

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAKURU**  
**ELC NO. APPEAL NO. E073 OF 2025**

PAUL KOSKEY.....1<sup>ST</sup> APPELLANT/APPLICANT  
BENARD KOECH .....2<sup>ND</sup> APPELLANT/APPLICANT  
SHADRACK ..... LANGAT.....3<sup>RD</sup>  
APPELLANT/APPLICANT  
JULIUS K. ARAP SANG.....4<sup>TH</sup> APPELLANT/APPLICANT  
VERSUS  
SAMMY SIGEI (Suing as the legal administrator  
Of the estate of MICHAEL KIPSIGE  
TOO-Deceased) .....RESPONDENT

**RULING**

1. This ruling is in respect of the Notice of Motion application dated 31<sup>st</sup> October, 2025, by the Appellant/Applicants seeking the following orders:
  - a) *Spent.*
  - b) *Spent.*
  - c) *THAT pending the hearing and determination of the appeal herein, that is Nakuru ELC Land Appeal No. E073 of 2025, this Honourable Court be pleased to issue orders staying execution of the judgment delivered on 29<sup>th</sup> February, 2024 and the decree issued on 27<sup>th</sup> September, 2024 by the Senior Principal Magistrate in Molo ELC No. E030 of 2023.*
  - d) *THAT costs be in the cause.*

**APPLICANT’S CASE**

2. The application is grounded on the supporting affidavit of Paul Koskey the 1<sup>st</sup> Applicant who deponed that a ruling was delivered on 30<sup>th</sup> October, 2025, in Molo ELC No. 030 of 2023, where judgment was entered against them on 29<sup>th</sup> February, 2024. He further deponed that the said matter had been heard in their absence since they were never served with the summons to enter appearance or any hearing notices and upon learning of the existence of the judgment and decree their advocates filed an application that sought to set aside the judgment but the same was dismissed.
3. The Applicant deponed that being dissatisfied with the ruling; they preferred an appeal which raises triable issues with high chances of success, and further that the Respondent has attempted to evict them from the suit property. It was the Applicant's case that they are bonafide purchasers for value and that unless the orders sought are granted, they stand to suffer irreparable loss and that the subject matter in the appeal will be rendered nugatory.

#### **RESPONDENT'S CASE**

4. The Respondent filed his replying affidavit dated 21<sup>st</sup> November, 2025, where he averred that the Applicants are seeking a stay of a judgment dated 29<sup>th</sup> February, 2024, which they have not actually appealed against. Further, the current appeal related only to a ruling of 30<sup>th</sup> October 2025, which declined to set aside the earlier judgment.
5. It was the Respondent's disposition that a party cannot seek a stay of execution of a judgment they have not challenged, and that the Applicants

were properly and fully served with all pleadings and notices but chose not to participate in the proceedings leading to the judgment.

6. He further averred that the Applicants failed to meet the mandatory conditions for a stay of execution under Order 42 Rule 6(2) and urged the court to dismiss the application with costs, as it is incompetent.

### **APPLICANTS' SUBMISSIONS**

7. Counsel for the Applicant filed submissions and identified one issue for determination as to whether the Applicant has satisfied the requirements for stay under Order 42 Rule 6(2) of the Civil Procedure Rules. Counsel submitted that the Applicants were likely to suffer substantial loss should the Respondent execute the judgment and further that they were bona fide purchasers for value having acquired and settled on their respective portions in good faith.
8. Counsel also stated that the Applicants had constructed permanent homes and established their families on the suit parcel and that they do not have alternative place, and relied on the cases of Sewankambo **Dickson v Ziwa Abby (2005) UGCommC 9** and **Maina V Kinyua (Civil Appeal E132 of 2024)**, and urged the court to grant the orders as prayed.

### **RESPONDENT'S SUBMISSIONS**

9. Counsel for the Respondent identified two issues for determination:
  - i. ***Whether the present application is competent in law***

*ii. Whether the Applicant has satisfied the mandatory requirements under Order 42 Rule 6(2)*

10. On the first issue, as to whether the application is competent in law, counsel submitted that there was no appeal against the judgment sought to be stayed, therefore the application is incompetent. He further submitted that the judgment sought to be stayed was delivered on 29<sup>th</sup> February, 2024 and the only appeal on record is against the ruling delivered on 30<sup>th</sup> October, 2025 which dismissed the Applicant's application to set aside the judgment.
11. According to counsel, an appeal against a ruling to set aside a judgment cannot operate as a stay of execution of the judgment itself, and further that the ruling of 30<sup>th</sup> October, 2025, was a negative order which dismissed the application and therefore there was nothing capable of being stayed. Therefore, the application lacked any legal nexus between the appeal relied on and the decree sought to be stayed.
12. On the second issue, as to whether the applicants have met the requirements of Order 42 Rule 6 (2) of the Civil Procedure Rules, counsel submitted that no specific substantial loss had been demonstrated by the Applicant, apart from assertions without any evidence that execution would amount to substantial loss.
13. Counsel relied on the case of **James Wangalwa & Another V Agnes Maliaka Cheseto Misc Application No. 42 of 2011 [2012] eKLR**, and stated that the Applicants took no action until July, 2025, when they filed

an application to set aside the judgment long after execution had commenced. He added that the Applicant has not offered credible explanation for the delay, and urged the court to dismiss the application with costs to the Respondents.

### **ANALYSIS AND DETERMINATION**

14. The main issue for determination is whether the Appellants are entitled to orders of stay of execution pending appeal.

15. The grant of stay of execution pending appeal is anchored under **Order 42 rule 6** of the **Civil Procedure Rules** which provides as follows:

*(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.*

**(3) ...**

**(4) *For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.***

**(5) ...**

**(6) *Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.***

16. The Applicants are seeking stay of execution of a ruling that was delivered on 30<sup>th</sup> October 2025, in Molo ELC No. E030 of 2023, in which the court declined to set aside a judgment that was delivered on 29<sup>th</sup> February, 2024.
17. The current appeal is against the ruling that declined to set aside the *ex-parte* Judgment where the Applicants deponed that they were not served with the summons and hearing notices.
18. It is not correct to state that there is no appeal, if this appeal is heard and allowed, it will essentially set aside the judgment of the lower court, and if

it is declined then the Respondent will proceed with execution of the Judgment.

19. In the Court of Appeal case of **RWW v EKW (2019) eKLR** the court held as follows:

*“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”*

20. The Applicants have deponed that they are on the suit land having purchased the same and have been in occupation thereof with their families, and if they are evicted, they will suffer substantial loss. The court is cognizant of the fact that it must balance the rights of both litigants, namely the successful one and the one who would wish to exercise his/her right of appeal.

21. In dealing with the Appeal against the ruling, the court will determine whether the impugned judgment was regular or irregular, and whether the appellants were entitled to a ruling setting it aside *ex debito justitiae* as was held in the Court of Appeal case of **Waweru v Maina (Civil Appeal 59 of 2019) [2025] KECA 50 (KLR)**.
  
22. I have considered the application, the submissions by counsel and find that it would be in the interest of justice to grant an order of stay of execution pending the hearing and determination of this appeal.
  
23. The Appellants are to file a record of appeal within 45 days failure to which the order of stay of execution lapses. Costs of the Application to abide by the outcome of the appeal

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 4<sup>TH</sup>  
DAY OF MARCH 2026.**

**M. A. ODENY  
JUDGE**