

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**  
**ELC LA E003 OF 2023**

**JOSEPHAT ANDREW ..... 1<sup>ST</sup>**

**APPLICANT**

**HUSSEIN OUNDO MUKHEBI ..... 2<sup>ND</sup>**

**APPLICANT**

**ABDALLA ALI ..... 3<sup>RD</sup>**

**APPLICANT**

**= VERSUS =**

**CONNY KIPROP ..... 1<sup>ST</sup>**

**RESPONDENT**

**LEAH NASIKE OPIYO alias SUSAN OPIYO ..... 2<sup>ND</sup>**

**RESPONDENT**

**ELIZABETH OPIYO ..... 3<sup>RD</sup>**

**RESPONDENT**

**AKINYI NDALO KHAJUSU ..... 4<sup>TH</sup>**

**RESPONDENT**

**R U L I N G**

1. This ruling was due on 17<sup>th</sup> December 2025. However, following my transfer to Iten effective 15<sup>th</sup> January 2026, I have been engrossed in finalizing my part heard cases and delivering other rulings and judgments hence the delay. The same is regretted.

2. **JOSEPHAT ANDREW, HUSSEIN OUNDO MUKHEBI** and **ABDALLA ALI** (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants respectively) were the plaintiffs in **BUSIA CMC ELC CASE NO E27** of **2021**. They had impleaded **CONNY KIPROP, LEAH NASIKE OPIYO** alias **SUSAN OPIYO, ELIZABETH OPIYO** and **AKINYI NDALO KHAJUSU** as Defendants (now the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents respectively). It was the Applicants' case that the Respondents had fraudulently sub-divided the family land parcel **NO BUNYALA/BULEMIA/242** to create the land parcels **NO BUNYALA/BULEMIA/5411, 5033, 5012** and **5409** (the suit land) two of which were subsequently registered in the name of the 2<sup>nd</sup> Respondent. The trial magistrate found that fraud had been proved as against the Applicants and entered judgment in favour of the Respondents.
3. The Applicants were aggrieved by that judgment and filed this appeal. Upon hearing the appeal, this Court set aside the said judgment vide its orders issued on 13<sup>th</sup> March 2025 allowing the appeal.
4. The Applicants have now approached this Court vide their Notice of Motion dated 28<sup>th</sup> May 2025 and anchored on the provisions of **Sections 1A, 1B, 3A** and **6** of the **Civil**

**Procedure Rules, Order 42 Rule 6** of the **Civil Procedure Rules** and **Articles 22, 48, 50** and **159** of the **Constitution** by which they seek the following orders:

**1) Spent**

**2) Spent**

**3) Spent**

**4) That upon the hearing and determination of this application, this Honourable Court be pleased to order and it is hereby ordered that there be a stay of execution order directed at the Respondents, their agents, servants or any other person acting for and on their behalf from invading or purporting to interfere with the quiet possession of the land parcels NO BUNYALA/BULEMIA/242 and the resultant subdivision being land parcels NO BUNYALA/BULEMIA/5033, 5409, 5410, 5411 and 5412 pending the hearing and determination of Court of Appeal Civil Appeal NO E108 of 2025.**

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

5. The Motion is based on the grounds set out therein and is supported by the affidavit of the 1<sup>st</sup> Applicant herein.
6. The gist of the Motion is that being aggrieved by this Court's judgment delivered on 13<sup>th</sup> March 2025, the Applicants have filed an appeal at the Court of Appeal being Civil Appeal **NO COACA E108** of **2025**. That the Applicants live and graze their animals on the ancestral land being land parcel **NO BUNYALA/BULEMIA/242** which they risk losing if the judgment is implemented as there is a risk of the suit land being sold to third parties.
7. The Applicants have an arguable appeal which will be rendered nugatory unless the order of stay is granted. That other than the 1<sup>st</sup> Respondent, the other Respondents do not live on the suit land and will therefore not suffer any prejudice. If the Respondents execute the decree of this Court dated 13<sup>th</sup> March 2025, that will cause a total disruption of the Applicants' lives yet the 1<sup>st</sup> Applicant has been in possession of the suit land for over 50 years and will therefore suffer injustice. It is therefore fair that the orders sought are granted.
8. The following documents are annexed to the Motion:

1) Notice of Appeal dated 20<sup>th</sup> March 2025 and filed on 26<sup>th</sup> March 2025.

2) Memorandum of Appeal dated 17<sup>th</sup> May 2025.

9. The 1<sup>st</sup> Respondent **CONNIE KIPROP** filed her replying affidavit which is un-dated and in which she has deposed, inter alia, that the decree sought to be stayed is a negative order and therefore that this Motion is an abuse of the Court process as there is nothing to stay. That the Applicants have approached this Court with un-clean hands and have continuously engaged in hooliganism to prevent the 1<sup>st</sup> Respondent from using her land. There is no sufficient cause proffered to warrant the stay of execution of the decree herein and the Applicants have titles to their parcels of land and therefore there is nothing to stay. The application for stay has been made in bad faith. The fact that execution has commenced does not in itself amount to any substantial loss since, in any case, execution is a lawful process. The Applicants have their own land yet they have continued to bring cattle to graze on the Respondents' land. The Motion has no merit and should be dismissed with cost.

10. When the Motion was placed before me for directions on 22<sup>nd</sup> September 2025, I directed that it be canvassed by way of

written submissions. The same were to be filed on or before 16<sup>th</sup> October 2025. However, only the firm of **WANGIRA OKOBA & COMPANY ADVOCATES** for the Applicants filed their submissions dated 14<sup>th</sup> October 2025. The firm of **MASIGA, WAINAINA & ASSOCIATES ADVOCATES** for the Respondent did not file any submissions.

11. I have considered the Motion, the rival affidavits and the submissions by **MS ODUOR** instructed by the firm of **WANGIRA OKOBA & COMPANY ADVOCATES** for the Applicants.
12. The Applicants seek the main remedy that this Court do issue an order for stay of execution pending the hearing and determination of Court of Appeal Civil Appeal **NO COACA E018** of **2025** arising out of this Court's judgment delivered on 13<sup>th</sup> March 2025.
13. **Order 42 Rule 6(1) and (2)** of the **Civil Procedure Rules** provides for the procedure for seeking an order for stay of execution pending appeal. It reads:

**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.** Emphasis mine.

It is clear from the above that a party seeking any order of stay of execution must establish the following:

- 1) Sufficient cause,
- 2) Demonstrate that unless the order for stay is granted, he will suffer substantial loss,
- 3) File the application without unreasonable delay; and
- 4) Offer security.

14. The Court of Appeal stated in the case of **VISHRAM RAVJI HALAI -V- THORNTON & TURPIN (1963) LTD 1990 KLR 390** that whereas it's discretion to grant an order of execution pending appeal is unfettered, the power of this Court under **Order 42 Rule 6** of the **Civil Procedure Rules** is fettered by the following conditions namely -

- a) Establishment of sufficient cause,
- b) Demonstration of substantial loss,
- c) The furnishing of security, and

d) The application be filed without unreasonable delay.

The Applicant has already filed both the Notice of Appeal and the Memorandum of Appeal. That is sufficient cause.

15. On the issue of substantial loss **PLATT Ag J.A** (as he then was), expressed himself as follows in the case of **KENYA SHELL LTD -V- KIBIRU KLR 410:**

**“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 it’s various form is the cornerstone of both jurisdiction 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”.**

The 1<sup>st</sup> Applicant has deposed in paragraph 7 of his supporting affidavit that he has presented **“an arguable appeal”** which **“will be rendered nugatory unless the orders of stay sought herein are granted”**. This Court is considering an application for an order of stay of executions of it’s own

judgment pending an appeal to the Court of Appeal. The arguability or otherwise of that appeal cannot be a consideration in those circumstances and in any event, it is not one of the tests which an Applicant seeking stay orders under **Order 45 Rule 6 Civil Procedure Rules** must surmount.

16. The Applicants were required to prove that unless the orders of stay of execution are granted, they will suffer **“substantial loss”** which, as was held in **KENYA SHELL LTD -V- KIBIRU** (supra), is the **“cornerstone”** of such an application. The Applicants have not indicated what substantial loss they will suffer if the order of stay of execution is not granted. In paragraph 6 of his supporting affidavit, the 1<sup>st</sup> Applicant has deponed as follows:

**6: “That the dispute herein involves the contested sub-division of land known as BUNYALA/BULEMIA/242 and its subdivision into BUNYALA/BULEMIA/5033, BUNYALA/BULEMIA/5409, BUNYALA/BULEMIA/5410, BUNYALA/BULEMIA/5411 and BUNYALA/BULEMIA/5412 and there is a real risk of these parcels being transferred to third**

**parties who will not care about the history of the land.”**

I do not see how the suit land can be transferred to third parties when only the land parcels **NO BUNYALA/BULEMIA/5409** and **5012** are registered in the names of the 2<sup>nd</sup> Applicant while the 1<sup>st</sup> Respondent has deponed in paragraph 10 of his replying affidavit that he has been in possession and occupation of the suit land for over 50 years. He has not however identified which of the said parcels of land he has occupied during that period. The Applicants have not satisfied the test of substantial loss.

17. With regard to filing this Motion **“without unreasonable delay,”** the judgment and decree sought to be stayed was delivered on 13<sup>th</sup> March 2025 by way of electronic mail. I have not heard the Applicants say that they did not know about the judgment as soon as it was delivered. Indeed their Notice of appeal is dated 20<sup>th</sup> March 2025 and was filed on 26<sup>th</sup> March 2025. This Motion was filed on 28<sup>th</sup> May 2025 some two (2) months and two (2) weeks after the delivery of the judgment. The law does not define what remains to **“unreasonable delay”**. Each case must therefore be considered on it’s

particular circumstances since no two cases can be similar in all aspects. What is important is that each delay must be satisfactorily explained to enable the Court invoke its discretionary jurisdiction in favour of the party seeking an order of stay of execution pending appeal. An order of stay of execution pending appeal obviously curtails the decree holder's rights to enjoy the fruits of the judgment or any order made. It cannot be granted as a matter of course. And unless a satisfactory explanation is proffered for any delay, the Court must be slow to stay any execution of its process. In the circumstances of this case, I am persuaded that the delay of over 2 months is "**unreasonable**" and further, the same has not been explained at all. On that basis, the Motion must be dismissed.

18. It is also clear that in its judgment dated 13<sup>th</sup> March 2025, this Court only allowed the appeal from the judgment of the trial Court with costs. Save for the order of costs, this Court did not make any orders capable of execution. I am not therefore persuaded that there is any order to justify the remedy of stay of execution.

19. Finally, the Applicants have not made any offer of security nor deposed that they are ready and willing to abide by any conditions which this Court may impose for the grant of any order of stay of execution. Indeed, in paragraph 8 of his replying affidavit, the 1<sup>st</sup> Respondent has averred thus:

**8: “That the Applicant has proffered no security or even demonstrated his willingness to deposit security as the Applicant must show and meet the conditions of payment of security for due performance of the decree.”**

As was held in **MACHIRI -V- MOHAMED 2022 KEELC 2376 KLR;**

**“The offer for security must come from the defendant himself and is a demonstration of the fact that the application for stay of execution is being pursued in order to advance the cause of justice and is not simply a knee-jerk reaction only intended to delay and scuttle a lawful execution process.”**

See also **VISHRAM RAVJI HALAI & ANOTHER -V- THORNTON & TURPIN (1963) LTD** (supra) where the Court

of Appeal identified as among the test for a grant of orders of stay of execution being that **“the Applicant must furnish security.”** The Applicants herein have not done so.

20. The up-shot of all the above is that the Applicants have been unable to satisfy the threshold for the grant of an order of stay of execution pending appeal. The Notice of Motion dated 28<sup>th</sup> May 2025 is devoid of merit. It is accordingly dismissed. As the parties are family, each shall meet their own costs.

**BOAZ N. OLAO**

**JUDGE**

**26<sup>TH</sup> FEBRUARY 2026**

**Ruling dated, signed and delivered on this 26<sup>th</sup> day of February 2026 by way of electronic mail with notice to the parties.**

**BOAZ N. OLAO**

**JUDGE**

**26<sup>TH</sup> FEBRUARY 2026**