

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT**  
**KAKAMEGA**  
**ELC CASE NO. 178 OF 2016**

**BONFACE ONYANGO.....PLAINTIFF**

**VERSUS**

**WANJALA MAKANYANGA.....1<sup>ST</sup>**

**DEFENDANT**

**JOSEPH SIMIYU.....2<sup>ND</sup>**

**DEFENDANT**

**RULING**

**Introduction**

1. Before court is a Notice of motion dated 16<sup>th</sup> October 2025 filed by the 2<sup>nd</sup> defendant seeking orders that there be stay of execution of the judgment delivered on 27<sup>th</sup> March 2025 pending the hearing and determination of Kisumu Court of Appeal Civil Appeal No. E136 of 2025.
2. The application is supported by the affidavit sworn by the applicant on 16<sup>th</sup> October 2025. The applicant's case is that he was dissatisfied with the judgment herein whereof he filed an appeal before the Court of Appeal at Kisumu.

That his appeal has high chances of success. That if execution proceeds, he will be evicted from the suit property where he has established a home since 1964. That he saw officers from Highland Auctioneers surveying the suit property and is apprehensive of imminent eviction.

3. The application was opposed. Boniface Onyango, the plaintiff /respondent swore a replying affidavit dated 28<sup>th</sup> October 2025 opposing the application. He stated that the applicant is in unlawful occupation of the suit property as judgment was delivered on 27<sup>th</sup> March 2025.
4. Further that this application was brought late in the day as the applicant had 120 days stay of execution. That 120 days lapsed on 25<sup>th</sup> July 2025. That the application is an afterthought and the applicant has not shown the court the substantial loss he will suffer. That the applicant is seeking stay of eviction while he is busy selling the suit property to strangers.
5. Parties filed submissions in support of their positions, both of which the court has duly considered.

**Analysis and determination.**

6. The court has carefully considered the application, response thereto and 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.

7. 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.**

8. Therefore, to succeed in seeking stay of execution 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. Thus, imminent execution alone cannot form the basis for grant of stay of execution

pending appeal, since execution is a lawful process that follows grant of an order, judgment or decree.

9. The cornerstone for grant of stay of execution pending appeal is demonstration of substantial loss.

10. In the instant matter, the applicant stated that if stay is not granted, he will be evicted from the suit property, where he has established a home since 1964. The judgment herein was delivered on 27<sup>th</sup> March 2025 granting the applicant 120 days to vacate the suit property. Therefore, he ought to have vacated the suit property by 27<sup>th</sup> July 2025. The instant application was filed on 16<sup>th</sup> October 2025, which is about 3 months after expiration of the period granted for vacating the suit property.

11. I therefore find and hold that the application herein was filed after inordinate delay and when the applicant was already in unlawful occupation of the suit property.

12. The question of being on the suit property since 1964 was already determined vide this court's judgment and the court will not at this stage revisit that issue.

13. If the appeal raises arguable grounds, that is a matter that this court has no jurisdiction to interrogate as it has already pronounced itself substantively on the rights of the parties
14. The upshot is that I find no merit in the application dated 16<sup>th</sup> October 2025, which I hereby dismiss with costs to the respondent.
15. It is so ordered

**DATED, SIGNED AND DELIVERED AT KAKAMEGA  
IN OPEN COURT/VIRTUALLY THROUGH  
MICROSOFT TEAMS VIDEO CONFERENCING  
PLATFORM THIS 4<sup>TH</sup> DAY OF MARCH, 2026**

**A. NYUKURI  
JUDGE**

**In the presence of;**

Mr. Mutai holding brief for Mr. Oduor for the plaintiff

1<sup>st</sup> defendant in person

No appearance for the 2<sup>nd</sup> defendant

Court Assistant: Delphine