



Melompuki & another v Nthiani (Environment and Land Appeal E046 of 2025) [2026] KEELC 1773 (KLR) (19 March 2026) (Ruling)

Neutral citation: [2026] KEELC 1773 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E046 OF 2025
LC KOMINGOI, J
MARCH 19, 2026**

BETWEEN

MOSES MELOMPUKI 1ST APPELLANT

NTIPAPA SOMOIRE 2ND APPELLANT

AND

ERIC MWONGELA NTHIANI RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. Esther Kimilu in Loitokitok SMC ELC Case Number E002 of 2024 dated the 1st July 2025)

RULING

1. The ruling is in respect of determination is the Notice of Motion Application dated 28th July 2025 brought under: Section 3A, 63(e) and 79G of the [Civil Procedure Act](#), Order 42 Rule 6 of the Civil Procedure Rules, and all other enabling provisions of law and all other enabling provisions of Law. It seeks orders:-
 - i. Spent
 - ii. Spent
 - iii. That a stay of execution of the said Judgment and Decree be granted pending the hearing and determination of the appeal filed herein.
 - iv. The costs of this application be provided for in the cause.
2. The grounds are on the face of the application as set out in paragraphs a and g and supported by the sworn Affidavit of Ntipapa Somoire. He avers that the Applicants stand to suffer irreparable loss if the stay is not granted because if the orders are executed, the placement of beacons on Loitokitok/Enkariak-Rongena/5598, will irreversibly alter the boundaries of their land parcel Loitokitok/



Enkariak-Rongena/5869, prejudicing their proprietary rights, and livelihood. He also averred that the Respondent's advocate unlawfully instructed the District Surveyor in July 204 to resurvey the property without the Applicants' participation which led to the erroneous findings by the Lower Court. As such, it was necessary to stay the execution of the Lower Court's orders until the Appeal was heard and determined.

3. The Respondent in his Replying Affidavit dated 11th August 2025 deponed that he together with his wife were the registered owners of parcel Loitokitok/Enkariak Rongena/5598. He stated that the District Surveyor was to implement the Court orders on 8th August 2025 and that this Application had been overtaken by events. He went on to state that the District Surveyor's testimony at the Lower Court addressed the issue of conflicting mutations. As such, the appeal should be dismissed.
4. The Appellants/ Applicants in the Further Affidavit dated 20th September 2025 contested being in receipt of any letter from the District Surveyor of the purported site visit. Adding that the district surveyor, who testified in the lower court, reported that there was no trespass by the Appellants, and this was confirmed by the reports produced. They sought that the application be allowed.
5. This application was canvassed by way of written submissions.

The Appellants'/ Applicants' Submissions

6. Counsel submitted that the Applicants have occupied their registered parcel, Loitokitok/Enkariak-Rongena/5869, peacefully, openly, and without interruption for decades, long before the Respondent acquired the neighbouring land. They contend that the boundary dispute arises from historical mutation errors rather than trespass. In support of this position, a court-appointed surveyor issued two reports dated 3rd July 2024 and 1st October 2024 confirming that the Appellants had not encroached on the Respondent's land. These findings notwithstanding, the lower court disregarded the survey reports, held that the Appellants had trespassed, ordered a resurvey to allocate the Respondent a specific acreage of 2.84 hectares despite such relief not being pleaded, and went on to dismiss the Applicants counterclaim.
7. On whether the application has been overtaken by events due to the alleged execution of the judgment, it was submitted that the purported execution was void ab initio for non-compliance with mandatory procedure espoused in Sections 18(2) and 19(2) of the [Land Registration Act](#) because they were not notified of the same and the Respondent had not produced evidence of service. Further, that the surveyor's mandate was expressly limited to thirty (30) days from 1st July 2025. Therefore, the purported site visit and beacon placement scheduled for 8th August 2025 fell outside that court-sanctioned timeline. As such any act undertaken beyond the period authorized by the Court was ultra vires and void.
8. On whether the Applicants satisfied the conditions for grant of stay pending appeal, it was submitted that if the Lower Court's order was executed, the Applicants would suffer substantial loss of their ancestral land which could not be adequately compensated by damages. Reliance was made to the case of [James Wangalwa & Another vs. Agnes Naliaka Cheseto \[2012\] KEHC 1094 \(KLR\)](#) on substantial loss. It was also argued that the Appeal was filed without delay and it raised fundamental issues which should be addressed since the Court had a duty to balance interests and the Applicants should not be denied justice through premature execution as held in [Kenya Commercial Bank Limited vs Sun City Properties Limited \[2012\] eKLR](#). On the issue of security, it was submitted that the Applicants were ready and willing to abide by reasonable conditions of security that the Court would deem fit to order.



The Respondent's Submissions

9. On whether the Appellant had met the conditions for stay of execution pending appeal as per Order 42 Rule 6(2) of the Civil Procedure Rules, counsel submitted that the claim that the Appellant would suffer substantial loss of an acre of their land was unsubstantiated because they did not provide evidence showing the said measurements or encroachment of their land citing *Kenya Shell Ltd v Benjamin Karuga* [1982]. It was also submitted that the issues raised in the Appeal were *res judicata* having been litigated on at the Lower Court.
10. Counsel also argued that the Applicants were invited to attend site visit surveys but failed to, and could therefore not impeach a process they failed to take part in. As such, they would not suffer and prejudice and the Application should be dismissed with costs.

Analysis And Determination

11. I have considered the Notice of Motion, the Affidavit in support, the response thereto; the rival submissions and the authorities cited. I find that the issues for determination are:
 - i. Whether the Application for stay of execution of the judgment and Decree of the Lower Court issued on 1st July 2025 is merited;
 - ii. Who should bear the costs of this application?
12. The Appellants seek stay of execution of the Judgment dated 1st July 2025 in *Loitokitok MCELC E002 of 2024* on grounds that if executed, they will suffer irreparable loss since they stand to lose a portion of their land which was not an error occasioned by any party, but historical mutation errors.
13. The Respondent contested the Application on grounds that it had been overtaken by events, since the judgement had already been implemented. The Appellants further contested this allegation stating that they were never served with any implementation notice, and if the same had been undertaken, it was *ultra vires* as it did not adhere to the due process.
14. Order 42, rule 6 of the Civil Procedure Rules provides that:
 - (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 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;
15. The Appellants/Applicants contend that execution of the judgement will lead to the placement of beacons demarcating parcel No. *Loitokitok/Enkariak-Rongena/5598*, thereby altering the boundaries of their land parcel *Loitokitok/Enkariak-Rongena/5869*. Land disputes are emotive, and if the judgement is executed which involves alteration and demarcation of boundaries, then the Appeal could be rendered nugatory. This Court is guided by *Butt v Rent Restriction Tribunal* [1979] KECA 22



(KLR) where the Court of Appeal held: “... If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory...”

16. On the issue of substantial loss, Courts have held that substantial loss cannot be quantified by a fixed standard and must be assessed based on the circumstances of each case. The Court of Appeal in *Rhoda Mukuma v John Abuoga* [1988] KECA 107 (KLR) held that: “... substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory. Therefore it is necessary to preserve the status quo...” In the circumstances of this case, the Court is satisfied that it is necessary to prevent such loss by maintaining status quo so that its implementation does not prejudice the Applicants.
17. On the issue of security of costs, Order 42 Rule 6 (2)(b) Civil Procedure Rules gives the Court authority to order for security: 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. The Court finds it fit to order that the Appellants do deposit Kshs. 200,000 as security for cost within forty-five (45) days of this ruling.
18. I find merit in the application and grant the orders sought namely: -
 - a. There be a stay of execution of the Judgment dated 1st July 2025 in Loitokitok Magistrate’s Court ELC Case No. E002 of 2024 pending the hearing and determination of the appeal.
On condition
That appellants do deposit Kshs. 200,000 in a joint interest earning account in the joint names of the counsels on Record for appellants and the respondent within forty-five (45) days of this Ruling.
In default orders of stay shall automatically lapse.
 - b. That Costs of this application shall abide the outcome of the Appeal.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 19TH MARCH 2026.

L KOMINGOI

JUDGE

In presence of :

Ms Gatimu for the Appellants

Mr Marete for the Respondent

Court Assistant : Nelima

