

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT VIHIGA**  
**ELCLA NO. E015 OF 2024**

GEORGE OCHOLA.....1<sup>ST</sup> APPELLANT

DORCAS AYOMA MBALANYA.....2<sup>ND</sup> APPELLANT

VERSUS

JOSEPH ANJICHI ABURILI (Suing as the legal

Administrator of the estate of the late

OBED ABURILI OTENYO, deceased..... RESPONDENT

*(Being an appeal from the judgment of Honourable J. A. Agonda, Principal Magistrate Vihiga, delivered 28<sup>th</sup> June 2024 in VIHIGA MCELC NO 18 OF 2019)*

**RULING**

This ruling is in respect of the Notice of Motion application dated 17<sup>th</sup> November 2025. The application seeks orders that:

- i) an injunction be issued restraining the respondents, their servants, agents, and/or any person working under their instructions from selling the suit parcel of land pending the hearing and determination of the appeal to the Court of Appeal.
- ii) the execution of the judgment of the Vihiga High Court Land and Environment case No. E015/2025 be stayed pending the hearing and determination of the appeal to the Court of Appeal.
- iii) The costs of this application be provided for.

The grounds upon which the application was made are that, pursuant to the judgment entered in favour of the respondents on 30/10/2025, the applicant is

facing imminent loss of the suit land. That the 2<sup>nd</sup> respondent wants to sell the land. That the applicant herein, who was aggrieved by the judgment, has since filed a Notice of Appeal. That if the respondents are not restrained from selling the suit land, the applicant stands a great risk of losing his rightful share of the ancestral land. That the applicant has a good appeal with high chances of success, and that if the order sought is not granted, the appeal shall be rendered nugatory. That the respondents will not suffer prejudice if the application is allowed.

The application was supported by the contents of the applicant's Supporting Affidavit, sworn on 17<sup>th</sup> November 2025.

The application was opposed vide the contents of the Replying Affidavit sworn by the 2<sup>nd</sup> Respondent on 12<sup>th</sup> November 2025. It is the respondents' case that the order of the court herein was a negative order dismissing the appellant's suit, which order cannot be stayed. That a similar application had been dismissed by the trial court.

The application was heard by way of written submissions.

Written submissions dated 2<sup>nd</sup> February 2026 were filed on behalf of the applicant. Counsel submitted that an offence was committed by the Respondents in dealing with the suit property of the deceased without a valid confirmed grant. That if the injunction is not issued, the 2<sup>nd</sup> Respondent is likely to sell the suit property as per the messages to the applicant and her daughter, warning them not to appeal the court's decision, as she intends to sell the property; there is a need to preserve the suit property.

That the mere fact that the 2<sup>nd</sup> respondent is the registered owner is not sufficient proof of ownership, as the root of the title is challenged. That the applicant has a *prima facie* case with a probability of success.

That the applicant is likely to lose his ancestral land, and if the injunction is not granted, the appeal at the Court of Appeal may be rendered nugatory once the 2<sup>nd</sup> respondent sells off the land. That the balance of convenience tilts in favour of the applicant.

On the prayer for a stay of execution pending appeal, Counsel submitted that the applicant is likely to suffer substantial loss once the 2<sup>nd</sup> respondent disposes of the suit land. That the loss of an ancestral land is a loss that not even damages can compensate for, as the applicant is so attached to his ancestral home, and that the emotional damage he is likely to suffer would be so great.

That there was no undue delay in making the application. Regarding security, Counsel relied on the provisions of Order 42 Rule 6(2) (b) of the Civil Procedure Rules and the case of Gianfranco Manenthi & Another vs African Merchants Assurance Company Ltd. (2019) eKLR and submitted that it is the court that orders the kind of security the applicant should give, as may ultimately be binding upon the applicant.

Counsel urged the court to allow the application.

On behalf of the respondents, written submissions dated 12<sup>th</sup> January 2026, were filed. Counsel submitted that the applicant has failed to satisfy the condition that must be met for a stay of execution to be granted. That the applicant has not demonstrated that he will suffer substantial loss if the order of stay is not granted.

That the applicant's failure and unwillingness to propose a deposit of any security demonstrates that the application has been made in bad faith to perpetuate endless litigation and deny the respondent an opportunity to enjoy the fruits of the decree.

That the order issued herein is a negative order dismissing the applicant's suit which order cannot be stayed. Counsel relied on case law to demonstrate this submission; inclusive of the case of Kenya Commercial Bank Limited –vs- Tamarind Meadows Limited & 7 Others (2016) eKLR.

That the applicant is seeking the same order that he had sought in an application that was dismissed before the trial court. That hence, the present application is res judicata pursuant to the provisions of section 7 of the Civil Procedure Act.

That a similar application was handled in KAKAMEGA ELCA NO. 35 of 2019, which upheld the decision of the trial court denying the same orders.

Counsel urged the court to dismiss the application.

#### Determination

Two substantive orders are sought in the application. The first one is an order of injunction restraining the respondents and their agents from selling the suit land pending hearing and determination of the appeal. The jurisdiction of this court sitting as an appellate court to grant a temporary injunction is derived from Order 42 Rule 6 (6) of the Civil Procedure Rules, which provides that-

**“Notwithstanding anything contained in sub-rule 1 of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just, provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”**

In the present matter, the appeal that was before this court has already been determined. Vide the judgment delivered on 30<sup>th</sup> October 2025, this court already determined the appeal by allowing it and setting aside the judgment of the trial court that had allowed the applicant's suit and substituting it with a judgment dismissing the applicant's suit with costs.

Apart from the processing of the costs awarded, there is no pending business before this court in this appeal. The court became *functus officio* having pronounced its judgment on the appeal. The jurisdiction donated by Order 42 Rule 6 (6) is, in my view, therefore spent. The applicant has recourse to pursue the relief in the Court of Appeal.

Regarding the order for stay of execution of the judgment herein pending appeal, the grounds for the grant of an order of stay of execution of a judgment are provided for in Order 42 Rule 6(2) of the Civil Procedure Rules 2010, pursuant to which the present application was brought. It provides as follows:

**“No order for stay of execution may 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.”**

The court must be satisfied that the Applicant will suffer substantial loss if the order of stay of execution is not granted. In Dr. Daniel Chebutuk Rotich –vs-

Morgan Kimaset Chebutuk Nakuru H.C.C.C No.368 of 2001 substantial loss was stated to be -

**“Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an Applicant is likely to suffer if stay of execution is not granted and the Applicant is therefore forced to pay the decretal sum.”**

The burden of proof lies with the applicant to prove that the substantial loss will result to him if the order sought is not granted. See Charles Wahome Gethi vs Angela Wairimu Gethi [2008]eKLR, where it was held-

**“...it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the applicants stand to suffer if the Respondent execute the decree in this suit against them”**

The substantial loss that the applicant claims to suffer is that the land is ancestral land and that the respondents are planning to sell the land. To demonstrate this the applicant referred the court to messages attached to the application wherein the respondents are alleged to have threatened to sell the land. One of the documents is in a language other than the language of the court and without translation.

I have read the second document dated 4<sup>th</sup> November 2025. I find no indication therein that the land is due for sale. In Rhoda Mukuma vs John Abuoga [1988]eKLR, the court held that the issue of substantial loss is the cornerstone of both the jurisdiction under Order 42 rule 6 Civil Procedure Rules and Rule 5 of the Court of Appeal Rules. That substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

I find that the grounds for the grant of an order of stay of execution, and particularly, substantial loss, have not been demonstrated herein.

The applicant having failed to demonstrate the grounds for the grant of the order of stay of execution, I find that the application lacks merit. The application is hereby declined.

No order as to costs.

Orders accordingly.

**Ruling dated and signed at Vihiga and read virtually this 12<sup>th</sup> day of March 2026.**

**E. ASATI,  
JUDGE.**

**In the presence of:**

Ajevi- Court Assistant.

Rabote for the Applicant

N/A for the respondents.