

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ELC APPEAL NO. E042 OF 2025

MARGARET KANGAI.....1ST
APPELLANT/APPLICANT

MICHAEL ODHIAMBO ODDENYO.....2ND
APPELLANT/APPLICANT

THOMAS WILLIAM ODDENYO.3RD
APPELLANT/APPLICANT

DAVID CHARLES ODDENYO.....4TH
APPELLANT/APPLICANT

PETER OCHIENG ODDENYO..... 5TH
APPELLANT/APPLICANT

VERSUS

ELLY STEPHEN OCHIENG ODDENYO..... 1ST
RESPONDENT

JOB TIMOTHY OTIENO ODDENYO..... 2ND
RESPONDENT

**DANIEL CHRISTOPHER OGOLLA ODDENYO..... 3RD
RESPONDENT**

RULING

1. The court is tasked with determining the Notice of Motion application dated filed on 5th September 2025 seeking stay pending appeal of the judgement in Siaya ELC Case 17 of 2022 dated 5/8/2025. The application is supported by the affidavit sworn by the 5th Appellant Peter Ochieng Oddenyo sworn on 5th September 2025 and on behalf of the appellants siblings. It deponed as follows; -
2. That 1st Applicant is over 80 years old. The Respondents are step brothers to the applicants and who are the sons of Mama Christabel Oddenyo stepmother to the applicants. Prior to marriage to Christabel the applicant's father (patriarch) had already settled the 1st applicant LR GEM/SIREMBE/417 (suit property) which was the ancestral home. That the 1st applicant and the patriarch married in Church in the year 1958 later got divorced but reunited and an Affidavit of Marriage was sworn to that effect and which was produced in evidence but was totally ignored in the judgement.
3. It is deponed that in his will the patriarch bequeathed the suit property to Christabel leaving out the 1st Applicant but the appellants challenged the same in High Court Succ. No. 864 of 2009 where Lady Justice Angawa concluded that Margaret Kangai the 1st Applicant herein was a lawful

wife of the patriarch. Despite this being part of the record, the trial court ignored it. The clan recognised the 1st Applicant as the first wife of the patriarch and would not permit his disenfranchisement. That the suit was based on lies. A caution placed against the title was removed. At paragraph 16 of the replying affidavit the deponent sets out the grounds upon which the trial court judgement should be set aside and which reiterates the grounds in the Memorandum of Appeal. That an application for stay filed before the trial court was not certified urgent and the court is urged to grant orders of stay.

Replying affidavit

4. The application is opposed vide the replying affidavit sworn by the 1st Respondent Elly Stephen Ochieng Oddenyo on 2/12/2025. It is deponed that the patriarch never built a home for the 1st Applicant but for himself as he was not yet married then. The marriage with the 1st applicant was officially dissolved in Divorce Case No.50 of 1996- a copy of the decree Nisi is attached. There was never any reconciliation. The signature on the alleged affidavit of marriage could not be verified and was never corroborated. Respondents moved to the suit property after the divorce and they never saw the 1st Applicant until the demise of the patriarch. After the will was read the applicants took possession of North Gem/Sirenge/413 which they were bequeathed and have since disposed it by sale. That the Succession Cause 864 of 2009 was duly concluded. A copy of the grant of probate of written will

was annexed. That only the court has jurisdiction to determine land disputes and village barazas which looked down upon the second wife and are termed to be of no consequence.

5. It deponed that the applicants have approached the court with unclean hand and the particulars are set out in paragraph 12 including greed when they have already sold their portion. That a divorced wife is not recognised as a spouse/wife under section 3 of the Law of Succession Act. That all necessary procedures were followed in obtaining the grant. The trial court clearly established a basis for grant of orders of permanent injunction and eviction. The court is urged not to grant the orders of stay as the respondents never enjoyed the fruits of the sale of the applicants' portion and should not be punished for their greed. The application was meant to delay execution.
6. The applicants responded by way of further affidavit sworn on 5/12/2025 which the depositions the court has noted.

SUBMISSIONS

7. The application was argued by way of written submissions. The appellants submissions are dated 18/12/2025 and the Respondents 29/01/2026.
8. The applicants cite the provisions of Order 42 Rule 6 and submit that they will suffer irreparable damage as the trial judgement orders eviction of the 2nd -5th respondents and permitting the 1st applicant who is aged to remain but who needs care which she has been receiving from the 5th respondent. That the substratum of the appeal would be

destroyed since the property is still pending succession proceedings in Nairobi Succession Cause No. 864 of 2009 and is the applicants' matrimonial home. Execution would alter status quo permanently dispossessing the applicants only home. It is urged that the appeal is arguable as it is in all fours with this court decision in **Achayo Vs. Oyugi & Others (2025) KEELC 6633(KLR)**. That the trial court also lacked jurisdiction to determine validity of a will.

9. It is urged that there is no inordinate delay the application having been filed on 4/09/2025 and judgement on 5/8/2025 well within 30 days. On security it is urged given the circumstances of the case do not warrant need for security.

10. The respondents submit that a successful litigant is entitled to enjoy the fruits of its judgement except under exceptional circumstances. The appeal lacks merit and stands no chances of success. The applicants have been given $\frac{1}{2}$ an acre to utilize which is sufficient. Citing the provisions of Order 42 Rule 6 it is submitted that the same are couched in mandatory terms. No evidence that the applicants will suffer irreparable loss and damage and have left everything to the courts imagination to pluck evidence from the air. Reliance is place on the case of **Samvir Trustee Limited Vs Guardian Bank Ltd. (2007) eKLR**. Further that no security has been offered. That justice must be administered without undue delay.

ANALYSIS AND DETERMINATION

11. I have read the affidavits sworn in support of the application and those sworn in reply. I have also given due consideration to the submissions of the learned counsels appearing. The main issue for determination is whether the application meets the requirements for the grant of orders of stay of execution pending appeal.
12. It is pertinent to clarify at this juncture that the present application is for orders of stay of execution of the trial court decree pending a determination of this appeal. The court is not being called to delve into the merits of the appeal that is before this court which is what I note the parties have largely done in their affidavits. The court will therefore confine itself to the orders sought in the application.
13. The jurisdiction of the High Court to grant stay of execution pending appeal is provided under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, the relevant part of which states 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 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.

14. Arising from the above provisions the power is discretionary but the same is guided. The Court of Appeal in **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365,** had this to say; -

‘whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 (sic) rule 6 of the Civil Procedure Rules is fettered by three conditions

namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.'

15. The application ought to be made without unreasonable delay.
16. The court in **Bungoma HC Misc App No. 42 of 2011 James Wangalwa and Another versus Agness Naliaka Cheseto** discussed what substantial loss entails as follows;

“the application must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very the very essential care of the Applicant as the successful party in the appeal. This is what substantial loss would entail”

17. Arising from the above it is not enough for an applicant to state they will suffer substantial lose, the same ought to be proved. In the present case the main concern alluded to is that while the trial court decision has retained the 1st applicant on the suit property, she is old and sickly and is under the care of the 5th applicant who lives on the suit property with his family and who must leave. Further that the applicants will lose the only home they know.

18. I have keenly looked at the judgement of the trial court. The 1st defendant who is the 1st appellant in this appeal it was held would stay in the house built by the patriarch and utilize ½ an acre of the land within/around the house. The rest of the land is to be held exclusively by

the plaintiffs. Order (e) permanent injunction issues restraining the 2nd 3rd 4th and 5th defendants who are the 2nd -5th appellants herein from entering or dealing with the suit property and who are to utilize the land bequeathed to them being North Gem/Sireembe/417.

19. One of the grounds raised is that the orders of permanent injunction amount to an eviction order or notice to quit and considering the allegation that the 1st appellant is under the care of the 5th Defendant. While it has not been disputed that the 1st Applicant is elderly and sickly, she has not been ordered out of the property. My review of the supporting affidavit does not have any deposition disclosing that the said 5th defendant stays in the suit property and which portion considering that the 1st Applicant has been given the use of $\frac{1}{2}$ an acre thereof. I must reiterate that submissions cannot take the place of evidence – see Daniel **Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR.**

20. Further I do not think the permanent injunction would affect the entry of the appellants into their mothers $\frac{1}{2}$ acre portion and the patriarch home where she lives in and give her support. This is infact confirmed by the respondents who state the applicants have this portion to utilise.

21. This court is not persuaded that substantial loss has been proved to warrant the grant of the orders for stay of execution.

22. Having arrived at the above conclusion I do not see the need to delve into the issue of security and the timeliness of the application.

23. The upshot of the foregoing is that I find no merit in the application dated 5th September 2025. It is hereby dismissed. There shall be no orders as to costs noting that the parties are close relatives.

Orders accordingly

Dated at Siaya this 11th Day of March 2026

HON. JUSTICE A. E. DENA

JUDGE

11/03/2026

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

Mr. Saru for the respondent

Mr. Mbugua for Appellants.

Court assistant: Ishmael Orwa

SIAYA ELC LA NO. E042 OF 2025 - RULING