

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ELC APPEAL CASE NO. E080 OF 2025

AGGREY OBANDA WESONGA.....1ST

APPELLANT ALLAN

NYAWADE.....2ND APPELLANT

VERSUS

KALISTO ONGINJO OLOO.....1ST

RESPONDENT

RULING

1. The subject of this ruling is the application dated 4/12/2025 seeking the following orders; -
 - 1) THAT this Honorable Court be pleased to stay execution of Judgment and Decree issued on the 31st day of October, 2025 in Ukwala ELC Case No. E042 of 2025 and all consequential orders thereto pending the hearing and determination of the intended appeal.
 - 2) THAT this Honourable Court be pleased to grant a stay of proceedings pursuant to the Judgment and Decree issued on the 31st day of October, 2025 in Ukwala ELC Case No. E042 of 2025 pending the hearing and determination of the intended appeal and or on such terms as the court may deem just.
 - 3) THAT this Honourable Court be pleased to grant such orders as it may deem fit and just to grant.

- 4) THAT the cost of this application does abide the outcome of the intended appeal herein.
2. The application is premised on the grounds on its face and the depositions in the supporting affidavit sworn jointly by Aggrey Obanda Wesonga the 1st appellant.
 3. It is deponed that the Hon. E. Tsimonjero S.R.M. delivered a judgement on 31/10/2025 in ELC Case NO. E042 of 2025 and ordered an eviction against the appellants herein to vacate land parcel number SOUTH UGENYA/AMBIRA/215 within 60 days and in default, the respondent to evict him. A copy of the decree and the judgment is attached.
 4. That being aggrieved they have filed their Memorandum of Appeal and annexed a copy. It is deponed that the appellants and the respondent have all been staying on the suit parcel known to them as their ancestral land.
 5. That the trial court, failed to consider the appellants evidence demonstrating their beneficial right to the suit land including the illegalities leading to the acquisition of the suit parcel by the respondent, which were conceded to by the respondents. That part of the suit parcel forms part of the homestead where the appellants have their family and kin staying, commonly known as their ancestral homestead. That they also farm and stem their livelihood in the land. Photos showing the appellants ancestral home and burial sites was annexed with attendant certificates of electronic evidence.

6. That after the judgement the respondent visited the appellants and informed them that they needed to vacate the land immediately, a clear manifestation that she is keen to execute the decree. That the appellants, their family and kin are now at the verge of being rendered landless and homeless should the respondent proceed to evict them.
7. That should the stay of execution be declined, the intended appeal which is arguable shall be rendered an academic exercise. That it is in the interest of fairness and justice that the orders sought be granted.
8. Additionally, the appellants state they are ready and willing to comply with the orders of this court in fulfilment of the stay of execution herein. It is further urged that the grounds under which the application is sought constitutes sufficient reason that allows the Court to determine the application herein in favor of the applicant.
9. That the respondent will suffer no prejudice not compensable by an award of costs if the orders sought herein are granted.
10. The 2nd appellant also swore a supporting affidavit which I note echoes the averments above and I will therefore not rehash the same to avoid repetition.

Replying Affidavit

11. The application is opposed vide the replying affidavit sworn by Kalisto Onginjo Oloo sworn on 28/06/2025. It is deponed that the appellants laid claim to a portion of the said parcel on account of a customary trust created by

virtue of the fact that they are relatives, yet there is no family lineage between the Defendants and the appellant. That the trial court rightly pointed out the fact that there was not blood relationship or lineage between the Appellants and hence the Appellants had outlived their welcome on the suit parcel of land. The deponent avers that since the judgement the Appellants have engaged in all manner of wanton waste, damage and destruction of the plants and trees on the suit property, by cutting down trees and selling them to 3rd parties.

12. It is deponed that the Memorandum of appeal does not raise any arguable grounds of appeal, lacks in merit and it is frivolous. The deponent however depones that should the court be inclined to grant the orders of stay then the same should be conditional upon payment of one-half of the decretal sum and the balance be deposited in a joint interest earning account of the advocates of both the Applicant and the Respondents.
13. That the application is merely meant to delay and or defeat the course of justice by denying the Respondent fruits of the judgment as the Applicants have not demonstrated that they will suffer substantial loss or quantification of the suit property.
14. The Respondent avers that he is not a man of straw and that he is able to refund any sums paid to him by the Appellants in the event that he is not successful in the appeal. The court is invited to in the interest of justice and

fair play dismiss the appeal with costs as it is bad in law, fatally and incurably defective.

15. The applicants responded further with a supplementary affidavit dated 4/2/2026 emphasising that should eviction proceed and stay denied then they will suffer substantial loss as their matrimonial home, developments on the land, sentimental attachments to their home and kin buried on the land would have been destroyed and cannot be compensated by any award of damages. Further that the appeal has been brought timely.

SUBMISSIONS

16. The application was canvassed by way of written submissions. The respondents filed submissions dated 4/3/2026.

ANALYSIS AND DETERMINATION

17. I have considered the application, the response thereto and the submissions on record. The main issue for determination is whether the Orders sought in the application should be granted
18. The powers of the court to grant orders of stay of execution are donated under Order 42 Rule 6 of the Civil Procedure Rules, which provides as follows;-

“(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.

19. It is evident from the above provisions that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should

be made without undue delay and the court will impose such security for the due performance of any decree or order as may ultimately be binding on the Applicant. See **Amal Hauliers Limited Vs Abdulnasi Abukar Hassan (2017) eKLR & Butt Vs Rent Tribunal (1982) KLR 417.**

20. The court in **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, 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, it 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. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise

of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...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.”

21. Arising from the above, substantial loss is the main parameter to be demonstrated by an applicant desiring orders of stay of execution of the decree of the court.
22. What amounts to substantial loss has already been explained in **James Wangalwa & Another v Agnes Naliaka Cheseto (supra)**
23. The applicants have explained that they have known the suit property as their ancestral home where they have lived together with respondents for a long period of time. The applicants have also adduced photos showing the houses and graves in the suit property. The respondent does not deny the fact that the appellants have lived on the suit property for long except that they agree with the finding of the trial court that the appellants had outlived their welcome on the land.

23. I have perused the final orders of the judgement delivered on 31/10/2025. The defendants appellants were supposed to vacate within 60 days of the judgement or in default be forcefully evicted. Further upon such eviction they would be permanently barred from entering the suit property.
24. I think to allow eviction will not only cause turmoil and great inconvenience to the appellants and their families but also loss that is not compensable. Moreover, the appeal would be rendered nugatory. In this regard I'm further emboldened and persuaded by the decision in High Court Civil Appeal No.106 of 2023: **Abson Motors Limited vs Nyongesa (2023) KEHC 23643(KLR)** where Magare J cited the case of **RWW V EKW (2019) KEHC 6523 (KLR)** which considered the purpose of stay of execution pending appeal thus:

“The purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory. However, in so doing, the court should weigh this right against the right of a successful litigant who should not be deprived of the fruits of his/her judgment....”

25. What about the rights of the decree holder? The respondent has urged that the appeal raises no arguable grounds. The threshold for an arguable appeal is not

whether the appeal will succeed but whether it raises a bona fide issue that ought to be fully ventilated before the appellate court. In this regard I'm guided by the case of **Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR** where it was held that:

"On arguability, an arguable appeal must not necessarily succeed, but one which ought to be argued fully before the court; one that is not frivolous. In addition, one ground of appeal can sufficiently fulfill this condition."

26. Moreover, I see no prejudice that the decree holder will suffer which is not compensable by way of costs. The respondent has proposed that there be a conditional stay of execution to the extent that the one-half of the decretal sum is paid and the balance be deposited in a joint interest earning account of the advocates of both the Applicant and the Respondents. To resolve this issue I will be guided by the case of **Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100** where the Court of Appeal expressed itself as follows:

"The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is

adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal.

27. I will therefore not fetter the applicants right to appeal. The decretal sum granted was just but part of the judgement and I think the respondents can await the same should the appeal fail.
28. The upshot of the foregoing is that this court finds the application dated 4/12/2025 has merits and it is hereby allowed in the following terms'-
- 1) THAT this Honorable Court be pleased to stay execution of Judgment and Decree issued on the 31st day of October, 2025 in Ukwala ELC Case No. E042 of 2025 and all consequential orders thereto pending the hearing and determination of this appeal.
 - 2) THAT the applicants shall not fell any trees on the suit property or erect any new buildings on the suit property pending the hearing and determination of this appeal.

3) That the costs of this application are awarded to the respondents.

Orders accordingly

Dated at Siaya this 18th Day of March, 2026

HON. JUSTICE A. E. DENA

JUDGE

18/03/2026

**Ruling delivered virtually through Microsoft Teams
Video Conferencing Platform in the Presence of:**

Mr. Oduol for the Appellants/Applicants

Ms. Maube for the Respondent

Court assistant: Ishmael Orwa