



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI LAW COURTS, NAIROBI

ELC SUIT NO E093 OF 2023

KENAFRIC PROPERTIES LIMITED.....
PLAINTIFF/RESPONDENT

-VERSUS-

GEORGE ODANGA DENYO & 65 OTHERS

DEFENDANT/APPLICANTS

RULING

1. In the Notice of Motion application dated 18th June 2025, the Applicant sought the following orders:

1. Spent

2. **THAT** pending the hearing and determination of this Application, this Honourable court be pleased to issue orders restraining the Decree- Holder/Respondent by itself, its servants and/or agents, family members, relatives and/or any other person whomsoever acting under his instructions from evicting the Applicants from the suit property being L.R NO. 339/109(I.R 95767) and from continuing with the developments on all that parcel of land known L.R 339/109 (I.R 95767).

3. **THAT** pending the hearing and determination of this application, this Honourable Court be pleased to issue an order of stay of execution of enforcing the whole of the ruling

delivered on the 15th June 2023 by Honourable Justice M.D Mwangi in ELC CASE NO. E093 OF 2023-Kenafic Properties Limited Vs George Odanga Denyo and 34 Others

4. **THAT** in alternative of prayer 2 and 3 above this Honourable Court be pleased to issue status quo orders in regards to all that parcel of land known L.R 339/109(I.R 95767) and any further activity being undertaken thereof.
5. **THAT** pending the hearing and determination of this application, this Honourable Court be pleased to join the applicants herein as defendants and National Land Commission, Nairobi City County Governments and Ethics and Anti-Corruption Commission as interested parties in this suit.
6. **THAT** pending the hearing and determination of this application this Honourable Court be pleased to grant leave to the intended defendant/applicants to file their statement of defence out of time and that the annexed draft defence is deemed as duly filed and served.
7. **THAT** the National Police Service and in Particular the Officer Commanding Police Division, Ruaraka Police Station do assist in effecting and enforcing the orders.
8. **THAT** upon the hearing and determination of this application, this Honourable Court be pleased to review, set aside vary and/or vacate the ruling delivered on the 15th June 2023 by Honourable Justice M.D Mwangi in ELC CASE NO. E093 OF

2023-Kenafric Properties Limited Vs George Odanga Denyo and 34 Others.

9. **THAT** upon the hearing and determination of this Application, this Honourable court be pleased to issue orders restraining the Decree- Holder/Respondent by itself, its servants and/or agents, family members, relatives and/or any other person whomsoever acting under his instructions from evicting the Applicants from the suit property being L.R NO. 339/109(I.R 95767) and from continuing with the developments on all that parcel of land known L.R 339/109(I.R 95767).
10. **THAT** upon the hearing and determination of this application, this Honourable Court be pleased to join the applicants herein as defendants and National Land Commission, Nairobi City County Governments and Ethics and Anti-Corruption Commission as interested parties in this suit.
11. **THAT** upon the hearing and determination of this application, this Honourable Court be pleased to set aside the Ruling delivered on the 15th June, 2023 and the subsequent decree issued on the 30th June 2023, and be pleased to further direct that the suit be reopened for hearing on merit.
12. **THAT** upon the hearing and determination of this application, this Honourable Court be pleased to issue an order of stay of execution of enforcing the whole of the ruling delivered on the 15th June 2023 by Honourable Justice M.D

Mwangi in ELC CASE NO. E093 OF 2023-Kenafric Properties Limited Vs George Odanga Denyo and 34 Others .

13. **THAT** the costs of this Application be provided for.
2. The Application is supported by the affidavit sworn by Alphonse Amadi where he depones he has the authority to swear the affidavit on behalf of the other applicants evidenced by the letter of authority drafted on the 17th May 2025.

He deponed that they were not aware of the proceedings in ELC NO E093 of 2023 and only became aware of it when the eviction notice was issued pursuant to ruling delivered on the 15th June 2023 and subsequent decree dated 30th June 2025. That they were not accorded an opportunity to defend themselves.

he further deponed that they had been in possession of the suit property for over 50 years and it being public land was not available for private use hence this application seeking to set aside the ruling and decree to enable them participate and defend their rights

Respondent's s reply

3. The respondent opposed the application in a replying affidavit sworn by Kirtan Shah dated 21st June 2025.

She deposed that the suit property belonged to the plaintiff after having acquired it from the previous owners via an agreement for sale dated 30th June 2004. That following some demolitions on the adjacent parcel of Land, the applicants herein then constructed some illegal structures on the plaintiff's land causing for trespass which resulted in the filing of this suit for encroachment.

She deponed that the applicants had been given 3 months' notice and the said notice published in 2 local dailies as per the requirements of the law and adhered to all other legal requirements in the Land Act.

That this prompted the filing of the case where the court was convinced that it was a matter that warranted summary judgement and hence the ruling and subsequent decree.

The plaintiffs further deponed that the orders sought after had been overtaken by events as the eviction had already happened and the plaintiffs were in possession and full control of the property

Applicant/ defendant's submissions

The applicant filed submissions dated 19th September 2025 and submitted on totally different issues as in their application. The application sought for stay of execution of the ruling and decree whereas the submissions touched on the issue of injunctions. The said submissions can therefore not be relied on

Plaintiff/respondent's submissions

The respondents submitted on the following issues

- i. Whether the applicant are entitled to stay of execution orders.
They submitted that as per order 22 rule 22 the applicants had not demonstrated sufficient cause to warrant stay of execution and further execution had already happened
- ii. Whether sufficient cause had been shown for setting aside the ruling and decree.

On this it was submitted that the applicants had been served with hearing notice but failed to attend the same hence the ruling obtained without their participation

- iii. Whether the applicants should be allowed to file a defence out of time.

It was submitted that the applicants had not demonstrated any identifiable stake in the suit property and in the proceedings and how they will be prejudiced if they are not made parties to the suit.

- iv. On the issue of costs, the respondent submitted that having discharged the burden of proof they should be awarded costs.

Analysis and Determination

4. Having considered the foregoing, the following are issues for the court's determination;
 - Whether the applicant is warranted to the stay of execution orders
 - Whether the applicant should be granted leave to file defence out of time.

The Courts jurisdiction is derived from of Order 42 rule 6 (1) of the Civil Procedure Rules which provides;

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.

On the first criterion as set out in order 42 Rule 6 (2) that is whether applicant has brought this application without unreasonable delay. The application herein was filed on 18th June 2025 while the ruling was entered on the 15th June 2023 and there being no reasonable explanation for filing the same after delay the 1st condition fails

On the second criterion, the applicant is required to establish that if the application is not allowed, substantial loss would result. Substantial loss has been defined in several judicial pronouncements. In the case of **Francis K. Chabari & another vs Mwarania Gaichura Kairubi [2022] eKL Justice C. K. YANO** quoted **Geoffery Muriungi & another v John Rukunga M'imonyoso** as to define substantial loss as follows;

“the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal”

5. The applicants in their application have not shown any identifiable interest in the subject suit and in the pleadings hence not shown how substantial loss will be occasioned to them.

Having failed to show how substantial loss will be occasioned, then the orders of stay cannot issue as against the judgment. In the case of **Kenya Shell Limited -v- Benjamin Karuga Kigubu & Another (1982-1988) KAR 108** the Court of Appeal stated.

"It is usually a good rule to see if order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be rendered nugatory by some other event. Substantial loss in various forms is the cornerstone for granting stay."

In light of the above then it goes without saying that the applicant has not met the conditions for grant of stay as in order 42 rule 6.

Moreover, the Respondent has demonstrated that execution has already taken place. The respondent has attached photographs to its replying affidavit at page 215 of the annexures which shows that the said eviction has already been carried out. As the Court of Appeal emphasized in **Benjoh Amalgamated Ltd & Another v Kenya Commercial Bank Ltd [2014] eKLR**, the Court will not make orders in futility. In the circumstances, the application for stay is overtaken by events and cannot be sustained.

On the issue for the applicant to be granted leave to file their defence, the same also fails as the applicant has no identifiable issue raised that will be triable in a defence

The cumulative effect of the foregoing is that the Applicant have failed to satisfy the threshold for stay of execution, there being no triable issues raised to warrant filing of defence, and the fact that execution has taken place render the application unsustainable and moot.

Final disposition

In view of the above I make the following order

- i. The notice of motion application dated 18th June 2025 is hereby dismissed.
- ii. Each party to bear their own costs

It is so ordered.

DATED, SIGNED and DELIVERED virtually at **NAIROBI** on this **23rd** day of **March, 2026.**

MOHAMMED N. KULLOW
JUDGE

Ruling delivered in the presence of: -

Mr. Keaton..... for the Applicant

Ms. Angela..... for the Respondent

Philomena W..... Court Assistants