

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**ELCA CASE NO. E005 OF 2025**

**PHILIP CHEPSENGENY ARAP TOO.....**  
**APPELLANT**

**VERSUS**

**SALOME KWAMBAI.....**  
**RESPONDENT**

**JOSEPH KIPNGETICH TONU.....**  
**RESPONDENT**

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**RULING**

**Introduction.**

1. This ruling is in respect of the Appellant/Applicant's Notice of Motion application dated 13<sup>th</sup> February, 2025. The application is expressed to be brought under **Order 42 Rule 6 & Order 51 Rule 1** of the Civil Procedure Rules and **Sections 1A, 1B, 3 & 3A** of the Civil Procedure Act.

2. The applicant seeks the following orders;

**a. Spent**

**b. Spent**

- c. That pending the hearing and determination of the appeal, there be stay of execution of the judgement dated 13<sup>th</sup> August 2024 and decree dated 9<sup>th</sup> October 2024 arising from the proceedings in Kericho CMCC E130 of 2021.***
- d. That the costs of this application be provided for.***

- 3.** The application is based on the grounds on its face and the supporting affidavit of **Philip Chepsengeny Arap Too** which affidavit is sworn on 13<sup>th</sup> February, 2025.

**Factual Background.**

- 4.** The Appellant/Applicant filed the Memorandum of Appeal dated 13<sup>th</sup> February, 2025 appealing from the ruling of Hon. Charles Obulutsa delivered in Kericho CM ELC Case No. E130 of 2021 on 21<sup>st</sup> January, 2025.
- 5.** The grounds of appeal are as follows;

- a. The Learned Magistrate erred in fact and in law in failing to find that the Court lacked the territorial jurisdiction to determine the land parcel Molo South/Block 7/109 (Ogilgei) as the same is in Nakuru County. (sic)**
- b. The Learned Magistrate erred in fact (sic) and in law in failing to find that the Appellant's advocate never informed the Appellant on the day that he was to attend Court and never filed a defence in the matter having been fully instructed.**
- c. The Learned Magistrate erred in fact and in law in failing to exercise his judicial discretion by failing to consider the grounds and evidence before the Court that braised (sic) triable issues and a plausible defence.**
- d. The Learned Magistrate erred in fact and in law in dismissing the Appellants (sic) application against the weight of the evidence on record.**
- e. The Learned Magistrate erred by directing that costs be borne by the Applicant.**

6. The Appellant/Applicant prays for the following orders;

**a. The appeal be allowed with costs.**

**b. The Ruling delivered on 21<sup>st</sup> January 2025 by the Trial Court (Hon. Charles Obulutsa) be set aside and be substituted by an order allowing the Appellant's application dated 6<sup>th</sup> December, 2024.**

**c. The costs of this appeal be borne by the Respondent (sic) (Plaintiff) hereinbefore the trial Court.**

7. The application under consideration first came up for hearing on 18<sup>th</sup> February, 2025 when the Court directed that it be served upon the Respondents.

8. The application was rescheduled for hearing on 10<sup>th</sup> March, 2025 and on the said date, the Appellant/Applicant sought and was granted more time to serve the Respondents.

9. On 9<sup>th</sup> July, 2025 the Court issued directions that the application be canvassed by way of written submissions.
10. On 23<sup>rd</sup> September, 2025, the matter was mentioned to confirm filing of submissions and then reserved for ruling.

**The Appellant/Applicant's contention.**

11. The Appellant/Applicant contends that he instructed the firm of Koech Chepkirui & Associates Advocates to represent him in Kericho CM ELC Case No. E130 Of 2021. He goes on to state that the said firm of advocates entered appearance but failed to file a Statement of Defence.
12. The Appellant/Applicant also contends that on 13<sup>th</sup> August, 2024, an *ex parte* judgement was delivered and a decree issued on 9<sup>th</sup> October, 2024.
13. The Appellant/Applicant further contends that he discovered that judgement had been delivered after he perused the file.

- 14.** It is the Appellant/Applicant's contention that he instructed the firm of Kipyegon Malel & Co. Advocates to represent him and goes on to state that the said firm of Advocates filed an application dated 6<sup>th</sup> December, 2024 in Kericho CM ELC Case No. E130 Of 2021 wherein they sought, among other orders, orders of stay of execution.
- 15.** It is also the Appellant/Applicant's contention that on 21<sup>st</sup> January, 2025, the trial Court delivered a ruling on the said application and dismissed it.
- 16.** It is further the Appellant/Applicant's contention that he was denied an opportunity to be heard as the Counsel he previously instructed failed to inform him of the date the matter came up for hearing and/or update him on the progress of the suit.

- 17.** He contends that mistake of Counsel should not be visited upon innocent parties.
- 18.** He also contends that he is apprehensive that the Respondents will execute the judgement of the trial Court before the appeal is heard and determined thereby rendering the appeal nugatory.
- 19.** He further contends that he will suffer loss and prejudice if the orders of stay are not granted.
- 20.** He ends his deposition by stating that land parcel No. **Kericho/Kapsaos/1042** which is the suit property is his matrimonial home where he lives with his children.

**The Respondents' Response.**

- 21.** In response to the application, the Respondents filed a Replying Affidavit sworn on 28<sup>th</sup> May, 2025 by the 1<sup>st</sup> Respondent.

- 22.** She deposes that she has the authority of the 2<sup>nd</sup> Respondent to swear the affidavit.
- 23.** She also deposes that the Appellant/Applicant has not attached a copy of the judgement delivered in Kericho CM ELC Case No. E130 of 2021 which judgement the Appellant/Applicant is seeking to stay.
- 24.** She further deposes that the Appellant/Applicant has not attached to the instant application the the ruling delivered on 21<sup>st</sup> January, 2025 which ruling the appeal is premised on.
- 25.** It is her deposition that litigants are bound to place before the Court all the evidence and documents that may be required to support their case.

- 26.** It is also her deposition that the application under consideration is fatally defective for failure to attach crucial documents.
- 27.** It is further her deposition that the trial Court delivered judgement on 13<sup>th</sup> August, 2024 and allowed the prayers sought in the Counterclaim and adds that the Court issued a decree on 9<sup>th</sup> October, 2024.
- 28.** She deposes that upon issuance of the decree, the Court Administrator executed the transfer documents of land parcel No. **Kericho/Kapsaos/1042** in her favour.
- 29.** She also deposes that the Appellant did not file an appeal against the judgement of the trial Court and he instead filed the application dated 6<sup>th</sup> December, 2024. She goes on to state that in the said application, the Appellant/Applicant sought for orders of stay of execution of the decree, orders

to set aside of the judgement and leave to file a Statement of Defence out of time.

- 30.** She further deposes that the trial Court delivered a ruling on 21<sup>st</sup> January, 2025 and dismissed the said application.
- 31.** It is her deposition that she is advised by her advocates on record that the trial Court became *functus officio* after it delivered judgement.
- 32.** It is also her deposition that the prayer seeking stay of proceedings is misconceived, untenable and procedurally flawed.
- 33.** It is further her deposition that she is advised by her advocates on record that the Appellant/Applicant has failed to establish the existence of exceptional circumstances to warrant the issuance of stay of execution orders.

- 34.** She deposes that in order for an application for stay of execution pending appeal to succeed, an Applicant must demonstrate the substantial loss that is likely to result if the order sought is not granted, that the application has been filed without unreasonable delay and the Applicant must offer security for due performance of the decree.
- 35.** She also deposes that she has been advised by her advocates on record that the Appellant/Applicant has failed to meet the said conditions.
- 36.** She further deposes that the Appellant/Applicant has not demonstrated why he has filed the application under consideration six months after judgement was delivered. She goes on to state that the Appellant/Applicant is guilty of laches as the delay is prolonged and inexcusable.
- 37.** It is her deposition that a cursory read of the Memorandum of Appeal dated 13<sup>th</sup> February, 2025 shows that the

Appellant/Applicant has filed an appeal against the ruling delivered on 21<sup>st</sup> January, 2025.

- 38.** It is also her deposition that it will be absurd to grant orders of stay of execution of a judgement and/or decree where no appeal has been lodged.
- 39.** It is further her deposition that it is not disputed that the Appellant/Applicant was served with summons to enter appearance and he instructed an advocate who entered appearance.
- 40.** She deposes that the Appellant/Applicant however failed to file a Statement of Defence and her claim was therefore uncontroverted.
- 41.** She also deposes that the Appellant/Applicant's plea to be granted an opportunity to be heard is untenable as he failed

to explain why he did not defend the suit before the trial Court despite being given sufficient notice.

**42.** She further deposes that the Appellant/Applicant was accorded a fair opportunity to be heard and the trial Court cannot be faulted in exercising its discretion and determining the matter without his involvement.

**43.** It is her deposition that the Appellant/Applicant has not demonstrated whether he followed up with his previous advocates on record to find out the progress of the suit.

**44.** It is also her deposition that the Appellant/Applicant's supporting affidavit merely apportions blame on his former advocates without accounting for his own inaction or lack of initiative.

**45.** It is further her deposition that she is advised by her advocates on record that litigants must take ownership of

their suits and should not shift blame to their advocates for any wrong doing, inactivity and/or mistakes.

- 46.** She deposes that the Appellant/Applicant's inertia has been solely awakened by the impending execution of the trial Court's judgement.
- 47.** She also deposes that this constitutes indolence on the part of the Appellant/Applicant which this Honourable Court should not countenance.
- 48.** She further deposes that the Appellant/Applicant has not demonstrated any substantial loss he is likely to suffer if orders of stay of execution are not granted.
- 49.** It is her deposition that she is advised by her advocates on record that the Appellant/Applicant's contention that he lives on the suit parcel of land is not sufficient demonstration of substantial loss.

**50.** It is also her deposition that the Appellant/Applicant has not demonstrated how the appeal will be rendered nugatory if orders of stay of execution are not granted.

**51.** It is further her deposition that the Appellant/Applicant has not offered any security to warrant the grant of an order of stay of execution of the decree.

**52.** She ends her deposition by stating that it is in the interest of justice that the Appellant/Applicant's application be dismissed with costs.

**Issues for Determination.**

**53.** The Appellant/Applicant filed submissions on 10<sup>th</sup> July, 2025 while the Respondents filed their submissions on 17<sup>th</sup> November, 2025.

**54.** The Appellant/Applicant submits on the following issues;

**a. Whether the Applicant has met the legal threshold for orders of stay of execution under Order 42 Rule 6 of the Civil Procedure Rules.**

**b. Whether the proceedings and judgment of the trial Court raise jurisdictional concerns warranting interference by this Honourable Court.**

**55.** On the first issue, the Appellant/Applicant relies on **Order 42 Rule 6(2)** of the Civil Procedure Rules, the judicial decision of **Butt vs Rent Restriction Tribunal [1982] KLR 417** and submits that the application under consideration has been filed without undue delay.

**56.** It is the Appellant/Applicant's submissions that the application under consideration was filed on 13<sup>th</sup> February, 2025 which was about three weeks after the trial Court delivered a ruling on his application.

57. The Appellant/Applicant relies on the judicial decision of **James Wangalwa & another vs Agnes Naliaka Cheseto [2012] eKLR** and submits that he is likely to suffer substantial loss if orders of stay of execution are not granted.
58. It is also the Appellant/Applicant's submissions that if the judgment of the trial Court is executed, the suit parcel of land is likely to be sold and/or transferred.
59. It is further the Appellant/Applicant's submissions that he is willing to comply with any security conditions that this Court may impose but the nature of loss may justify minimal or no security.
60. On whether the appeal is arguable, the Appellant/applicant relies on the judicial decision of **Kenya Commercial Bank Ltd vs Sun City Properties Ltd [2012] eKLR** and submits that the appeal raises substantial issues.

- 61.** The Appellant/Applicant submits that the trial Court did not have jurisdiction to hear the suit and his right to be heard under **Article 50(1)** of the Constitution was violated. The Appellant/Applicant relies on the judicial decision of **Owners of the Motor Vessel “Lilian S” vs Caltex Oil (Kenya) Ltd [1989] KLR 1** in support of his submissions.
- 62.** The Appellant/Applicant relies on the judicial decision of **Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR** and reiterates that the appeal will be rendered nugatory if the application is not allowed as the suit parcel of land will be disposed off and/or transferred.
- 63.** The Appellant/Applicant concludes his submissions by urging the Court to allow the application as prayed.
- 64.** The Respondents submit on the following issues;

**a. Whether proceedings in Kericho CM ELC  
Case no. E130 of 2021 should be stayed**

***pending hearing and determination of the application.***

***b. Whether orders of stay of execution of the judgment delivered in Kericho CM ELC Case No. E130 of 2021 should be granted.***

- 65.** On the first issue, the Respondents submit that under prayer 2 of the application under consideration, the Appellant/Applicant seeks for orders of stay of proceedings of Kericho CM ELC Case No. E130 of 2021 pending the hearing and determination of the application.
- 66.** The Respondents also submit that no such orders were sought pending hearing and determination of the appeal. That being the case, prayer No. **2** of the application under consideration has been overtaken by events.
- 67.** The Respondents reiterate the averments in their Replying Affidavit and submit that there are no pending proceedings in the trial Court that can be stayed.

68. On the second issue, the Respondents reiterate the averments in their Replying Affidavit, rely on **Order 42 Rule 6 (2)** of the Civil Procedure Rules, the judicial decisions of **James Wangalwa & another vs Agnes Naliala Cheseto [2012] eKLR** as was cited in **Republic vs Mwato; County Government of Busia (Interested Party) [2025] KEELC 7818 (KLR)**, **Mulei vs Njagi [2023] KEELC 16574 (KLR)** and reiterate that the Appellant/Applicant has not demonstrated that he will suffer substantial loss if orders of stay of execution are not granted.

69. It is the Respondents submissions that the Appellant has not tendered any evidence to demonstrate that the suit parcel of land is matrimonial property.

70. The Respondents rely on the judicial decision of **Charles Wahome Gethi v Angela Wairimu Gethi [2008] eKLR** as was cited in **Matolo v Kitung'a [2025] KEELC 5675 (KLR)**

and submit that the appeal will not be rendered nugatory if orders of stay of execution are not granted as no appeal has been filed from the judgement.

- 71.** The Respondents reiterate that the Appellant/Applicant has not demonstrated why he has filed the application under consideration six months after judgement was delivered.
- 72.** It is the Respondents submissions that the Appellant/Applicant has not offered any security for the Court to issue orders of stay of execution.
- 73.** The Respondents conclude their submissions by relying on **Section 27** of the Civil Procedure Act and urge the Court to dismiss the Appellant/Applicant's application with costs.

**Analysis and Determination.**

**74.** I have considered the application, the response thereto and the rival submissions. The following issues arise for determination;

**a. *Whether an order of stay of execution of the judgement and decree issued in Kericho CM ELC Case No. E130 of 2021 should be granted pending the hearing and determination of the appeal.***

**b. *Who should bear costs of the application.***

**A. Whether an order of stay of execution of the judgement and decree issued in Kericho CM ELC Case No. E130 of 2021 should be granted pending the hearing and determination of the appeal.**

**75.** The Appellant/Applicant contends that he was sued in Kericho CM ELC Case No. E130 of 2021 and he instructed Counsel who entered appearance but failed to file a Statement of Defence.

- 76.** The Appellant/Applicant also contends that Counsel failed to update him on the progress of the matter and when he perused the file, he discovered that judgement had already been delivered.
- 77.** The Appellant/Applicant further contends that he instructed another advocate who filed an application that sought for orders of stay of execution among other orders which application was dismissed on 21<sup>st</sup> January, 2025.
- 78.** It is the Appellant/Applicant's contention that the suit parcel of land is matrimonial property and that is why he is now seeking for orders of stay of execution pending appeal.
- 79.** In response, the Respondents contend that the Appellant/Applicant was served with the pleadings in Kericho CM ELC Case No. E130 of 2021 but he failed to file a Statement of Defence.

- 80.** The Respondents further contend that the matter proceeded for hearing and judgement was delivered 13<sup>th</sup> August, 2024.
- 81.** It is the Respondents contention that the Appellant/Applicant filed an application dated 6<sup>th</sup> December, 2024 seeking for amongst other orders, orders of stay of execution and setting aside of the judgement.
- 82.** It is also the Respondent's contention that the said application was dismissed on 21<sup>st</sup> January, 2025.
- 83.** It is further the Respondent's contention that the present appeal has been filed against the ruling delivered on 21<sup>st</sup> January, 2025.
- 84.** It is the Respondent's contention that no appeal has been filed against the judgement delivered on 13<sup>th</sup> August, 2024 and therefore orders of stay of execution of the said judgement cannot be granted.

**85.** The law relating to stay pending Appeal is **Order 42 Rule 6 (2)** of the Civil Procedure Rules which provides as follows;

***“(2) No order for stay of execution shall be made under sub rule (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.”***

**86.** Two things are worth noting;

**a. The Appellant/Applicant is seeking orders of stay of execution of the**

**judgement and decree of Kericho CM ELC  
Case No. E130 of 2021.**

**b. The Appellant/Applicant is appealing  
from the ruling and order issued in  
Kericho CM ELC Case No. E130 of 2021.**

**87.** As submitted by the Respondents, it is evident that the Appellant/Applicant is seeking for orders of stay of execution of a judgment with respect of which no appeal has been lodged.

**88.** In the judicial decision of **Njoki & another v Goko [2025] KEELC 5404 (KLR)** the Court held as follows;

***“The law relating to stay pending Appeal is Order 42 rule 6 (2) of the Civil Procedure Rules. The provision anticipates that there is a filed appeal that is pending such that an order of stay of execution of the Judgment and/or decree is predicated on the hearing and disposal of such appeal. Where a***

***party has not filed an appeal, an application under Order 42 Rule 6 of the Civil Procedure Rules would not lie. Having found that there is no pending appeal, the prayer for an order for stay of execution becomes moot. The order for stay of execution as sought herein cannot be granted. It would be absurd to stay a judgment where no appeal has been lodged.*** (Emphasis mine)

**89.** In the above cited judicial decision, the Court held that an application for stay of execution pending appeal under **Order 42 Rule 6(2)** of the **Civil Procedure Rules** is filed where an appeal is pending. The Court also held that an application for stay of execution will not lie in instances where an appeal has not been filed.

**90.** In the present case, it is evident that the Appellant/Applicant has not filed an appeal from the judgement delivered on 13<sup>th</sup>

August, 2024 and therefore the question of stay of execution of the said judgement is moot.

**B. Who should bear costs of the application.**

- 91.** On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of **Section 27** of the Civil Procedure Act (Cap 21). A successful party should ordinarily be awarded costs of an action unless the Court for good reason, directs otherwise.

**Disposition.**

- 92.** Taking the foregoing into consideration, I find that the application dated 13<sup>th</sup> February, 2025 lacks merit and it is hereby dismissed with costs.

- 93.** It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO  
THIS 26<sup>TH</sup> DAY OF FEBRUARY, 2026.**

**L. A. OMOLLO  
JUDGE.**

**In the presence of: -**

**Mr. Malel for the Appellant/Applicant.**

**Mr. Kipkorir for Wangila for interested  
party/Applicant.**

**Mr. Evanson Kirui for the Respondents**

**Court Assistant; Mr. Joseph Makori.**