

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCC NO. E007 OF 2023

SAMUEL MOKAYA MOMANYI 1ST PLAINTIFF

STANLEY MEMBA MOKAYA 2ND PLAINTIFF

VERSUS

KEVIN ONG'ERA ONGWAE 1ST DEFENDANT

THE NATIONAL LAND COMMISSION 2ND DEFENDANT

THE KISII COUNTY LAND REGISTRAR 3RD DEFENDANT

THE HON. ATTORNEY GENERAL 4TH DEFENDANT

RULING

(Application for stay pending appeal; principles to be considered; respondents having filed suit for revocation of title of the applicant and succeeding; applicant signalling intention to appeal and seeking stay; stay granted subject to conditions)

1. The application before me is that dated 14 October 2025 filed by the 1st defendant. It is an application for stay of execution of the judgment and decree herein, pending hearing and determination of an intended appeal to the Court of Appeal. The application is opposed by the successful plaintiffs.
2. By way of background, the plaintiffs commenced this suit vide a plaint filed on 5 June 2023. They asserted that they were the rightful proprietors of the land parcel Kisii Municipality/Block I/185. They filed suit because the 1st defendant/applicant had taken possession of the suit property and commenced development of an apartment block. The 1st defendant/applicant filed defence where he contended that it was him who was the lawful title holder of the suit property and that it was him who was registered as proprietor at the Kisii land registry.
3. In my judgment, delivered on 1 October 2025, I held that it was the plaintiffs who were the rightful title holders of the suit property. I further held that the registration of the 1st defendant/applicant as owner of the suit property was fraudulently procured. I made an order directing the Land Registrar, Kisii, to expunge all records leading to the issuance of title of the 1st defendant/applicant and ordered him to reconstruct the records using

documents of the plaintiffs. I further ordered the applicant to pay general damages of Kshs. 3,000,000/= to the plaintiffs as general damages for forcible detainer and trespass. Regarding possession of the property, I gave the 1st defendant/applicant 30 days to demolish his structures and further barred him by an order of permanent injunction from entering the property after lapse of the 30 days. I ordered that if the applicant fails to demolish the structures therein, the plaintiffs were at liberty to take over the suit property as it is, or demolish the structures and pass the cost thereof to the applicant. I also ordered the applicant and the 3rd and 4th defendants (respectively the Land Registrar, Kisii, and Attorney General) to pay the costs of the suit to the plaintiff.

4. Aggrieved, the applicant filed a Notice of Appeal and he has now followed that up with this application for stay of execution pending appeal. In his supporting affidavit, the applicant avers that he has developed a seven-storey building which may be demolished. He also states that the plaintiffs may dispose the property, or permanently change its character, and as a result his appeal will be rendered nugatory if he succeeds.
5. The application is opposed by the replying affidavit of the 2nd plaintiff. He has deposed that the applicant will not suffer any substantial loss because he is capable of making good any loss that he may suffer. He has deposed that he owns two properties, one in Runda valued at Kshs. 150,000,000/= and another in Lavington valued in excess of Kshs. 300,000,000/=. He has deposed that there are no guarantees that the suit property will be preserved. He has added that they will continue being deprived of the use and enjoyment of the property as they will not be able to develop it yet the cost of investing continues to soar. He has deposed that if the court is disposed of granting stay, then the applicant needs to deposit the sum of Kshs. 3,000,000/= ordered as general damages in an escrow account; the title of the applicant be annulled; the applicant be directed not to undertake any further developments; the applicant to deposit Kshs. 20,000,000/= which is the income the plaintiffs stand to lose if they are to develop the property; and the applicant to deposit a further Kshs. 8,000,000/= as the fair estimate of the undeveloped site value of the property.
6. I have taken note of the above together with the submissions filed by both counsel for the applicant and the plaintiffs/ respondents.
7. This is an application for stay pending appeal and I stand guided by the principles laid down in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010, which is drawn as follows :

(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.

8. From the above, it will be seen that three issues are important. The first is delay, the second is substantial loss, and the third is offer of security.
9. Starting with delay, I do not see any in the circumstances of this case. The judgment was delivered on 1 October 2025 and this application was filed 14 days later. The application has also been filed within the 30 days given to the applicant to vacate the suit property.
10. The next issue is substantial loss which we all know is the cornerstone of an application such as this.
11. We need to remember that the essence of an order of stay pending appeal is to preserve the subject matter of the dispute so that if the appellant ends up being successful, his success is not rendered nugatory. This however has to be counterbalanced with the right of a successful litigant to enjoy the fruits of the judgment. The assessment will depend on the nature of orders made in the decree.
12. In our case, I can summarize the orders made in the judgment into three being :
 - (i) Reconstruction of the records in the Land Registry.
 - (ii) Demolition of the structures or in the alternative the plaintiffs taking over the suit property with the structures on as is basis.
 - (iii) General damages of Kshs. 3,000,000/= in favour of the plaintiffs.
13. I am prepared to give an order of stay on the reconstruction of the records in the Land Registry but this will need to be counterbalanced with an order that the applicant does not enter into any disposition nor deal with the title thereof whatsoever until the appeal is concluded. I will fortify this by making an order of inhibition, inhibiting the registration of any disposition in the register of the suit property as held by the Land Registrar, Kisii, until the appeal is concluded.
14. On the status of the suit property, I am also prepared to order that the status quo currently obtaining be maintained until the appeal is heard and concluded. I am however alive to the claim of the plaintiffs that they stand to suffer some loss by being kept away from the suit property for the duration of the appeal. In his submissions, counsel for the applicant submitted that there was no economic activity that the plaintiffs were undertaking on the suit property thus they cannot claim that they are going to suffer any loss. It is correct that there was no substantial economic activity that they were undertaking but the fact that a

stay will be granted means that even if they wished to start any project therein, that is stalled. We need to factor in the opportunity cost and the time value of money. In that regard, I am prepared to order the applicant to deposit the sum of Kshs. 3,000,000/= to compensate the plaintiffs in terms of opportunity cost and time value, considering that the appeal may take two to three years to be heard.

15. On the money aspect of the decree, this will need to be secured by a deposit.

16. In total therefore I am prepared to grant stay of execution subject to the applicant depositing the sum of Kshs. 6,000,000/= in a joint interest earning account within the next 60 days. The applicant will also need to deposit the taxed costs within 60 days of taxation into the same account. The said joint interest earning account will be in the name of counsel for the plaintiffs/respondents and counsel for the 1st defendant/applicant. If deposited, the monies to remain therein until the appeal is finalized. If the applicant succeeds, then the money together with the interest earned will be released to him. If he fails, then the money together with the interest earned will be released to the plaintiffs. If the monies are not deposited as directed, or if the applicant while the appeal is pending deals with the suit property, or interferes with the current status quo, then the plaintiffs are at liberty to apply to have the stay lifted in which event the stay will lapse and the plaintiffs will be at liberty to execute the judgment.

17. The last issue is costs. They will be in the appeal.

18. Orders accordingly.

DATED AND DELIVERED THIS 5 DAY OF MARCH 2026

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Masore Nyang'au and Mr. Bosire Gichana for the 1st defendant/applicant

M/s Nyamurongi & Company for the plaintiffs/respondents – Absent

2nd defendant (National Land Commission) – Absent

State Law Office for the 3rd & 4th defendants – Absent

Court Assistant – Michael Oyuko