

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ELCLA NO. E 070 OF 2025

NATIONAL BANK OF KENYA1ST
APPLICANT

MUGANDA WASULWA T/A KEYSIAN AUCTIONEERS.....2ND
APPLICANT

VERSUS

JOSEPH MUKWANA OCHIENG (Suing for and on behalf

of the Dependants and the Estate of **GRACE NABUDE OCHIENG**
(Deceased)

.....**RESPONDENT**

RULING

1. The appellant initially filed this appeal in the High at Siaya being an Appeal against the whole Judgment and Decree of Hon. Benjamin Limo in MCELC E091 OF 2023- SIAYA dated 8/10/2025. The file was placed before High Court Judge D. Kemei on 5/11/2025. Upon perusal the learned Judge observed that the matter in the trial court the subject of the appeal was a land matter. Consequently, he transferred the appeal to the ELC at Siaya for determination.
2. The file was transferred and given an ELC number. Together with the appeal was an application dated 6/11/2025 seeking an interim stay of execution of the trial court judgement and attendant decree.

3. In response to the application by his replying affidavit sworn on 10/12/2025 the respondent averred that there is no competent appeal before this court since the High Court Judge ought to have downed his tools and dismissed Siaya HCCOMMA/E003/2025 rather than transferring the appeal to the ELC upon realization it was not seized of jurisdiction. He urged that the action culminates into sanctifying an incompetent suit to the disadvantage of the Respondent.
4. The application was canvassed orally on 11/12/2025. Counsel for the applicant/appellant submitted that they had met the requirements of Order 42 rule 6 given the nature of the decree they will suffer irreparable loss since the bank will lose the security including the title that was given as security for a facility that stood at Kshs.11,617,934 as at the date of the judgement. That the appeal will be rendered an academic exercise even if it succeeds. It is also submitted that there was no delay in the application and that the appellant was ready to abide by any order of the court. Further that a challenge to the appeal should be by a formal application and not a replying affidavit. Counsel urged the court to let the appeal be ventilated by the court.
5. Mr Ochieng submitted on behalf of the Respondent and reiterated that there is no appeal upon which the application would be anchored and determined since the High Court lacked jurisdiction to transfer a land matter

filed before it to ELC. The court was referred to the case of **Korir Vs Chepkwony & Ano. (2023) KELC 21671 KLR.**

6. At the instance of Mr. Wauna for the Appellant I gave him leave to respond further since he had not been served with the authorities cited. The court also directed that the authority is filed for the benefit of Mr. Wauna. The authority was filed by way of List of Authorities. Mr. Wauna did not exercise his right of further reply.

ANALYSIS AND DETERMINATION

7. I have anxiously pondered over the emerging objection raised by the Respondent with regard to the decision by the High Court to transfer the appeal to this court. The question that lingered over my mind is whether the objection itself is properly before me and in other words whether I have jurisdiction to seat on appeal of a decision of a court of concurrent jurisdiction.

8. My answer to the above is that the above objection is not properly before me. I say so because the ELC is a court of concurrent jurisdiction by dint of the Constitution. This court cannot therefore purport to seat and determine whether the learned Judge ought or not to have downed his tools and whether he had the right to transfer the appeal. See the Court of Appeal case of **Lalji vs Diamond Hasham Lalji & 2 Others (Civil Appeal 165 of 2017) (2023) KECA (KLR) (7 July 2023) Judgement.**

9. In my view if the respondent is aggrieved by the decision to transfer the matter to the ELC then this is a point to be

urged before the court of appeal and or for review before the learned judge in the High Court.

10. Having resolved the above issue, the position is that there is an appeal and an application before me which I will proceed to make a determination by resolving whether the application is merited.

11. The Application is premised on the provisions of Order 42 Rule 6 of the Civil Procedure Rules 2010.

Order 42 Rule 6 of the Civil Procedure Rules, provides 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.

12. Arising from the above provisions, substantial loss is the main parameter to be demonstrated by an applicant desiring orders of stay of execution of the decree of the court. The appellant depones that he is apprehensive that that the respondent will move with haste and execute the decree and the applicant will lose the loan and interest advanced when the land registrar discharges the charge.
13. The security for the loan based on the judgement of the trial court stood at Kshs.11,617,934 as at the time of the judgement. Order (b) of the judgement directs that the 1st Defendant should discharge the charge over the suit property and release the title to the Plaintiff within 60 days and the Land Registrar to issue new title deed to the plaintiff in the name of the deceased free from any encumbrance.
14. In my view the appellants apprehension is justified. The orders if implemented have the effect of discharging the security upon which the loan was allegedly advanced. Once the property is encumbered the estate of the

deceased would be at liberty to even dispose the land before the appeal is heard and determined. Should the appellant exercising his right of appeal succeed then the appeal will be rendered nugatory.

15. As to whether there is any inordinate delay I find that the appeal as transferred was filed timely the judgement having been delivered on 8/10/2025 and the appeal filed on 11/11/2025 a period of about a month.
16. On security given the circumstances of the case, the Bank must release the title allegedly held as collateral to the custody of the Court. This ensures that there will be no disposal by exercise of statutory power of sale.
17. The following orders therefore issue to dispose of the application dated 6th November 2025; -
18. That pending hearing and determination of the appeal herein, there be an order of stay of execution of the judgement dated 8/10/2025 and Decree of the trial court being Chief Magistrate Court Siaya **MCELC E091 OF 2023** Joseph Mukwana Ochieng Vs National Bank of Kenya & Another.
19. That the Applicant/ Appellant shall within 30 days of this ruling deposit for the custody of the Court the title for the suit property **SIAYA/ KARAPUL RAMBA/1653** pending the determination of the appeal.
20. The costs of this application shall abide the outcome of the appeal.

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. Oluoch for the Appellant/applicant

N/A for the Respondent

Court assistant: Mr. Elisha Mboya

ORIGINAL