REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE APPEAL NO. E015 OF 2026

JOHNSTONE MUNYENDO……APPELLANT

VERSUS

MONICA MAKOKHA & 5 OTHERS…… …….RESPONDENTS

RULING

Introduction

1. Before court is a Notice of motion dated 24th February 2026 filed by the appellant seeking orders that there be stay of execution of the judgment delivered in Kakamega Chief Magistrates Court ELC Number E037 OF 2021 on 9th February 2026, pending hearing and determination of the appeal herein.

2. The application is supported by the annexed affidavit of the applicant. The applicant's case is that he has been farming the suit property since 1990 and that the 1st to 4th respondents have since moved onto the suit property and have began planting. That unless stay is granted, he will

suffer loss of an entire planting season and that the loss cannot be compensated in damages.

3. The application was opposed. The 3rd respondent swore the replying affidavit dated 4th March 2026. She stated that the applicant was misleading the court in stating that the respondents had taken over the suit property and were planting thereon. She stated that the suit was based on allegations that she had extracted murram from the suit property which was denied at the hearing of the suit. That her land does not border the applicant's land hence it is not true she has taken over the land.

4. That during the pendency of the suit in the lower court, the appellant used police to intimidate the respondents, a matter that was noted in the judgment. That therefore he intends to use orders of stay to intimidate the respondents. That the applicant has failed to disclose the material fact that he is in possession of 0.6 hectares that he purchased as reflected on his title and no one has interfered with it and that he is claiming an additional 0.3 hectares beyond what he purchased. That the applicant will not suffer loss and the appeal will not be rendered

nugatory as he remains in occupation of his 0.6 hectares. That if orders sought are granted, the respondents will lose access to their land.

5. The 4th respondent also filed replying affidavit dated 4th march 2026. He stated that the application herein is based on falsehoods. That he does not live near the suit property hence it is not possible that he has taken possession of the same. That no planting is happening on the suit property. That the applicant only invaded the suit property in 2017 and has not been there since 1990 as alleged. That he should use his portion of 0.6 hectares.

6. The 1st respondent filed replying affidavit dated 4th March 2026. He reiterated averments of the other respondents and stated that the court's judgment is a negative order and incapable of being executed. That the applicant remains in possession of his 0.6 hectares and she has not taken possession of the same.

7. She further stated that orders of stay will prejudice her as the dispute has persisted since 2021 and she has been deprived 0.3 hectares of her land. That during trial, the

applicant admitted to have purchased 0.6 hectares. That she did not file a counterclaim hence the court merely dismissed the appellant's claim.

8. On 5th March 2026, both counsel made oral submissions in regard to the application, which the court has duly considered.

Analysis and determination.

9. The court has carefully considered the application, response thereto and parties' rival submissions. The sole issue for the court's determination is whether the applicant has met the threshold for grant of orders of stay of execution pending appeal.

10. Order 42 Rule 6 of the Civil Procedure Rules provides for the jurisdiction of the court to grant orders of stay of execution pending appeal as follows;

"Stay in case of appeal [Order 42, rule 6]

(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."

11. Essentially, imminent execution alone cannot form the basis for grant of stay of execution pending appeal, as execution is a lawful process pursuant to grant of an order, judgment or decree by a court. Hence, to succeed in seeking stay pending appeal, an applicant ought to demonstrate imminent substantial loss; that they have sought stay without unreasonable delay and that they are willing to provide security for the due performance of the decree that may issue against them.

12. In the case of **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR,** 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 … 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."

13. Regarding substantial loss, the court discussed the element of substantial loss in the case of **Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation) [2004] 2 EA 331** as follows;

> **"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."**

14. Both counsel extensively submitted on the issue as to whether the judgment constituted a negative or positive order capable of being stayed. In so far as the trial court in its judgment dismissed the appellant's suit and adopted the Land Registrar and County Surveyor's

report dated 2nd December 2021, ordered that the boundary between parcel Nos. Butsotso/Esumeiya/1979 and 1980 is deemed duly ascertained and fixed in accordance with those reports and ordered parties to respect and maintain the boundary fixed on 15th November 2021, my view is that the judgment contains both negative and positive orders capable of being stayed.

15. In the instant matter, the applicant stated that if stay is not granted, he will suffer substantial loss as the respondents had started planting on the suit property and he will lose the opportunity to plant during this season. It is not disputed that the appellant purchased 0.6 hectares. The report by the Land Registrar that the appellant occupied 0.9 hectares instead of 0.6 hectares was not controverted by any other expert report.

16. When the trial court allowed the Land Registrar and surveyor to visit the suit property and confirm the acreage, that order was not challenged by way of an appeal or review. Hence the report formed a key part of the evidence on record.

17. The appellant has not shown the substantial loss to be suffered, and has not denied that he is entitled to and is using 0.6 hectares. He is not saying that the disputed portion is part of the 0.6 hectares. In the event he succeeds in this appeal, the lost planting season for 0.3 hectares can be compensated by way of damages. As of now, he still has the 0.6 hectares to cultivate.

18. In the premises, I am not satisfied that the applicant has demonstrated substantial loss or an arguable appeal.

19. Ultimately, I find and hold that the application dated 24th February 2026 lacks merit and the same is hereby dismissed with costs.

20. It is so ordered

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 23RD DAY OF MARCH, 2026

A. NYUKURI

JUDGE

In the presence of;

Mr. Mwangale for the appellant/applicant

Mr. Rene for the respondent

Court Assistant: Delphine