

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT SIAYA
ELC LAND APPEAL NO. E 049 OF 2025

CHRISTABEL MBOGO OBANDA
APPELLANT

VERSUS

MORGAN ONYANGO OMONDI
RESPONDENT

RULING

1. This Honorable Court is tasked to determine a Notice of Motion application dated 12th November 2025 by **the** Appellant and which seeks for the following orders: -
 1. This Honourable Court be and is hereby pleased to stay the execution of the judgment delivered by Honourable Benjamin Limo in Siaya MCELC No. E019 of 2021 on 01.08.2025 and the consequent decree issued to the plaintiff pending hearing and determination of this appeal.
 2. Costs of this application be granted to the appellant.
2. The application is premised on the Supporting Affidavit of Christabel Mbogo Obanda sworn on the 12th November 2025. It is deponed that the trial Court issued a judgment in favour of the respondent on 01.08.2025 who has extracted a decree and is keen on executing the same. The decree is attached. That her application for an order of stay of execution before the trial court was dismissed on the basis that the trial Court was functus officio and that the application for stay of execution should be made to this Court. A copy of the ruling is attached.

3. It is averred that if the execution is not stayed and the judgment implemented, the applicant will suffer irreparable damage and the appeal will be rendered nugatory. That the respondent may proceed with implementation of the judgment and the applicant will be rendered destitute as the judgment affects her matrimonial home. That she has a justified legal interest in the suit property and she stand to suffer prejudice and irreparable loss should the property be sold or transferred in execution of the decree of the trial Court.
4. That the decree holder has no known assets or income which can be attached to remedy any loss that will arise if the order for stay of execution is not granted.
5. That it is in the interest of fairness and justice that the orders sought are granted to ensure that the appeal is heard on its merit and is not rendered nugatory, in the event that the same is successful.
6. It is deponed that no party's position will be irretrievably changed if the orders sought are granted. The respondent will still have his day in Court.

THE REPLYING AFFIDAVIT BY THE RESPONDENT.

7. The application was opposed by the Replying Affidavit sworn by Morgan Onyango Omondi, dated 19th January 2026. It is deponed that the Application is frivolous, frolicsome, vexatious, without merit, and bad in law.
8. That Judgment in Siaya MCELC No. E019 of 2022, the subject matter of this appeal, was delivered on 1st August 2025, wherein the Honourable Court found that the respondent lawfully

purchased the suit property and consequently issued orders for specific performance directing the Appellant/Applicant to transfer the suit land to the respondent. A copy the Judgment dated 1st August, 2025 and the Order dated 8th September, 2025 are annexed.

9. That the present application was filed in November 2025, over three (3) months after delivery of Judgment, and no explanation whatsoever has been offered for this inordinate and unexplained delay, contrary to the requirements of Order 42 Rule 6(2) of the Civil Procedure Rules.
10. It is averred the Applicant has failed to demonstrate that she stands to suffer any substantial loss if the orders sought are not granted, which is a mandatory statutory requirement for the grant of an order for stay of execution.
11. That the Applicant's allegations that the respondent is incapable of refunding the decretal sum or satisfying the decree in the event the appeal succeeds are bare, speculative, and unsupported by any evidence, and therefore cannot form a basis for the grant of stay. The respondent states he has known sources of income and means and fully capable of complying with any lawful orders of this Honourable Court, and the Applicant has not discharged the burden of proof required to show otherwise.
12. That the decree sought to be stayed is not a purely monetary decree, but one for specific performance, namely the transfer of land, which is a unique and irreplaceable asset, and whose enjoyment has already been unjustly delayed. That staying

execution of a decree for specific performance would amount to denying the applicant the fruits of a lawful judgment, while unjustly allowing the Applicant to continue benefiting from land she was found not to lawfully own.

13. It is urged that the Applicant's Memorandum of Appeal is premised on allegations of forgery of signatures, which allegations were fully canvassed before the trial court and were rejected for want of proof. The Applicant has not demonstrated that the intended appeal is arguable or raises any bona fide triable issues capable of upsetting the judgment of the trial court.
14. The respondent avers that the Applicant has failed to disclose whether she is capable of complying with the decree for specific performance in the event stay is granted, nor has she disclosed her ability to pay costs or the decretal sum should the appeal fail. Further she has not offered or proposed any form of security for the due performance of the decree, as mandatorily required under Order 42 Rule 6(2)(b) of the Civil Procedure Rules. This is fatal.
15. That the Applicant's assertion that no party will be prejudiced is misleading, as the respondent continues to suffer prejudice through denial of ownership, use, and enjoyment of land lawfully adjudged to belong to him. The Application is intended to delay execution, frustrate enforcement of a lawful judgment, and deny him the fruits of litigation, contrary to the principles of justice and equity. The balance of convenience tilts heavily in the applicants' favour, and justice demands that litigation must come to an end.

SUBMISSIONS

16. The application was heard by way of written submissions.

APPLICANTS SUBMISSIONS

17. The Appellant/Applicant through the Law Firm of Messrs. Owino Kojo & Co. Advocates, filed written submissions dated 12th November 2025, and urged this Honourable Court to grant the orders sought. The same addressed one issue Whether this Honourable Court ought to grant an order for stay of execution pending the hearing and determination of the appeal.
18. It was contended that the Appellant, being aggrieved by the entire judgment of the trial Court, lodged an appeal and now seeks preservation of the subject matter pending determination thereof. It is submitted that the grant of stay of execution is discretionary and must be exercised judiciously upon satisfaction of the well-established principles under Order 42 Rule 6 of the Civil Procedure Rules.
19. Counsel argued that the Appellant has demonstrated sufficient cause and stands to suffer substantial and irreparable loss if the orders sought are not granted, as the decree holder is likely to proceed with execution, including subdivision and possible sale of the suit land.
20. It was further submitted that the suit property constitutes the Appellant's matrimonial home where she resides with her children and grandchildren, and that execution would render her destitute and occasion irreparable harm.
21. Counsel contended that the substratum of the appeal would be destroyed if the decree is executed, as the suit land may be transferred or alienated to third parties, thereby rendering the appeal nugatory.

22. Counsel further submitted that the Respondent has not demonstrated financial capability or disclosed any known assets sufficient to compensate the Appellant in the event the appeal succeeds, thus heightening the risk of irreparable loss.
23. On the issue of delay, Counsel submitted that there was no unreasonable delay, as the present application was filed within twenty (20) days following the ruling of the trial Court delivered on 4th November 2025, which dismissed the earlier application for stay.
24. Counsel argued that the Respondent's allegation of inordinate delay is misleading and fails to take into account the procedural history of the matter, particularly the intervening application before the trial Court.
25. On security for due performance, Counsel submitted that the requirement is inapplicable in the present case as the decree is not monetary but relates to land, specifically subdivision and transfer of the Appellant's matrimonial property.
26. Counsel emphasized that the balance of convenience tilts in favour of preserving the suit property, as no prejudice will be suffered by the Respondent if stay is granted, whereas denial would result in irreversible consequences to the Appellant.
27. It was further submitted that the appeal raises arguable issues, including the propriety of the trial Court's findings, and should be allowed to proceed without being rendered nugatory by execution.

RESPONDENTS SUBMISSIONS.

28. The Respondent, filed written submissions in opposition and framed two issues Whether the Applicant has satisfied the

statutory threshold for grant of stay of execution under Order 42 Rule 6 of the Civil Procedure Rules, 2010 and whether grant of stay would unjustifiably deny the Respondent enjoyment of the fruits of judgment.

29. On the first issue, Counsel submitted that the grant of stay is governed by Order 42 Rule 6(2) of the Civil Procedure Rules, which requires an Applicant to demonstrate: substantial loss, absence of unreasonable delay, and provision of security for due performance of the decree.
30. Counsel argued that these conditions are conjunctive and must all be satisfied, and failure to meet any one of them is fatal to the application.
31. On substantial loss, Counsel submitted that the Applicant has merely made bare assertions that the suit property is her matrimonial home and that she will suffer destitution, without placing any cogent evidence before the Court to substantiate such claims.
32. It was further submitted that no documentary or evidentiary material has been provided to demonstrate occupation, lack of alternative accommodation, or any imminent risk of irreparable harm, and that the alleged loss remains speculative and unproven.
33. Counsel contended that the Applicant has also failed to demonstrate that the appeal would be rendered nugatory if execution proceeds, as the suit property remains identifiable and within the jurisdiction of the Court, and any transfer can be reversed if necessary.

34. On the allegation that the Respondent lacks means to refund or compensate, Counsel submitted that the burden of proof lies with the Applicant, and mere lack of knowledge of the Respondent's financial position does not suffice.
35. Counsel pointed out that the Respondent, in his Replying Affidavit dated 19th January 2026, expressly deponed that he has known and identifiable sources of income and is capable of complying with any lawful orders of the Court, which assertions remain uncontroverted.
36. On the issue of delay, Counsel conceded that the application was filed without unreasonable delay, and therefore the Applicant satisfies only this limb of the statutory requirements.
37. On the requirement for security, Counsel submitted that the Applicant has neither offered nor proposed any security for the due performance of the decree, contrary to the mandatory provisions of Order 42 Rule 6(2)(b).
38. It was argued that the Applicant's contention that security is only applicable to monetary decrees is legally untenable, as the law applies to all decrees, including those relating to land and specific performance.
39. Counsel emphasized that security is a condition precedent and a demonstration of good faith, and failure to provide it disentitles the Applicant from the discretionary relief sought.
40. In view of the foregoing, Counsel submitted that the Applicant has failed to satisfy the mandatory statutory threshold, having only met the requirement on timeliness but failed on substantial loss and security.

41. On the second issue, Counsel submitted that the Court must balance the competing interests of the parties, ensuring that the appeal is not rendered nugatory while at the same time safeguarding the Respondent's right to enjoy the fruits of a lawful judgment.
42. It was contended that the Applicant has not demonstrated any real risk of injustice if stay is declined, whereas the Respondent continues to suffer prejudice through denial of possession, use, and enjoyment of property adjudged to belong to him.
43. Counsel argued that granting stay would unjustifiably prolong the Respondent's deprivation and allow the Applicant to retain control of the suit property despite an adverse judgment.
44. It was further submitted that the balance of convenience tilts in favour of permitting execution, as the Respondent's rights have already been determined by a court of competent jurisdiction.
45. In conclusion, Counsel urged this Honourable Court to find that the Applicant has failed to meet the legal threshold for grant of stay of execution and that the application is devoid of merit.

ANALYSIS AND DETERMINATION

46. I have keenly considered the pleadings filed by all the parties, the elaborate and robust written submissions by the Learned Counsel, the relevant provisions of the law and the cited authorities.
47. Two issues commend determination namely whether the orders sought should be granted and who bears the costs of the present application.

48. It is now well established that the grant of stay of execution is a discretionary remedy which must be exercised judicially. The statutory basis for such an order is firmly anchored in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 which provides as follows:

"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."

49. The Court of Appeal in **Mukuma v Abuoga [1988] KLR 645** restated that three prerequisites namely: 1) that the application has been brought without undue delay; 2) that substantial loss may result to the applicant if the order is not made; and 3) such security as the court orders for the due performance of the decree has been given by the applicant.

50. In the case of **Butt v Rent Restriction Tribunal [1979] eKLR**, the Court of Appeal stated thus:

"It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. The court as a general rule ought

to exercise its discretion in a way so as not to prevent the appeal, if successful, from being nugatory."

51. Applying the above I will proceed to analyze whether the applicant has discharged the required threshold, having regard to the particular facts and circumstances of this matter.
52. On the timeliness within which the application has been made the Respondent states the same was filed approximately three months and eleven days after the delivery of the trial court's judgment on 1st August 2025, and that no sufficient explanation has been offered for this delay. The delay is termed inordinate and unexplained failing on the first test.
53. But what constitutes unreasonable delay. I will be guided by the holding in the case of **Jaber Mohsen Ali & Another Vs. Priscillah Boit & Another (2014) KEELC 132 (KLR)** to the effect that unreasonable delay must be assessed against the particular circumstances of each case which is more consistent with the spirit of justice
54. Examining the circumstances of this case, from the record it is apparent and undisputed that the Appellant did not sit idly after the judgment was delivered. Rather, the Appellant promptly proceeded to make an application for stay of execution before the trial court. That application was heard and dismissed by the Honourable Benjamin Limo vide his ruling dated 4th November 2025, who interalia directed the same be filed to this Appellate Court.
55. The course taken by the applicant to seek stay before the trial court and which option is available in law shows the diligence

with which the applicant acted before approaching the appellate court. The dismissal of that application on 4th November 2025 triggered the present application which was thereafter filed on 12th November 2025, a mere eight (8) days following the ruling of the trial court. This Court is unable to characterize a period of eight days as constituting any delay, let alone unreasonable delay. Moreover, the Respondent concedes at paragraph 20 of their written submission the application was filed without unreasonable delay.

56. On substantial loss this is the most critical and consequential issue for determination in this application. The Respondent has strenuously urged this Court to find that the Appellant has offered nothing more than bare, vague and speculative allegations of loss, unsupported by any cogent evidence, and that the alleged loss is therefore insufficient to ground a stay of execution.

57. The Appellant has deponed that if the execution is not stayed, she will be unfairly rendered destitute if the judgement is executed as the same affects her matrimonial home. That she has a justified claim and legal interest in the suit property and that she will suffer irreparable loss should the property be sold or transferred in the execution of the decree. The information that the applicant lives in the home with her children is not based on the applicants' depositions but have been included as part of the submissions. I must state that submissions are not evidence.

58. The applicant has furnished the decree. The trial court made an order of specific performance directing transfer of

100x60x30x30 feet by the defendant (Appellant herein) being a portion of the suit property. The requisite applications for transfer are ordered to be signed by the executive officer Siaya Law Court.

59. I have noted that one ground of appeal is that the appellants consent was not sought as a spouse. That she has a valid and legal claim as a spouse over the matrimonial home. I think for me a matrimonial home has sentimental value to a spouse and therefore emotional connotations that cannot be quantified to enable monetary compensation thus irreparable loss. I will be guided by the case of **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] KECA 94 (KLR)** where the nature of the subject matter of the dispute was a material consideration in the assessment of substantial loss.
60. The appeal would then be rendered not merely nugatory in the colloquial sense but substantively valueless as a legal remedy. If the appeal succeeds on its merits, the Appellant must be in a position to benefit meaningfully from that success. Indeed, the Court of Appeal in **Butt v Rent Restriction Tribunal [1979] eKLR** that the Court ought to exercise its discretion in a way that does not prevent a successful appeal from being nugatory.
61. On security I have noted the Appellant has not, in her supporting affidavit proposed any specific form of security for the due performance of the decree should the appeal ultimately fail. The Respondent has submitted, that this failure is fatal to the application, and that the furnishing of security is

a condition precedent rather than a matter of judicial discretion.

62. This Court respectfully disagrees with the Respondent's proposition. I say so for the reason that Order 42 Rule 6(2)(b) of the Civil Procedure Rules vests in the Court the discretion to determine what form of security is appropriate in the circumstances of each case. The provision states that "such security as the court orders" meaning that it is not for the applicant to offer or set the same, though a proposal by an applicant could be serve as a sign of goodwill. An applicant's silence on the issue of security does not, in and of itself, defeat an application for stay; rather, it calls upon the Court to impose appropriate conditions in the exercise of its discretion.

63. In the present case, this Court observes that the subject matter of the dispute is itself available as natural and appropriate security. The original title deed for parcel No. North Gem/Ndere/757, being the very property that is the subject of the decree and the appeal, constitutes a form of security that is directly proportionate to the nature of the decree and the interests in dispute. The deposit of the title deed in court would prevent the Appellant from dealing with the land to the prejudice of the Respondent during the pendency of the appeal.

64. Additionally, this Court considers it both appropriate and necessary that the Appellant be expressly restrained from committing waste upon the suit land during the pendency of the appeal. The Respondent, while not raising this as a specific ground in the present application, has indicated in his

depositions that the property and the portion awarded is the subject of a lawful decree in his favour, and the principles of equity require that the status of the property be preserved pending the appellate process.

65. This Court further observes that the Respondent will not be indefinitely or irreversibly prejudiced by the grant of stay, provided that appropriate conditions are imposed to protect his interests as the decree holder. The deposit of the original title deed in court as security ensures that the property cannot be dealt with by the Appellant to his detriment. The restraining orders against waste and alienation further protect his interests. His right to enjoy the fruits of the judgment will not be permanently extinguished but merely temporarily suspended pending the outcome of the appeal, which this Court directs should be expeditiously disposed of.

66. This Court therefore finds that the balance of convenience, having regard to all the circumstances and the conditions to be imposed, tilts in favour of granting the stay of execution sought by the Appellant.

67. The upshot of the foregoing is that the Notice of Motion Application dated 12th November 2025 is allowed in the following terms; -

1) THAT a stay of execution of the judgment delivered in Siaya MCELC No. E019 of 2021 on 1st August 2025 and the consequent decree issued to the Respondent/Plaintiff be and is hereby granted pending the hearing and determination of this Appeal.

- 2) THAT as a condition of the stay of execution hereby granted, the Certificate of Title for parcel No. North Gem/Ndere/ 757 shall within fourteen (14) days of the date of this Ruling, be deposited with the Court Administrator Siaya Law Courts.
- 3) THAT pending the hearing and determination of this Appeal, the Appellant/Applicant be and is hereby restrained from committing any acts of wastage that will change the character of the portion of parcel North Gem/Ndere/757 designated on the decree including sell or subdivision thereof.
- 4) THAT the costs of this application shall abide the outcome of the Appeal.

Orders accordingly.

Dated at Siaya this 14th Day of April , 2026

**HON. JUSTICE A. E. DENA
JUDGE**

14/04/2026

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

Mr. Owino for the appellant

Ms Chebet Holding Brief for Odundo for Respondent

Court assistant: Dorothy Owuor