



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Bogonko v Nyamboki (Suing through Samwel Nyamboki - Holder of power of Attorney)
(Land Case Appeal E005 of 2026) [2026] KEELC 1828 (KLR) (12 March 2026) (Ruling)**

Neutral citation: [2026] KEELC 1828 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
LAND CASE APPEAL E005 OF 2026**

**AA OMOLLO, J
MARCH 12, 2026**

BETWEEN

JOSEPH BOGONKO APPELLANT

AND

**CHARLES ONSOMU NYAMBOKI (SUING THROUGH SAMWEL NYAMBOKI -
HOLDER OF POWER OF ATTORNEY) RESPONDENT**

RULING

1. The Applicant has moved this court by way of notice of motion application brought under the provisions of order 42 rule 6 of the Civil Procedure Rules. In it, he seeks for orders:
 - a. Spent.
 - b. Spent.
 - c. That the Honourable Court be pleased to issue an order of stay of execution of the Ruling and Order rendered by Hon. Benard Obae Omwansa dated the 9th day of December 2025 arising out of Suit No. KISII CM ELC Case No. E088 of 2019 pending the hearing and determination of the instant Appeal.
 - d. That the costs of this application be provided for.
2. The application is supported by the grounds listed on its face and the affidavit sworn by the Applicant. Inter alia,
 - a. On the 9th day of December 2025, the Learned Trial Magistrate delivered a ruling adopting a survey report dated the 4th day of March 2025 over the subject disputed boundary and directing the Land Registrar and County Surveyor to visit the area and demarcate the boundary as per their findings.



- b. The impugned survey was conducted on the 27th day of February 2025 in the absence of the Applicant herein despite him having communicated the same vide his letter addressed to the Land Registrar and dated the 25th day of February 2025.
 - c. That the effects of the implementation of the said ruling will lead to the unilateral encroachment by the Respondent herein into the Applicant's parcel of land and thus cause him irreparable damage.
 - d. The present application has been brought promptly and without undue delay. The Applicant has acted consistently and diligently in pursuing stay orders since delivery of judgment.
3. The Applicant deposes that owing to his bereavement of a niece, he drafted a letter dated 25th February, 2025 and addressed to the Land Registrar communicating the same and seeking a postponement of the planned exercise. However, the County Surveyor and the Land Registrar made the visit in his absence and compiled a report dated the 4th day of March 2025, alleging that I had trespassed onto the Respondent's parcel of land
 4. That On the 9th day of December 2025, the Learned Trial Magistrate delivered a ruling adopting a survey report dated the 4th day of March 2025 over the subject disputed boundary and directing the Land Registrar and County Surveyor to visit the area and demarcate the boundary as per their findings.
 5. That the impugned ruling has unilaterally empowered the Land Registrar and County Surveyor to implement their findings on a matter that was pending before court and was not substantially finalized hence undermining the authority of the jurisdiction as conferred by *the Constitution* of Kenya, 2010. He avers that nothing bars the Respondent from executing or implementing the impugned ruling, and there exists a real likelihood of such execution unless stayed by this Court.
 6. The application is opposed by the Respondent by way of a replying affidavit he swore on 7th February, 2026. He deposed to the contents of his claim filed before the Magistrate's court. He also confirmed that the trial court had issued an order directed at the Land registrar and the county Surveyor to visit the suit property and identify its boundaries and prepare a report.
 7. The Respondent deposes inter alia that the appellant/applicant has not approached this honourable court with dean hands. The permit for burial that the said appellant/applicant has annexed over the death of Susan Kwamboka Bosire dated 4th March 2025 does not form the foundation for grant of an order of stay. The said deceased person is not a daughter of the appellant/applicant herein. Therefore the said permit for burial is not the reason the appellant/applicant did not attend the said visitation by tie Land Registrar and Surveyor.
 8. That the said deceased person died on 19th of February 2025 as it is indicated in the said permit for burial. The Surveyor and Land Registrar visited the suit properties on 27th February 2025 and therefore burial of the said deceased person was not on 27th day of February 2025 to warrant the absence of the said appellant/applicant.
 14. He avers to advice given to him by his advocate on record that request for stay is a legal question which requires a party to satisfy the conditions pursuant to Order 42 Rule 6 of the Civil Procedure Rules 2010.
 9. Directions were given for prosecution of the application by way of written submissions to which directions both parties complied with. The Applicant filed submissions dated 6th February, 2026 and the Respondent's submissions are dated 7th February, 2026.



10. The Applicant cited the case of Timothy Simasi & another (Suing as Administrators of the estate of the late D.A Vaughan Philpott) v Registrar of Lands, Mombasa & another 120201 eKLR, which he argues set out the elements to be considered on whether or not to grant a stay of execution.
11. He submits that his application has been filed without undue delay. On substantial loss, the Applicant states that in the absence of an order of stay of execution of the Judgement of the Court, the Respondent may proceed and apply for the execution of the said orders. Further, the Respondents will proceed to have the Applicants evicted from the subject parcel, rendering the instant appeal nugatory.
12. The Applicant submits that he is amenable to obey or comply with any orders the Court may issue as regards to security, as long as the same are reasonable and takes into account the relationship between the two parties who are neighbours and also the Constitutional dictate of the right to appeal and also access to justice.
13. On the other hand, the Respondent submits that the Applicant has not met the conditions for granting a stay order and referred the court to the case of Mombasa ELC No. 35 of 2019, Hussein Alo M. Khaki & 2 Others versus Saidi Juma and another, where he Kibunja J stated that "... a court will not grant stay order upon a mere vague speculation, there must be the clearest ground of necessity disclosed in evidence."
14. It is the Respondent's contention that the present application has been filed merely because there is an appeal lodged. He argues that the Applicant has not satisfied the conditions set out in order 42 rule 6(2). He relies on the decision in HC Civil Appeal no E135 of 2024; Joseph Okiring Barasa versus David Nambale (Mbungi). The Respondent urged the Court to dismiss the present notice of motion application.

Analysis and Determination:

15. There is only one question in determination of this application, which is:
Whether the Applicant has met the conditions to be granted a stay of execution pending the hearing and determination of his appeal.
16. The Applicant filed a memorandum of appeal dated 13th January 2026 challenging the decision of the learned trial magistrate rendered on 9th of December, 2025. Alongside the memorandum of appeal, he filed the present application dated 19th January 2026.
17. Order 42 rule 6 sets out two conditions that a party must establish: the application must be brought without undue delay, and the Applicant must demonstrate that he will suffer substantial loss unless the orders sought are granted. The third condition of providing security depends on the circumstances of each case.
18. In this case, the application was filed one month after the delivery of the order or decree being appealed against, which is a reasonable period for taking such a step. The dispute between the parties here concerns a boundary, which, in my considered opinion, does not require the deposit of any security. Even the Respondent did not request for provision of security in his replying affidavit or in the written submissions.
19. The Applicant, in arguing that he will suffer substantial loss unless the orders sought are granted, stated that if the order is implemented, he is likely to be evicted, and this result will render his appeal nugatory. At paragraph 10 of the Replying Affidavit, the Respondent deposes that the County Surveyor was able to establish the trespass, and it is this finding by the County Surveyor that the trial Court adopted



in its decision. The decree appealed rendered the Applicant a trespasser who should vacate to end the acts of trespass.

20. The Respondent stated that by the Applicant filing this appeal, it implies that the boundaries shall not be fixed whatsoever. It is the implementation of the order (of fixing the boundaries) which the Applicant has sought to stay until his appeal is heard and determined. Thus, if the orders are implemented, the status of the parties on the ground is likely to change, and that change is likely to negatively affect the Applicant. For this reason, I am persuaded to hold that the Applicant has demonstrated that he will suffer loss unless the orders of stay of execution are granted.
21. This court has taken note of the fears of the Respondent that the orders if granted will deny him the fruits of his judgment. Therefore, the court shall endeavour to ensure the hearing of the appeal is fast-tracked and it is evident by the determination of the application having been concluded within three months.
22. In light of my finding that the Applicant has demonstrated substantial loss, I hold that the application dated 19th January 2026 is merited. I grant it in terms of prayer (c) of the application that an order of stay of execution is issued, staying the implementation of the order/decreed delivered on 9th December 2025, pending the hearing and determination of the appeal.
23. The costs of the application are to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 12TH DAY OF MARCH, 2026.

A. OMOLLO

JUDGE

