

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT IN SIAYA
ELC CIVIL APPEAL NO. E033 OF 2024

**ROSE ACHIENG ACHAYO.....APPELLANT/1ST
RESPONDENT**

VERSUS

**FRANKLIN JENNENS ODHIAMBO OYUGI ..1ST
RESPONDENT/APPLICANT**

**EMMAH AKUMU.....2ND
RESPONDENT/APPLICANT**

**LAND REGISTRAR SIAYA.....3RD
RESPONDENT/APPLICANT**

**THE HON. ATTORNEY GENERAL.....4TH
RESPONDENT/APPLICANT**

RULING

1. The subject of this ruling is the Notice of Motion application dated 30th October 2025 seeking the following verbatim orders; -

- 1) THAT this application be certified urgent and be heard ex - parte in the first instance for the purpose of granting prayer 2.
- 2) THAT this Honorable court be pleased to stay the execution of its judgment delivered on the 2nd day of October 2025 by the Hon. Justice A. E Dena pending the

hearing and determination of this Application inter-partes.

- 3) THAT this Honorable court be pleased to stay the execution of its judgment delivered on the 2nd day of October 2025 by the Hon. Justice A. E Dena pending the hearing and determination of the intended Appeal to the Court of Appeal.
- 4) THAT costs of this application be provided for.

2. The application is premised on the following verbatim grounds; -

- 1) **THAT** the thirty (30) days' stay of execution of the judgment delivered by this Honorable Court on the 2nd day of October 2025 is set to lapse on the 31st day of October 2025, and the Appellant has commenced the process of executing the said judgment.
- 2) **THAT** on the 2nd day of October 2025, this Honorable Court delivered judgment in favor of the Appellant, overturning the decision of the trial court which had dismissed the Appellant's claim with costs.
- 3) **THAT** the 1st and 2nd Respondents/Applicants, being dissatisfied with the said judgment of this Honorable Court, have commenced the process of appealing to the Court of Appeal against the whole of the decision delivered on the 2nd day of October 2025.
- 4) **THAT** pursuant thereto, the 1st and 2nd Respondents/Applicants have timeously filed and served their Notice of Appeal and a formal request for typed proceedings upon the Appellant/Respondent.

3. The application is supported by the affidavit of FRANKLIN JENNENS ODHIAMBO. It is deponed that on the 2nd day of October 2025, this Honorable Court delivered judgment in favor of the Appellant, overturning the decision of the trial court which had dismissed the Appellant's claim with costs. A copy of the judgment is attached as FJOO-1. The court granted 30 days stay of execution of the judgement which was set to lapse on 31st day of October 2025, and the Appellant has commenced the process of executing the said judgment. A copy of the decree as extracted is annexed as FJOO-2.
4. It is deponed that being dissatisfied the Appellant had commenced the process of appealing to the Court of Appeal against the whole of the decision delivered on the 2nd day of October 2025 by filing and serving Notice of Appeal and a formal request for typed proceedings - a copy of the Notice is attached as FJOO-3.
5. It is averred the application is urgent owing to the fact that the 2nd respondent and the deponent have been in occupation of the property known as **North Gem/Malanga/700** for over 20 years where they have built since 2004, having treated it as our family home with permanent residential structures, and the 2nd Respondent's husband was interred thereon. Attached is a photograph for the 2nd Respondent's husband's grave and the structures FJOO-4 & 5. That following the judgement of this court. the family faces eviction which will render them homeless and suffer irreparable harm.

6. It is deponed that their school-going children will suffer undue hardship and disruption of their education if eviction is effected before the intended appeal is heard and determined.
7. The court is invited to grant an order of stay of execution of its judgment delivered on the 2nd day of October 2025, to preserve the subject property and maintain the status quo pending the hearing and determination of the intended appeal.
8. It is deponed that the Appellant/Respondent will not suffer any prejudice if the stay is granted since the applicants family has been in peaceful and uninterrupted occupation of the property for the past twenty (20) years.
9. That land being an irreplaceable commodity any eviction and demolition of my homestead will occasion loss and damage that cannot be adequately compensated by an award of damages.
10. The applicant depones that they have an arguable appeal with high chances of success as demonstrated in the Memorandum of Appeal.

Replying affidavit

- 11.. The application is opposed vide the replying affidavit of Rose Achayo. It is deponed this court having delivered a judgement on this matter became functus officio hence this court has no jurisdiction to continue granting stay orders once it has delivered its judgement.

12. It is averred that the applicant therefore ought to have filed this application in the court of appeal where the applicant intends to appeal.
13. It is deponed that there is no evidence tabled by the applicant that execution has commenced. Moreover the 90 days' Notice to vacate has not even been issued. The application is termed as an apprehension of the execution of the judgement. That stay of execution should only be granted in instances where execution process is already being undertaken.
14. Further that the memorandum of appeal, does not have an arguable appeal as the issues raised therein such as adverse possession were not a subject of litigation in the trial court. That fraudulent title can be impeached.
15. It is averred the court did not award compensation for trespass hence there is no way the deponent will benefit from the applicant for using her father's land for all the years she has used the land and the time she is to use it pending the appeal. Grant of stay will undermine the respondents constitutional right to own property as enshrined in article 40 of the constitution. Moreover, further that no offer for security deposit has been made
16. The deponent states she is willing to grant the applicant stay orders upon security deposit of kshs 500,000. That if the applicant wins the appeal, then she is entitled to be refunded the said security deposit but if she loses the appeal, the

same is to be released to the deponent as compensation for usage of the land for the usage herein.

17. That the applicant herein has not approached this court with clean hands hence cannot benefit from any equitable doctrine. The court is invited to dismiss the application.

Submissions

18. The application was canvassed by way of written submissions. Parties filed and exchanged submissions. The applicants' submissions are dated 23/11/2025 and the Respondents 13/11/2025 which I have considered.

ANALYSIS AND DETERMINATION

19. Having considered all the foregoing, the main issue for determination is Whether the application is merited and who bears the costs of the application.
20. The legal frame work for the grant of orders of stay of execution is Order 42 Rule 6 (2) which reads; -

“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.

21. Therefore, arising from the above provisions an applicant must satisfy the court that they will suffer substantial loss if the order of stay of execution is not granted. There is also the requirement to furnish security and the application must be made without unreasonable delay. See **Antoine Ndiaye v African Virtual University [2015] eKLR**.
22. In the case of **Butt & Rent Restriction Tribunal [1982] KLR 417** the court held that stay of execution is a discretionary power bestowed upon the court. The court enumerated the requirements to be satisfied by an applicant before the court exercises its discretion thus; -
- a) That substantial loss may result to him unless the stay is granted
 - b) That the application has been made without delay
 - c) That the applicant has given security or is ready to give security for due performance of the decree.
23. Substantial loss is the main consideration for grant of orders of stay of execution. What constitutes substantial loss was clarified by the court in the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, thus; -
- “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the*

CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

24. The applicant has explained that she has lived in the suit property for over 20 years with her family allegedly without interference. She has presented evidence of photos showing a permanent structure on the suit property. the Respondent does not deny the existence of the same and has argued vehemently on the fact that she ought to have been compensated for this long usage of her fathers property by the applicant.
25. It has been submitted on behalf of the Respondents that, there is no evidence tabled by the applicant that the respondent will not be able to take care of any loss suffered by the applicants should they win the appeal.
26. For me considering the effect of the above, it will mean that the appellants vacate the land and the developments or even demolition of the same which will render the appeal nugatory should it succeed. Further this would cause irreparable harm considering the psychological trauma that is likely to be

suffered. I do not see how this would be quantifiable for the respondent to make good.

27. It is therefore the finding of this court that the applicant has on a balance of probabilities demonstrated the requirement for substantial loss.
28. The other requirement is the timeliness with which the application was filed before court. The judgement herein was delivered on 2/10/2025 and the instant application was filed on 30th October 2025 a period of less than a month considering that I had given a reprieve of 30 days as deponed. It is the finding of this court that the application was filed without undue delay.
29. On security the court in **Arun C Sharma -V- Ashana Raikundalia T/A Rairundalia & Co. Advocates** explained the rationale for the same thus;-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I

presume the security must be one which can serve that purpose.”

30. One of the principles on which a court exercises its discretion in an application for security for costs as considered in the case of **Keary Development v. Tarmac Construction (1995) 3 ALL ER 534** cited by F. Tuiyot., J in **Ocean View Beach Hotel Ltd v. Salim Sultan Mollo & 5 Others (2012) eKLR** is that the court must carry out a balancing exercise. On one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.
31. Applying the above this court is of the view a security deposit of Kshs. 100,000/- will suffice. The same may be in the form of cash deposit or alternatively a bank guarantee of an equivalent amount.
32. On costs of the application the same is discretionary and I'm inclined to order that each party shall bear their own costs.
33. In conclusion I find and hold that the Applicant has fulfilled the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules. Accordingly, I hereby allow the application dated 30th October 2025.

34. The Security shall be deposited within 45 days of this ruling either in cash with the court and or by way of bank guarantee within 45 days.
35. Each party shall bear their own costs.

It is so ordered.

Dated at Siaya this 9th Day of March, 2026

HON. JUSTICE A. E. DENA

JUDGE

09/3/2026

**Judgement delivered virtually through Microsoft Teams
Video Conferencing Platform in the Presence of:**

Mr. Ooro for the Appellant

Mr. Otieno h/b for Mr. Nyamwaro for 1st & 2nd Respondent

Court assistant: Mr. Elisha Mboya