



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC APPEAL NO. E046 OF 2025

LAWRENCE

KARISA

CHEA.....APPELLANT

VERSUS

KALUME KIFALU FONDO..... .1ST

RESPONDENT

UMI OMAR MOHAMED.2ND

RESPONDENT

LANDS REGISTRAR -KILIFI3RD

RESPONDENT

THE ATTORNEY GENERAL4TH

RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon.
James Mwaniki, Chief Magistrate, delivered on 23rd July 2025 in*

***the Kilifi Chief Magistrate Court, MC ELC Case No: E033 OF 2023,
Kalume Kifalu Fondo-v-Umi Omar Mohamed and 3 others)***

RULING

- 1.** The application dated 11th September 2025 seeks, among other prayers, that:
 - a)** Spent;
 - b)** Spent;
 - c)** Pending the hearing and determination of the Appeal herein, this Honorable Court be pleased to grant an order staying the execution of the judgment and decree of the Honorable Chief Magistrate dated 23rd July, 2025, and all consequential orders issued pursuant to the said decree dated 23rd July, 2025;
 - d)** The costs of this application should be provided for.
- 2.** The application is supported by the annexed affidavit of Lawrence Karisa Chea, deposed on 23rd September 2025, and the supplementary affidavit dated 3rd October 2025.
- 3.** The application is opposed. The respondent relies on the replying affidavit sworn on 23rd September 2025.
- 4.** The court directed the application to be canvassed through written submissions. I acknowledge receipt of submissions

from learned counsel for the applicant, Mr. Kinaro, and learned counsel for the respondent, Ms. Omollo, with appreciation, as the same went a long way toward resolving the issues raised in the application.

- 5.** Arising from the materials placed before me, the issues I frame for the court's decision are whether the applicant has set forth a case to warrant a stay of execution pending appeal and who should bear the costs of the application.
- 6.** The applicant contends that, in the present case, the Trial Court issued eviction orders dated 3rd September 2025, pursuant to the Decree dated 23rd July 2025, ordering the immediate eviction and demolition of the applicant's home. If the eviction and demolition were to proceed and the appeal succeeds, the applicant will have lost his home. The loss of the home will render the applicant and his family destitute. It will be an irreparable loss/harm that an award of damages cannot compensate.
- 7.** Hence, the applicant contends that he has satisfied the requirement of substantial loss in the present case.
- 8.** Besides, the application for stay has been brought without unreasonable delay, the same having been filed seven days

after the Order of eviction was issued on 3rd September 2025 against the applicant/appellant herein

- 9.** Further, the applicant is ready and willing to abide by any conditions that the Court may impose on the applicant as security for the due performance of the Decree if the applicant's appeal is dismissed.
- 10.** The applicant avows that unless this Court issues stay orders, the substance of the appeal will be defeated and the appeal rendered nugatory and/or academic.
- 11.** Furthermore, the Memorandum of Appeal dated 22nd August 2025 and submitted on the same date, contesting the Decree issued on 23rd July 2025, was lodged within the stipulated timeframes as prescribed by Section 79G of the Civil Procedure Act, Cap 21, Laws of Kenya. Accordingly, the appeal herein is deemed admissible. The Memorandum of Appeal presented herein articulates substantive and arguable grounds of appeal, thereby indicating a substantial likelihood of success.
- 12.** On the other hand, the 1st respondent asserts that the decree of 23rd July 2025 declared the 1st respondent the lawful owner of Plot No. Kilifi/Kijipwa/105. The appellant

claims that he will suffer "*irreparable loss*" if evicted. The respondent avers that this assertion is misconceived. The appellant's occupation of the suit property has been adjudged unlawful. Loss of unlawful possession cannot constitute substantial loss in law. See **Machira t/a Machira & Company Advocates v East Africa Standard [2002] eKLR.**

13. 1st respondent further contends that the appellant failed to disclose to the trial court that he had instituted a parallel adverse possession suit over the same land. Having obtained those orders, he transferred the land to third parties (Mwanganda, Abel, and Fatuma Kadenge) during the pendency of the suit herein. This is a classic abuse of the court process, involving parallel cases, the concealment of material facts, and forum shopping. The appellant claims substantial loss if a stay is not granted. This is untrue because he is no longer the owner. One who voluntarily divests their interest cannot claim to be prejudiced by the execution of a decree. Finally, any loss, if any, is purely commercial and compensable in damages. Based on the

above, it is the 1st respondent, the declared owner, who continues to suffer deprivation of his land.

14. Further, the 1st respondent argues that the appeal was filed late, that Order 42, Rule 6(2) of the Civil Procedure Rules has not been complied with, and that the Memorandum of Appeal raises no arguable issues.

15. In Kenya, the principles governing the stay of execution pending appeal in land matters are primarily derived from Order 42, Rule 6 of the Civil Procedure Rules and from the Civil Procedure Act (Sections 1A, 1B, and 3A). The court exercises discretion to preserve the subject matter of the dispute—often land—to ensure the appeal is not rendered nugatory.

16. In **RWW v EKW [2019] eKLR**, the Court considered the purpose of a stay of execution order pending appeal, stating:

“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.”

17. Considering the positions of the parties in this matter—namely, the appellant's right to exercise the right of appeal and the respondent's interest in enjoying the benefits of the judgment—and in order to protect the core of the appeal, I exercise discretion to grant the application dated September 11, 2025, to the extent of issuing a stay of execution of the judgment, decree, and consequential orders issued by the Chief MC ELC Case No. E033 of 2023.

18. Costs in the appeal.

Dated, signed, and delivered electronically in Nyeri on this 11th day of March, 2026.

E. K. MAKORI

JUDGE

In the presence of:

Ms. Muendo H/B for Mr. Kinaro for the Applicant

Ms. Ndungu H/B for Ms. Omollo, for the Respondent

Kendi: Court Assistant