



REPUBLIC OF KENYA



**KENYA LAW**  
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**Siwoi v Arasa (Land Case Appeal E071 of 2025)  
[2026] KEELC 1601 (KLR) (19 March 2026) (Ruling)**

Neutral citation: [2026] KEELC 1601 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
LAND CASE APPEAL E071 OF 2025**

**CK YANO, J**

**MARCH 19, 2026**

**BETWEEN**

**AMOS KIPKOECH SIWOI ..... APPELLANT**

**AND**

**SHARON BOSIBORI ARASA ..... RESPONDENT**

**RULING**

1. The Appellant/Applicant herein filed a Notice of Motion dated 18<sup>th</sup> December, 2025, seeking the following orders against the Respondent THAT: -i. Spent.ii. Spent.iii. This Honourable Court be pleased to issue interim order of stay of execution of the orders issued by the trial court in MCELC NO. E198 of 2025 on 27.11.2025 allowing the plaintiff's prayer "for the county surveyor Uasin Gishu county to visit the disputed parcel of land registration No. Pioneer/Langas Block 1/1027 to take measurements and to ascertain the exact acreage and to file a report in court" pending the hearing and determination of the present Appeal.iv. The costs of this application be provided for.
2. The application is premised on 8 grounds on the face thereof and supported by the applicant's affidavit sworn on even date. He deponed that a ruling was rendered in the matter on 27.11.2025 directing that the County Surveyor to visit the suit land and resurvey the same and further extended the interim orders of injunction thereto.
3. It is his claim that being aggrieved by the said ruling and order of the trial court, he has since lodged an appeal against the said decision.
4. He further contended that allowing the surveyor by an order of the court to visit the subject parcel of land to take measurements, which is an issue subject to the proceedings before the trial court, is premature and unprocedurally intended to determine the plaintiff's claim before they are given an opportunity to be heard.



5. He averred that the trial court also allowed an extension of the interim orders of injunction and whose effect was to restrain him from entering into the suit land despite the fact that he is in possession and occupation thereof while the respondent is not.
6. It is his contention that the effect of allowing and extending the interim orders of injunction would imply that he be evicted from the suit land.
7. It is his claim that unless the orders sought herein are granted, the present appeal will be rendered nugatory and he shall suffer irreparable loss.
8. He maintained that the respondent will not suffer any prejudice if the orders sought in the application are granted.
9. In conclusion, he deponed that the application had been filed without unreasonable delay and thus urged the court to exercise its discretion by allowing the application and granting the orders sought.
10. The application was opposed. The Respondent filed a Replying Affidavit dated 16.01.2026 in response to the averments made in the present application.
11. In response to paragraphs 6 and 7 of the Supporting Affidavit, it was her claim that the trial court is vested with the jurisdiction to grant the extension of the interim orders issued ex parte in order to preserve the substratum of the suit pending the hearing and determination thereof.
12. In response to paragraph 9 of the supporting affidavit, it was the respondent's claim that allowing the County Surveyor to visit the suit land for purposes of taking measurements is neither premature nor will it determine the claim before the appellant is given an opportunity to be heard.
13. On the contrary, it was her claim that the said order will assist the court in fairly determining the issue of acreage of the subject land and other issues arising therefrom on the outstanding balance, which are at the center of the dispute in the trial court.
14. It is the respondent's claim that the appellant/applicant has not demonstrated what prejudice he shall suffer should the County Surveyor be allowed to visit the subject land and take the measurements as directed.
15. In response to paragraphs 10 and 11 of the supporting affidavit, the respondent dismissed the allegations that the extension of the interim orders of injunction would imply that the applicant be evicted from the suit land.
16. The respondent deponed that the appellant is not in occupation of the suit land. She reiterated that the orders of injunction extended were to the effect that the appellant, either by himself, his agents, employees and assigns be banned from further fencing, offering for sale, alienating, evicting the respondent from the suit land or otherwise interfering with the respondent's quiet and peaceful occupation of the suit land.
17. She maintained that she is currently in possession of the suit land and not the appellant as alleged and thus there is no eviction of the appellant likely to take place as alleged.
18. She averred that no irreparable or substantial loss is likely to be suffered by the appellant if the county Surveyor Uasin Gishu County is allowed to visit the suit land. On the contrary, the same will allow the court to effectively determine the issue of acreage of the suit land
19. In conclusion, it was her claim that the present application is a delay tactic by the appellant aimed at preventing the expeditious determination of the proceedings before the trial court.



20. She therefore urged the court to dismiss the application and in the interest of justice allow the county surveyor to visit the suit land as ordered.
21. The present application was canvassed by way of written submissions. The appellant/applicant filed his submissions dated 20.02.2026 while the respondent filed her submissions dated 04.02.2026 together with authorities, which I have read and considered.

### **Analysis and Determination**

22. Having carefully considered the Application and the grounds therein, the Supporting Affidavit and the annexures, the relying affidavit in response to the application as well as the rival submissions in totality, it is my considered view that the issues arising for determination are;
  - i. Whether an Order for Stay of Execution can issue against order of the trial court issued on 27.11.2025.
  - ii. Who shall bear the costs of the present Application.

### **Whether an Order for Stay of Execution can issue against judgment issued on 20.05.2025;**

23. It is now well settled that no appeal shall operate as an automatic stay of execution. Order 42 Rule 6 of the Civil Procedure Rules provides as follows: -

6.

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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.  
(emphasis mine)

24. In view of the above provision, the three elements that must be proved to warrant the grant of an order for stay of execution include;i. The Court is satisfied that substantial loss may result to the Applicant unless an order for stay of execution is ordered;ii. The application is brought without undue delay aniii. Security for costs as the court orders for the due performance of such decree or order is provided.

25. I will now proceed to determine each of the above requirements as hereunder;



## **Substantial Loss:**

26. Substantial loss has been held to mean any loss, great or small, that is of real worth or value and not mere nominal loss. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma vs Abuoga* (1988) KLR 645 where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

27. The appellant/applicant is therefore duty bound to demonstrate the substantial loss he is likely to suffer unless the order for stay of execution sought is granted. It has been held that it is not sufficient to merely state that substantial loss may be occasioned without demonstrating the same. (See *New Stanley Hotel Ltd –vs- Arcade Tobacconist* (1980) KLR 757).

28. It is the appellant/applicant’s claim that the effect of allowing the order of the trial court and allowing the county surveyor to visit the suit land for purposes of ascertaining the acreage of the same and filing a report thereafter would amount to disposing of the dispute between the parties before being given an opportunity to be heard.

29. He further avers that the extension of the interim orders of injunction by the trial court will lead to his eviction from the suit land at an interim stage.

30. The respondent on her part maintained that the applicant has not sufficiently demonstrated the substantial loss he is likely to suffer and submitted that the effect of the orders of the trial court if allowed to proceed would help the court in conclusively and effectively determining the issue of acreage which is at the center of the dispute in the trial court.

31. She further added that she is currently in possession and occupation of the suit land and reiterated the injunctive orders granted, which were to the effect that the appellant, either by himself, his agents, employees and assigns be banned from further fencing, offering for sale, alienating, evicting the respondent from the suit land or otherwise interfering with the respondent’s quiet and peaceful occupation of the suit land

32. I have taken the rival arguments into consideration as well as the effect of the order of trial court issued on 27.11.2025. The averments by the applicant are marred by mere assumptions and assertions with no sufficient proof and demonstration.

33. Further, from a perusal of the annexure marked “AKS 3”- a copy of the impugned order of the trial court, the same is directed to the County Surveyor Uasin Gishu County to visit the disputed land, take measurements to ascertain the exact acreage and thereafter file a report in court. Parties were asked to be present during the exercise. I have not seen any order directing/ordering the resurvey of the subject land known as PIONEER/LANGAS BLOCK 1/1027 as alleged by the applicant.

34. In *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR the Court expressed itself as hereunder:

“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 Civil Procedure Rules. 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.”

35. Guided by the above, it is the finding of this court that the appellant/applicant has not sufficiently demonstrated the substantial loss that he is likely to suffer if the orders of stay of execution sought are not granted. Consequently, this court finds that substantial loss has not been demonstrated.
36. It is well settled that substantial loss is the corner stone of an application for stay of execution. Having held that the same has not been satisfactorily proved, it is my considered view that discussing the remaining 2 elements would amount to an academic exercise.
37. In view of the foregoing, this court finds that the present is not merited. The applicant has not sufficiently demonstrated the necessary conditions for the grant of an order of stay of execution.

**Who shall bear the costs of the present Application;**

38. The general rule is that costs shall follow the event in accordance with the proviso to section 27 of the *Civil Procedure Act*, unless the court is satisfied otherwise.
39. In the present case, having held that the appellant/applicant has failed to prove his claim to the required standard, I find that the respondent is entitled to costs of defending the application.

**Conclusion:**

40. In view of the foregoing, I accordingly find that the Notice of Motion Application dated 28<sup>th</sup> August, 2025 is not merited and is hereby dismissed with costs to the respondent.
41. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 19<sup>TH</sup> DAY OF MARCH, 2026.**

**HON. C. K. YANO**

**JUDGE**

Ruling delivered in the virtual presence of: -

Ms. Kipseii for the Appellant/Applicant

Ms. Omuya holding brief for Mr. Nyambegera for Respondent.

Court Assistant – Laban

