

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC CASE NO 20 OF 2019**

**PHILIP MUNYAO MUTWOTA (Suing on behalf of Benjamin Jackson Mutwota Muia.....1<sup>ST</sup>)**  
**PLAINTIFF**

**NDAVI WAMBUA (Suing as the administrator and personal representative of Wambua Makau Ndungu).....**  
**2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ELIJAH MULALA & 31 OTHERS.....DEFENDANTS**

**RULING**

**Introduction**

1. This is a ruling in respect of a notice of motion dated 3<sup>rd</sup> July, 2025 in which the Defendants/Applicants seek stay of execution of the judgment delivered on 26<sup>th</sup> September, 2025 pending hearing and determination of an intended appeal before the Court of Appeal.

**Applicants' Contention**

2. The Applicants contends that in the judgment delivered by the court, there was an eviction order which was granted. They state that if execution is carried out, they will suffer substantial loss which will render the appeal nugatory.
3. The Applicants state that they have filed a notice of appeal signifying their intention to pursue an appeal and that they have already applied for proceedings to enable them to compile a record of appeal. They further state that they have taken all the necessary steps towards pursuing their appeal.

They are willing to deposit security for costs as provided by the provisions of Order 42 of the Civil Procedure Rules.

4. The Applicants state that the application has been brought without unreasonable delay and that if execution proceed, it will render the appeal an academic exercise.

### **Respondents' Contention**

5. The Applicants' application was opposed by the Plaintiffs/Respondents based on a replying affidavit sworn on 17<sup>th</sup> January, 2026. The Respondents contend that the Applicants' application is an abuse of the process of court; that the Applicants' supporting affidavit is fatally defective for failure to annex authority from his co-respondents authorising him to swear on their behalf and that the application offends the provisions of Order 9 Rule 9 of the Civil Procedure Rules.
6. The Respondents further state that the Applicants have not demonstrated that they deserve stay of execution and that the application is an attempt to obstruct execution process. They further state that filing of a notice of appeal does not entitle one to stay of execution.
7. The Respondents contend that the Applicants have failed to disclose that they had been granted a stay of 180 days and they cannot come to court seeking to stay a lawful process. They finally state that litigation must come to an end.

### **Applicants' Further Affidavit**

8. In a further affidavit sworn on 17<sup>th</sup> February, 2026, the Applicants state that their advocate duly obtained a consent to come on record from the previous advocates. The consent is dated and filed in court on 13<sup>th</sup> October, 2025. On the issue of authority to swear on behalf of the other Applicants, the

deponent of the affidavit states that he is the one who has been signing all pleadings on behalf of the other Applicants and in the supporting affidavit he clearly indicated in paragraph one that he had authority to swear on behalf of his co-Applicants.

9. The Applicants state that they have since filed a memorandum of appeal in Nairobi Civil Appeal No. E1134 of 2025. They stated that failure to annex the authority to the supporting affidavit is a mere technicality which cannot defeat the application.

### **Applicants' Submissions**

10. The parties were directed to file submissions. The Applicants filed their submissions dated 17<sup>th</sup> February, 2026. They submitted that the court's power to grant stay of execution is discretionary and should be exercised in such a way as not to render an appeal nugatory. Reliance was placed in the case of **Butt –vs- Rent Restriction Tribunal Civil Application NAI 6 of 1979**.
11. The Applicants submitted that the Respondents have already obtained eviction orders and if the same were to be executed, it will cause substantial loss as land lost is irreplaceable. They relied in the case of **Mukuma –vs- Abuoga (1988) KLR 645** where it was held that “substantial loss is what is has to be prevented by preserving the status quo because such loss would render the appeal nugatory”.
12. The Applicants' also submitted that they had brought the application without delay.

### **Respondents' Submissions**

13. The Respondents submitted that litigation must come to an end. They relied on the case of **Flora N. Wasike –vs- Destimon Wamboko (1988) eKLR**.

They further submitted that the application offends the provisions of Order 9 Rule 9 of the Civil Procedure Rules. They relied on the case of **Lalji Bhimji Shangani Builders & Constructors –vs- City Council of Nairobi (2012) eKLR** where it was held that pleadings filed in violation of Order 9 Rule 9 of the Civil Procedure Rules are incompetent.

14. The Respondents also submitted that Article 159 of the Constitution cannot be invoked to cure non compliance with mandatory procedural requirements. They relied on the case of **S. K. Tarwadi –vs- Veronica Muhlmann (2019) eKLR**. On lack of authority they submitted that where a deponent fails to annex authority, the affidavit is defective and of no probative value. They relied on the case of **Kisya Investments Ltd –vs- Kenya Finance Corporation Ltd (2005) EKLR**.

#### **Analysis and Determination**

15. I have carefully considered the Applicants' application, the opposition thereto as well as submissions. The only issue for determination is whether the Applicants have met the threshold for grant of stay of execution pending appeal.

16. Stay of execution is governed by Order 42 Rule 6(2). The conditions which have to be met are clearly stated. An applicant has to bring the application without unreasonable delay. The Applicant has also to demonstrate that if stay is not granted, he will suffer substantial loss. The Applicant has as also to provide security for costs as may ultimately be binding upon him on the decree.

17. In the instant case, the impugned judgment was delivered on 26<sup>th</sup> September, 2025. The application for stay was made on 3<sup>rd</sup> December, 2025. This is a period of slightly over two months. This is attributable to the fact that the Applicants had to change their advocate. The change of advocate was

effected by consent on 13<sup>th</sup> October, 2025. I therefore find that the delay was not unreasonable in the circumstances.

18. On the issue of substantial loss, the facts which emerged during the hearing is that the Applicants have built business premises within the suit property. Some have their residential houses on that suit property. These buildings have been on the suit property for a long time. If these buildings were to be demolished before the appeal is determined, the Applicants will be greatly prejudiced. The Applicants have therefore demonstrated that they will suffer substantial loss. The appeal might even be rendered nugatory or an academic exercise.

19. The issue of non-compliance with Order 9 Rule 9 of the Civil Procedure Rules was answered by the Applicants demonstrating that their advocate sought consent to come on record from the previous lawyers. It is not in dispute that the deponent of the supporting affidavit is the one who has been signing all pleadings with authority from the other Applicants. Failure to exhibit such authority is not fatal to the Applicants' application. The deponent clearly indicated in the opening paragraph that he had authority from the other Applicants to swear the affidavit.

20. The Applicants have demonstrated seriousness in filing all that was required to progress the appeal.

### **Disposition**

21. It is clear that the Applicants' application is well merited. I allow the application with the result that there is an order of stay of execution granted against the judgment of the court delivered on 26<sup>th</sup> September, 2025 together with all consequential orders pending the hearing and determination of the appeal on condition that the Applicants shall deposit a sum of

Kshs.200,000/= in a joint interest earning account in the names of the parties advocates within 45 days. The Applicants shall have costs of the application.

It is so ordered.

.....

**HON. E. O. OBAGA**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT  
TEAMS THIS 16<sup>TH</sup> DAY OF MARCH, 2026.**

**IN THE PRESENCE OF:**

Mr. Nyangito for Defendants.

Ms. Mwende for Plaintiff.

Court assistants – Steve and Nyaanga