

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NAKURU
ELC APPEAL NO. E033 OF 2025

JOSEPH BASWONYAPPELLANT

VERSUS

JAMES KIPKOSGEI KWAMBAI1ST
RESPONDENT

DANIEL KIRUI LANGAT.....2ND
RESPONDENT

ALLAN KIPRONO.....3RD
RESPONDENT

SAMUEL NYAMBISA OBAGA.....4TH
RESPONDENT

STANLEY CHEBII.....5TH
RESPONDENT

MANASSEH KIMAIYO.....6TH
RESPONDENT

WILLIAM ROTICH.....7TH
RESPONDENT

JENIFFER CHEMOIYO.....8TH
RESPONDENT

MUSA CHEPSAT9TH
RESPONDENT

FRANCIS TALLAM.....10TH
RESPONDENT

WILLIAM KIPYATOR TOROITICH11TH

RESPONDENT

PETER ONGAKI.....12TH

RESPONDENT

SIMON CHEPSOTO KIBUGUT.....13TH

RESPONDENT

(Being an appeal against the Judgment and Decree of the Chief Magistrate's Court, Molo by Hon. Caroline A. Ocharo (CM) delivered on 26th May 2025)

R U L I N G

1. The ruling is in respect of the Notice of Motion dated 1st December 2025. This is brought under **Order 42 Rule 6(1) of the Civil Procedure Rules)**
2. It seeks orders: -
 1. **Spent**
 2. **Spent**
 3. **That pending the hearing and determination of the Appellant/Applicant's Appeal herein, this Court be pleased to issue an Order of stay of execution of the decree emanating from the judgment issued on 26th May 2025 from Molo MCELC No.497 of 2011.**
 4. **That the costs of this application be provided for.**

3. The grounds are on the face of the Application and are set out in paragraph's a to g.
4. The Application is supported by the Affidavit of Joseph Baswony, the Appellant herein, sworn on the 1st December 2025.
5. The Application is opposed. There is a Replying Affidavit sworn by James Kipkosgei Kwambai, the 1st Respondent herein on the 22nd January 2025.
6. There is also a Replying Affidavit sworn by Allan Kiprono, the 3rd Respondent on the 15th January 2026. He also states that he swore the same on behalf of the 4th to 7th Respondents.
7. It appears that the 2nd Respondent did not file any response to the Notice of Motion.
8. The Notice of Motion was canvassed by way of written submissions.

THE APPLICANTS SUBMISSIONS

9. They are dated 16th January 2026. They set out four issues for determination: -
 - (i) Whether the Applicant has demonstrated substantial loss if the stay is not granted.**

- (ii) **Whether the application was filed without undue delay.**
- (iii) **Whether the applicant is willing to provide security for the due performance of the decree**
- (iv) **Whether the balance of convenience favours the granting of a stay of execution.**

10. Counsel submitted that eviction from **parcel No. Nakuru/Ngongongeri/1242** will result in irreparable loss rendering the appeal nugatory.

Reliance placed on the case of ***Mukuma -vs- Abuoga (1988) KLR 645*** where it was held that substantial loss includes loss of residence or dispossession, which cannot be adequately compensated by damages.

11. Counsel also submitted that the application was filed without undue delay, promptly after the dismissal in the lower court.

Reliance is placed on the case of ***Florence Hare Mkaha -vs- Pwani Tawakal Mini Coach & Another (2014) eKLR.***

12. It is submitted that the application seeks to preserve the status quo pending appeal and that Appellant is willing to

abide by any conditions as to security; as the Court may impose. He has put forward the case of **Butt -vs- Rent Restriction Tribunal (1982) KLR417.**

13. It is further, submitted that the balance of convenience favours the Applicant/Appellant because eviction will result in irreversible harm, whereas any monetary loss to the Respondent can be adequately secured. He has put forward the case of **James Wangalwa & Another -vs- Agnes Naliaka Cheseto (2012) eKLR.** He prays that the Application be allowed.

THE 1ST RESPONDENT'S SUBMISSIONS

14. They are dated 22nd January 2026. Counsel submitted that the Appellant has not met the legal threshold for grant of stay of execution pending appeal. Reliance is placed on **Order 42 rule 6 (2) of the Civil Procedure rules.**
15. It is also submitted that the Appellant has failed to demonstrate any substantial loss that he stands to suffer, if the decree is executed. It is the 1st Respondent's contention that granting stay would perpetuate an illegality by allowing the Appellant to continue occupying and benefitting from land that does not belong to him, while the 1st Respondent remains dispossessed.
16. It is also submitted that the 1st Respondent is entitled to the fruits of a lawful judgment and stay would unjustly delay

enforcement of rights conclusively determined by the trial Court.

17. It is also the 1st Respondent's submission that he is financially capable and willing to refund the sum awarded if required should the appeal succeed.
18. It is also the 1st Respondent's submission that the balance of convenience tilts in his favour as he is the lawful owner of the suit property. He prays that the application be dismissed with costs.

THE 2ND - 7TH RESPONDENTS SUBMISSIONS.

- 19 They are dated 15th January 2026. They raise one issue for determination. Whether or not the 2nd to 7th Respondent's should bear costs of the Application. Reliance placed on **Section 27 of the Civil Procedure Act**, where it is provided that costs ought to follow the event.

ANALYSIS AND DETERMINATION

Order 42 rule 6 (2) of the Civil Procedure Rules provides that:-

“(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.”

20. In *Peter Ondade t/a Spreatwett Chemist -vs- Josephine Wangari Karanja (2006) eKLR* the court states as follows:

“The issue for determination by the court is whether the Applicant has established a case to enable the court to grant stay of execution sought. For the court to grant stay of execution it must be satisfied that substantial loss may result to the Applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the Applicant must provide security as may ultimately be binding on him”

21. It is the Appellants submissions that he stands to suffer substantial loss if he is evicted from the suit property. That the Appeal will be rendered nugatory if these orders are not granted.

In the case of *Suleiman -vs- Amboseli Resort Ltd (2004)2KLR589* which was quoted with approval *Jason Ngumba Kagu & 2 others -vs- Intra Africa Assurance Co. Ltd (2014) eKLR* where it was held that:-

“ The possibility that substantial loss will occur if an order of extension is not granted is the cornerstone of the jurisdiction of Court in granting stay of execution pending appeal under

Order 42 rule 6 of the Civil Procedure rules. The court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High Court, is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here it is not really a question of measuring the prospects of the appeal itself, but rather whether by asking the Applicant to do what the judgment requires he will become a Purus explorer in the judicial process”

22. It is the 1st Respondent’s submission that granting the orders herein would be allowing the Appellant to continue to occupy and benefit from his land.
23. I have considered the rival positions and the written submissions and find that the Appellant ought to be given a chance to prosecute his appeal.
24. I find merit on this application and I grant the orders sought namely:-

(a) That a stay of execution of the judgment and Decree of Hon. Caroline A. Ocharo (CM) dated 26th May 2025 in Molo MC ELC No.497 of 2011 is hereby granted pending the hearing and determination of the Appeal herein.

On Condition

- (i) That the Appellant does deposit Kshs.300,000/= in Court as security for costs within forty-five (45) days from the date of the ruling.
- (ii) That the Appellant shall file and serve the Record of Appeal within sixty (60) days, in order to move the court towards finalization of the Appeal within a reasonable time.

In default

The order of stay shall lapse.

- (b) That cost of this application shall abide the outcome of the Appeal.

Ruling dated, signed and delivered virtually at Nakuru this 26th days of February 2026.

**L KOMINGOI
JUDGE**

In presence of

Ms. Kinya for Mr. Mugambi for the Appellant
Mr. Mamwacha for the 1st Respondent
Mr. Odhiambo for the 2nd to 7th respondents
Court Assistant: Nelima