties will be wasted and they will be evicted. She also stated that they were willing to abide by any conditions set by the Court.

5. The Respondents did not file any response to the application. Their advocate on record, Mr Makori, told the court that they were relying on the entire record and proceedings in opposition to the application.

6. The Appellants urged the court to allow the application.

7. I have carefully considered the application, the affidavits and the submissions. The sole issue for determination is whether the orders sought should issue.

8. Principally, the Appellants seek stay of execution and an order restoring them in the suit properties. Looked at from whichever perspective, everything boils down to stay of execution, for without stay of execution of the judgment, there would be no valid basis upon which to grant the Appellants possession. In fact, restoring the Appellants in possession is essentially an order of injunction pending appeal whose guiding principles are the same as stay pending appeal.

9. The application is primarily brought under **Order 42 rule 6 (2)** of the **Civil Procedure Rules** which provides as follows:

> ***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.***
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> ***(2) No order for stay of execution shall be made under sub rule (1) unless—***
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> ***(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.

10. The essence of those provisions is that an applicant seeking stay pending appeal or an injunction pending appeal must demonstrate that substantial loss will result to her if stay is not granted, and that the application has been made without unreasonable delay. Such an applicant is further required to give such security as the court may order for the due performance of the decree. See **Kenya Power & Lighting Co. Ltd v Kigaita Ngare Unduthu & 36 others [2020] eKLR** and **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**. As Platt Ag JA (as he then was) stated in **Kenya Shell Limited v Benjamin Karuga Kibiru & another** (supra), substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is virtually impossible for such an application to succeed if an applicant fails to demonstrate that he will suffer substantial loss if stay is not granted.

11. The judgment that the Appellants are appealing against is one of striking out of the Appellants' suit and the Respondents' counterclaim with an order that each party to bear own costs. The order appealed against is a negative order since the decree did not order the parties to do anything or refrain from

doing anything. A negative order is incapable of execution. Consequently, there is nothing to stay in it.

12. Faced with an application in a similar scenario in **Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others [2021] KECA 465 (KLR)**, the Court of Appeal held thus:

> ***With regard to the first prayer, a cursory perusal of the record herein shows that the High Court vide its judgment dated 30th July 2020, merely dismissed the applicant's case with costs to the respondents. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the High Court is in the nature of a negative order incapable of execution and as such there is nothing to stay. See Western College of Arts and Applied Sciences v EP Oranga & 3 others [1976] eKLR where the Learned Judges stated thus:***
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> ***"what is there to be executed under the judgment, the subject of the intended appeal" The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In Wilson v Church the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to***

do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered."

…

Consequently, the prayer for stay of execution must fall by the wayside and the same is hereby dismissed.

13. In view of the foregoing, I find no merit in Notice of Motion dated 25th September 2025, and I therefore dismiss it. Costs shall abide the outcome of the appeal.

Dated, signed, and delivered at Nyamira, this 18th day of February 2026.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Mr Ogari for the Appellants

No appearance for the Respondents

Court Assistant: B Kerubo