

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ELCLA No. E013 OF 2024

**AGNES MORAA NYARIKI & FELISTAS NYARIKI (Suing as the administrators of estate of HENRY NYARIKI OKARA APPELLANTS
VERSUS**

**BILLAH KEMUNTO SANI
1ST RESPONDENT
THE COUNTY LAND REGISTRAR,
NYAMIRA COUNTY
2ND RESPONDENT
THE AREA CHIEF, NYANSIONGO LOCATION 3RD
RESPONDENT
THE DEPUTY COUNTY LAND REGISTRAR,
NYAMIRA COUNTY 4TH
RESPONDENT
ELIJAH SANI
5TH RESPONDENT**

(Being an appeal from the judgment and decree of the Chief Magistrate’s Court at Keroka (C. Ombija, Senior Resident Magistrate) delivered on 20th November 2024 in Keroka MCELC No. E001 of 2023)

RULING

1. Judgment was delivered in this appeal on 4th February 2026. The Court found no merit in the appeal and the cross appeal and accordingly dismissed both with no order as to costs.

2. Subsequently, the Appellants filed Notice of Motion dated 19th February 2026, which is the subject of this ruling. The following are the prayers in the application:

1. THAT this matter be certified urgent.

2. THAT this Honourable Court be pleased to issue an interim order of stay of the judgement and decree dated 4th February, 2026 and 5th February 2026 respectively pending the hearing and determination of this application.

3. THAT this Honourable Court be pleased to stay it's judgement and decree dated 4th February, 2026 and 5th February 2026 respectively pending the hearing and determination of the intended appeal.

4. THAT costs of this Application be provided for.

3. The application is supported by an affidavit sworn by Agnes Moraa Nyariki who deposed that the effect of the judgment herein is that a public road be established thus affecting or passing through land registration number Gesima Settlement Scheme/93 (the suit property) and that in execution of the judgment and decree, the County Coordinator of the National Land Commission Nyamira County had issued a notice dated 16th February 2026 stating that a road would be established in the suit property on 25th February 2026.

4. She further deposed that she had filed a notice of appeal dated 11th February 2026 in respect of the judgment and that unless stay of execution pending appeal is granted, the road would be established, and the appeal shall be rendered nugatory thereby occasioning irreparable damage to the Applicants.
5. The First and Fifth Respondents opposed the application through Grounds of Opposition dated 19th February 2026 through which they contended that the application was frivolous, an afterthought, incompetent, vexatious, an abuse of the Court process and was brought to delay the enforcement of the decree. They further contended that the decree was a negative order which cannot be stayed.
6. The First and Fifth Respondents further contended that the judgment was to the effect that the road did not exist in the Applicants' property and added that the Applicants had not stated what kind of loss they would suffer. Additionally, they stated that the application had not met the threshold for granting stay of execution pending appeal and urged the Court to dismiss it with costs.
7. The rest of the parties neither responded to the application nor participated in its hearing.
8. The application was canvassed through written submissions. The Appellants/Applicants filed submissions dated 26th

February 2026 while the First and Fifth Respondents filed submissions dated 2nd March 2026.

9. I have carefully considered the application, the Grounds of Opposition and the submissions. The issues for determination are whether stay of execution pending appeal should be granted and who bears the costs of the application.
10. The application is brought under **Order 42 rule 6** of the **Civil Procedure Rules** which provides as follows:

6.(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 sub rule (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.

11.The upshot of those provisions is that an applicant seeking stay pending appeal must demonstrate that substantial loss will result to her if stay is not granted, and that the application has been made without unreasonable delay. Such an applicant is further required to give such security as the court may order for the due performance of the decree. See **Kenya Power & Lighting Co. Ltd v Kigaita Ngare Unduthu & 36 others [2020] eKLR** and **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**.

12.As Platt Ag JA (as he then was) stated in **Kenya Shell Limited v Benjamin Karuga Kibiru & another** (supra), substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is virtually impossible for such an

application to succeed if an applicant fails to demonstrate that he will suffer substantial loss if stay is not granted.

13. Judgment was delivered herein on 4th February 2026 while the application was filed two weeks later, on 19th February 2026. The Applicants have satisfied the condition requiring that such an application has been made without unreasonable delay.

14. The key requirement, however, is that the Applicant must demonstrate that substantial loss will result to them if stay is not granted. Substantial loss must be viewed from the perspective of what the judgment and decree command and how their execution will result in loss to the Applicant, which loss must be substantial.

15. In the judgment herein, the appeal and the cross appeal were both dismissed. None of the parties was condemned to pay any costs. The judgment is a perfect case of a negative order.

16. Faced with a similar scenario, the Court of Appeal held in **Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others [2021] KECA 465 (KLR)** thus:

With regard to the first prayer, a cursory perusal of the record herein shows that the High Court vide its judgment dated 30th July 2020, merely dismissed the applicant's case with costs to the respondents. The parties were not ordered to do anything or to refrain from doing anything. What

was therefore issued by the High Court is in the nature of a negative order incapable of execution and as such there is nothing to stay. See Western College of Arts and Applied Sciences v EP Oranga & 3 others [1976] eKLR where the Learned Judges stated thus:

“what is there to be executed under the judgment, the subject of the intended appeal” The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In Wilson v Church the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”

...

Consequently, the prayer for stay of execution must fall by the wayside and the same is hereby dismissed.

17. The judgment herein did not command any of the parties to do or to refrain from doing anything. Plainly, it is incapable of execution. Yet the Applicants’ contention in the present

application is that execution of the judgment is imminent and that it will cause them loss. There is nothing in the judgment and decree to execute. Similarly, there is nothing in them that can be stayed.

18. In the result, I find no merit in Notice of Motion dated 19th February 2026. I dismiss it with costs to the First and Fifth Respondents.

Dated, signed, and delivered at Nyamira, this 11th day of March 2026.

**D. O. OHUNGO
JUDGE**

Delivered in the presence of:

Mr Ochwangi and Mr Moriasi for the Appellants

Ms Mosomi for the First and Fifth Respondents

Mr Ndiritu for the Second to Fourth Respondents

Court Assistant: B Kerubo