



**Gikonyo v Thiga & 4 others (Environment and Land Appeal  
E231 of 2025) [2026] KEELC 1215 (KLR) (26 February 2026) (Ruling)**

Neutral citation: [2026] KEELC 1215 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E231 OF 2025**

**JG KEMEI, J**

**FEBRUARY 26, 2026**

**BETWEEN**

**JOSHUA NDUNG’U GIKONYO ..... APPELLANT**

**AND**

**DAVID MACHARIA THIGA ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH MUGWINI MWANGI ..... 2<sup>ND</sup> RESPONDENT**

**LUCY WAMBUI GITHAIGA ..... 3<sup>RD</sup> RESPONDENT**

**NDIRIKANIA COMPANY LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**PETER NGUKU ..... 5<sup>TH</sup> RESPONDENT**

*(In respect of the Appellant’s application dated 4/11/2025)*

**RULING**

( In respect of the Appellant’s application dated 4/11/2025)

1. Vide the Notice of Motion application dated 4/11/2025, which is expressed to be brought under the provisions of Section 1A, 1B, 3, 3A, 63 (e) & 65 of the *Civil Procedure Act*, Order 22 Rule 25, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, the Appellant/Applicant substantively seeks the following orders;
  - a. That this Honourable Court be pleased to grant a stay of execution from the Judgment delivered on 23/10/2025 and all consequential orders pending the hearing and final determination of the Appeal.
  - b. That the costs of the application to abide by the outcome of the Appeal.



2. The application is, on its face, premised on the Affidavit of Joshua Ndung'u Gikonyo, the Appellant herein, sworn on the same date. The deponent avers that Judgment was entered against him on 23/10/2025, declaring the estate of the late Damaris Wanjiku Nguku, represented by the 5th Defendant, as the lawful owner of Land Parcel No. Nairobi Block I35/245. He further avers that the trial Court granted a temporary stay of execution for thirty (30) days, which has since lapsed. He further avers that he has lodged an appeal challenging the findings on ownership and the dismissal of his claim, asserting that there was clear and uncontroverted evidence of ownership, possession, and developments.
3. The Appellant contends that any delay in determining the present application for a stay of execution of the impugned judgment will render the intended appeal nugatory and cause substantial and irreparable loss. It is averred that the proprietary rights, occupation, and development of Land Parcel No. Nairobi Block 135/245 are directly at stake. It is further averred that execution of the decree in respect of the suit property will cause grave and irreversible prejudice. In particular, the 5th Respondent may proceed to take possession and demolish existing lawful structures and improvements on the property, including the perimeter fence and storehouse. Such actions would not only destroy valuable investments but would also permanently alter the character of the land, thereby depriving the Applicant of the fruits of occupation and development.
4. He argues that the Appeal raises weighty issues with a high probability of success, and that executing the decree would render the Appeal nugatory. The Applicant contends that, if execution proceeds and the Appeal ultimately succeeds, recovery of the suit property would be impracticable. It is asserted that the application has been made without delay to prevent unnecessary costs and prejudice to the parties. The Applicant asserts that maintaining the status quo is necessary to preserve the subject matter of the Appeal and that no party will suffer prejudice if the stay orders are granted. The Applicant avers that it is only fair, just, and equitable for the Application to be allowed and the orders sought to be granted.
5. On 17/11/2025, the court directed the Applicant to serve the application on the Respondents. The Respondents were granted leave to file their Replying Affidavit. Thereafter, the parties were directed to file their written submissions within seven (7) days.
6. I have perused the Court Tracking System (CTS) and found that there is no response filed. There is however evidence that the respondent was served with the application.
7. The Appellant/Applicant complied and filed his written submissions dated 14/11/2025 in compliance with the court's directions. The court has had occasion to read through the said submissions and considered them in its determination.

### **Analysis and Determination**

8. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions a party must satisfy for the court to order a stay of execution are set out in Order 42 rule 6 of the Civil Procedure Rules. An applicant for an order staying the execution of a decree or an order pending appeal must, under Order 42 rule 6(2) of the Civil Procedure Rules satisfy the following conditions, namely:
  - a. That substantial loss may result to the applicant unless the order is granted.
  - b. That the application has been made without unreasonable delay, and
  - c. That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.



9. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -
- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
  - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
  - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.
10. Execution is a lawful process and is not a ground for granting a stay of execution. The applicant must show that execution will irreparably affect him or alter the status quo to his detriment, thereby rendering the appeal nugatory. With that in mind, I will proceed to consider each condition in light of the applicant's assertions.
11. As to whether the Application has been filed without undue delay, judgment was entered on 23/10/2025. The Application was filed on 4/11/2025, which is about eleven (11) days. This court thus finds that the Application has been filed without undue delay.
12. On the issue of substantial loss, Ogolla, J in *Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 stated that:
- “Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”
13. To this end, I am persuaded by decision of the Court in *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] KEHC 1094 (KLR) it was persuasively held that the fact that execution is likely to be put in motion does not amount to substantial loss. The court stated as follows:
- “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.
- The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma vs Abuoga* quoted above. The last case, referring to the exercise of discretion



by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus: "...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

14. The Applicant contends that it will suffer irreparable harm if the 5th Respondent demolishes the structures and improvements on the property, including the perimeter fence and storehouse. Thus, the appeal's substratum will be lost. Such actions would not only destroy valuable investments but also permanently alter the character of the land, thereby depriving the Applicant of the fruits of occupation and development. I am persuaded that the Applicant would suffer substantial loss if the stay sought is not granted.
15. An applicant seeking a stay pending appeal must also provide security for the due performance of any decree or order that may ultimately be binding on him. Under the provisions of Order 42, rule 6(1) and (2) of the Civil Procedure Rules, a party seeking a stay must offer such security for the due performance of the orders that may ultimately be binding on the Appellant.
16. In the instant matter, the applicant was required to provide either the actual security for the Court's consideration of its sufficiency or an undertaking that it is willing to comply with the conditions to be set by the Court. In the case of *Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates & 2 others* (2014) eKLR, the Court held that:

"The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose."
17. The Applicant has stated that it is willing to comply with any condition that this Honourable Court may impose for granting the stay orders. On this undertaking, I find that the Appellant/Applicant has satisfied this court as to the third condition.
18. As for the final condition regarding the provision of security, the grant of security for costs remains a discretionary order. I exercise my discretion and make no order as to security for costs.
19. Having considered all the matters set out hereinabove, I find the Notice of Motion application dated 4/11/2025 meritorious and it is allowed as prayed.
20. The costs of the application shall abide the outcome of the appeal.
21. It is so ordered

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 26<sup>TH</sup> DAY OF FEBRUARY 2026 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered Online in the presence of:



Mr. Mwangi for the Appellant

N/A for the 1<sup>st</sup> – 5<sup>th</sup> Respondents

CA – Ms Yvette Njoroge

