

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ELCLA No. E016 OF 2025

BETWEEN

JOSEPHINE MONYANGI MASIRA
APPELLANT

AND

ALEXINAH NYABOKE NYAMWEA
RESPONDENT

***(Being an appeal from the judgment and decree of the
Chief Magistrate’s Court at Nyamira (C I Agutu, Senior
Resident Magistrate) delivered on 17th September 2025 in
Nyamira CM ELC No. E042 of 2023)***

RULING

1. This is an appeal from the judgment and decree of the Chief Magistrate’s Court at Nyamira (C I Agutu, Senior Resident Magistrate) delivered on 17th September 2025 in Nyamira CM ELC No. E042 of 2023. The Subordinate Court found in favour of the Respondent and issued a declaration that Alexinah Nyaboke Nyamweya (Respondent) was the lawful proprietor of plot number 24B Nyabite market measuring 25 feet by 100 feet (suit property), ordered the Appellant to vacate the encroached portion of the suit property within 30 days from the date of the judgment and in default the Respondent to apply for eviction, and granted a permanent injunction

restraining the Appellant, her agents, servants, or assigns from entering, occupying, or interfering with the Respondent's quiet possession of the suit property. The Respondent was further awarded costs of the suit.

2. Aggrieved with the outcome, the Appellant filed this appeal on 13th October 2025, through Memorandum of Appeal dated 12th October 2025. Together with the Memorandum of Appeal, the Appellant filed Notice of Motion dated 12th October 2025. Subsequently, she also filed Notice of Motion dated 4th January 2026. This ruling is in respect of the two applications.

3. The following orders are sought in Notice of Motion dated 12th October 2025:

1. THAT the application be certified urgent and be heard ex parte in the first instance.

2. THAT a stay of the judgment (given on the 17th Day of September 2025, MCELC E042 of 2025, Alexinah Nyaboke Nyamweya v Josephine Monyangi Masira) and /or execution be issued pending the hearing and determination of an appeal by the Applicant.

3. ANY other that this Honourable Court shall deem fit to grant.

4. On the other hand, the following orders are sought in Notice of Motion dated 4th January 2026:

1. *THAT the application be certified urgent and be heard exparte in the first instance.*
 2. *THAT pending the hearing and at the determination of this Application and Appeal, the firm of Danstan Omari & Associates Advocates be granted leave to be on record for the Appellant/ Applicant after judgment.*
 3. *THAT pending the hearing and determination of this Application and appeal, a stay of execution be issued of the judgment given by Hon. Christabel Irene Agutu on the 17th Day of September 2025, MCELC E042 of 2025, Alexinah Nyaboke Nyamweya v Josephine Monyangi Masira.*
 4. *THAT at the hearing and determination of this application, a stay of execution be issued of the judgment given by Hon. Christabel Irene Agutu on the 17th Day of September 2025, MCELC E042 of 2025, Alexinah Nyaboke Nyamweya v Josephine Monyangi Masira.*
 5. *ANY other that this Honourable Court shall deem fit to give.*
5. The two applications are supported by affidavits sworn by the Appellant. She deposed that if the eviction ordered in the judgment was effected, she would suffer irreparable harm and loss since all her developments in the suit property would be

demolished. She added that the Respondent had begun eviction proceedings in the Subordinate Court.

6. The Respondent opposed the applications through a replying affidavit in which she deposed that she was not a party in MCELC E042 of 2025 and the application was brought too late in the day since judgment in MCELC E042 of 2023 was delivered on 17th September 2025. She further deposed that the Appellant had contradicted herself since all along she had taken the position that the suit property did not belong to her but to her late father yet she claimed in the application that the developments on the suit property were hers. She added that the appeal did not have any high chance of success and urged the Court to dismiss the application with costs.
7. The applications were canvassed through written submissions. The Appellant filed submissions dated 15th February 2026 while the Respondent filed submissions dated 9th February 2026.
8. I have carefully considered the applications, the affidavits and the submissions. The sole issue for determination is whether the orders sought should issue.
9. Among the reliefs sought in the applications is an order that the firm of Danstan Omari & Associates Advocates be granted leave to be on record for the Appellant after judgment. In that regard, it is important to recall **Order 9 rule 9** of the **Civil Procedure Rules** which provides:

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court -

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

10. The above rule deals with situations where a party effects change of advocate after delivery of judgment, or where a party who was previously represented by an advocate decides to act in person after delivery of judgment. In both those situations, the change or intention to act in person can only be effected with an order of the Court.

11. I have perused the applications and the affidavits in response. No material has been availed by the Appellant to show that she was previously represented by an advocate. No details of any such advocate are provided. Nevertheless, the prayer for leave for the firm of Danstan Omari & Associates Advocates to be on record for the Appellant is not opposed. I will therefore allow it.

12. The Appellant is seeking stay of execution pending hearing and determination of this appeal. The applications are brought under **Order 42 rule 6 (2)** of the **Civil Procedure Rules** which 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 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.

13. The essence of the foregoing provisions is that an applicant seeking stay pending appeal must demonstrate that substantial loss will result to her if stay is not granted, and that the application has been made without unreasonable delay. Such an applicant is further required to give such security as the court may order for the due performance of the decree. See **Kenya Power & Lighting Co. Ltd v Kigaita Ngare Unduthu & 36 others [2020] eKLR** and **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**. As Platt Ag JA (as he then was) stated in **Kenya Shell Limited v Benjamin Karuga Kibiru & another** (supra), substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is virtually impossible for such an application to succeed if an applicant fails to demonstrate that she will suffer substantial loss if stay is not granted.

14. In the judgment that is appealed against, the Subordinate Court issued a declaration that the Respondent was the lawful proprietor of the suit property and ordered the Appellant to

vacate a portion of the suit property within 30 days from the date of the judgment and in default she be evicted. The Court further granted a permanent injunction restraining the Appellant, her agents, servants, or assigns from entering, occupying, or interfering with the Respondent's quiet possession of the suit property.

15. The Appellant's complaint is that she risks eviction if the stay order is not granted. In view of the orders in the decree, I agree with the Appellant that there is an imminent threat of eviction. There is material on record showing that the Respondent filed an application dated 20th November 2025, seeking eviction in the Subordinate Court. An eviction would certainly constitute substantial loss.

16. An application for stay of execution pending appeal should be filed without unreasonable delay. Notice of Motion dated 12th October 2025, which is the first of the two applications under consideration, was filed on 18th December 2025. The appeal itself was filed on 13th October 2025. Despite the date of Notice of Motion dated 12th October 2025, there was clearly some delay in filing it. In an ideal situation, an application for stay of execution pending appeal should be filed simultaneously with the Memorandum of Appeal.

17. Pursuant to **Section 16A (1)** of the **Environment and Land Court Act**, which stipulates that an appeal from the Subordinate Court to this Court be filed within 30 days of

delivery of the judgment, the Appellant had until 17th October 2025 to file the appeal, and with it an application for stay. There was thus a delay of two months by the time the first of the two applications was filed. Given the circumstances, which included the firm of Danstan Omari & Associates Advocates taking over representation of the Appellant, I do not consider the delay of two months to be unreasonable.

18. The Respondent contended that the Appellant is seeking stay in respect of MCELC E042 of 2025 and that she was not a party in the said case. I have perused the applications and I note that indeed, the prayers for stay refer to MCELC E042 of 2025. I am however persuaded that this is a typing error since the Memorandum of Appeal is abundantly clear that this appeal is in respect of judgment and decree of the Chief Magistrate's Court at Nyamira (C I Agutu, Senior Resident Magistrate) delivered on 17th September 2025 in Nyamira CM ELC No. E042 of 2023. The Respondent is also in agreement that the later matter is the one that they had in the Subordinate Court.

19. In view of the foregoing discourse, I find merit in the two applications. I will limit the life of the stay orders, with a view to encouraging an early hearing and determination of this appeal.

20. I therefore make the following orders:

- a) Leave is hereby granted to the firm of Danstan Omari & Associates Advocates to be on record for the Appellant.**
- b) Pending the hearing and determination of this appeal, I grant stay of execution of the judgment and decree in Nyamira MCELC No. E042 of 2023.**
- c) The stay order shall, unless extended by the Court, remain in force for a period of only twelve months from the date of this ruling or until this appeal is determined, whichever occurs first. Consequently, parties are reminded to expeditiously prosecute this appeal.**
- d) Costs of Notice of Motion dated 12th October 2025 and Notice of Motion dated 4th January 2026 shall abide the outcome of this appeal.**

Dated, signed, and delivered at Nyamira, this 8th day of April 2026.

**D. O. OHUNGO
JUDGE**

Delivered in the presence of:

The Appellant present in person

Mr Okara for the Respondent

Court Assistant: B Kerubo