

to grant an order for stay of execution of judgment delivered on 20th May, 2025 by Hon. Benjamin Limo and all the consequential orders and decree.

3) Pending the hearing and determination of the appeal, the Honourable Court be pleased to grant an order for stay of execution of its judgment delivered on 20th May, 2025 by Hon. Benjamin Limo and all the consequential orders and decree.

3. The application is premised on the grounds on its face and the supporting sworn by Nehemiah Mwanda Onyango on 3rd June 2025. The deponent avers that he is aware of the judgment delivered on 20th May, 2025 dismissing his claim against the Respondents with costs to the 1st and 2nd Respondent. That aggrieved by the said judgment he has lodged the present appeal. That on advise of his advocate the appeal, if successful will be rendered nugatory unless stay of execution is granted pending its hearing and determination.

4. The deponent also avers that the subject matter is land registered in the name of the MAURICE ODUOR ABONY for valuable consideration sometime around 28th June, 2019. Vide sale agreement dated the 21st October, 2016, one DOLROSA AKINYI OCHIENG sold the subject property to one WILLIAM ONYANGO OLOLO before confirmation of Grant which was confirmed on 30th December, 2016 who subsequently transferred the said property to the 1st Respondent while there were pending orders issued. That the late DOLROSA AKINYI OCHIENG equally discharged the

subject property before the grants were confirmed. The subject property was charged to AGRICULTURAL FINANCE CORPORATION on the 13th August, 2012.

5. The deponent states that he purchased the subject property from one WILLIAM OCHIENG OGWANG to which he paid Kshs. 100, 000.00 and further legal costs arising from Kisumu HCC NO. 138 OF 2011. The same was acknowledged by the deceased vide letter dated 19th March, 2024 through the deceased's lawyer.
6. Moreover the 1st Respondent upon purchase from WILLIAM ONYANGO OLOLO and has since been in possession and use of the suit property and therefore the applicant states he stands to suffer irreparable loss and damage if the orders sought herein are not granted. That he is reasonably apprehensive that the suit property is likely to be exposed to adverse dealings by the 1st Respondent, including, sale, transfer or mortgage to third parties which in turn would affect the substratum of his appeal thus rendering it nugatory. To him the appeal has strong arguable grounds with high chances of success.
7. The applicant depones that he is willing to deposit a security for the due performance of any decree that may be binding on him or comply with such orders as the Court may make on security. That it is proper, just, fair and equitable that he is given opportunity to pursue the appeal while preserving the substratum of the appeal. The courts discretion ought to be exercised in such a manner as not to prevent an appeal. That

the 1st Respondent will not suffer prejudice if the orders sought herein are granted.

8. The deponent has attached Copy of agreement dated 21st October, 2016. b) Copy of certificate of confirmation of grant issued on 30/12/2016. c) Copy of official search dated 4th April, 2016. d) Copy of title e) Copy of green card dated 23/08/2024. f) Copy of the Letters dated 03/10/2011 and 19/03/2024. g) Minutes dated 25/06/2019. h) Copy of order issued and i) Copy of judgment delivered 20/05/2025.

Response to the application dated 3/6/2025

9. The application is opposed vide the replying affidavit of Maurice Oduor Abony the 1st Respondent sworn on 24/06/2025.
10. It is deponed that the trial Magistrate did not grant orders of stay of execution. That the trial court upon perusal of the entries in the green card of the suit property established that the same did not show the existence of a charge at any point. Further that the appellant did not pay any consideration for the property.
11. The respondent depones that he has incurred loss and damage as he has been unable to enjoy peaceful possession or make any better use of it. That the application was meant to delay execution and enjoyment of the respondents' fruits of the judgement. That the intended appeal has no chance of success and hence will not be rendered nugatory. That the application does not meet the threshold for the grant of orders of stay of execution.

NOTICE OF MOTION DATED 12/11/2025

12. The Notice of Motion dated 12/11/2025 was filed seeking orders that; -

- 1) SPENT
- 2) Leave be granted to produce and rely on the ruling dated 10/11/2025 in Kisumu Magistrates Court Succession No. 195 of 2016 revoking the Grant
- 3) Leave be granted to file a Supplementary Affidavit annexing the said ruling within 7 days
- 4) The taxed Bill of Costs (Kshs. 171,400/-) dated 24/10/2025 and its execution be stayed pending appeal
- 5) That the execution of the judgement and decree in MCELCNo.69 of 2019 be stayed pending appeal.
- 6) The ruling in the application dated 3/6/2025 be stayed pending the

13 The application is premised on the grounds on its face and the depositions in the replying affidavit of Nehemiah Mwanda Onyango the appellant herein. The applicant states he is aware of the application dated 3/6/2025 which was pending for ruling.

14 It is deponed that following the judgment herein the Respondents filed a Bill of Costs which was taxed and on 24th October, 2025. The the lower court taxed the 4th Respondent's party-and-party Bill of Costs at Kshs. 171,400/= despite not being awarded the costs in the

judgment and granted only a 30-day stay of execution, which was to expire on 23rd November, 2025.

- 15 Further that on 10th November, 2025, the Kisumu Magistrate's Court in Succession Cause No. 195 of 2016 (In the Estate of William Ochieng Ogwang) delivered a Ruling revoking the Grant of Letters of Administration and Confirmation of Grant issued to the late Dolrosa Akinyi Ochieng. It is deponed on the advice of his advocates on record for the applicant that that the said revocation Ruling is new, material, and decisive evidence that renders the Grant inoperative under Section 76 of the Law of Succession Act which will invalidate the sale to the 4th Respondent on 21st October, 2016, and subsequent transfer to the 1st Respondent.
- 16 Further that the same will undermine the basis of the taxed costs (instruction fees calculated on Kshs. 2.5 million transaction value) and strengthens his case for stay of execution and appeal.
- 17 It is deponed that the urgency was because the revocation Ruling was delivered after the close of pleadings and submissions in the stay application, the taxation of the Bill of Costs, The impugned judgment. That he acted with utmost expedition in obtaining a certified copy of the revocation Ruling on 11th November, 2025, and immediately filed this application.
- 18 That the 4th Respondent may execute the taxed costs upon expiry of the 30 days stay on 23rd November, 2025

therefore the ruling on the stay application on 4th December, 2025, will be rendered nugatory. Consequently, the applicant states he will suffer irreparable harm and substantial loss, including enforcement of costs based on an invalidated Grant.

- 19 That no prejudice will be occasioned to the Respondents by certifying urgency, as the revocation is a public judicial act directly affecting the estate at the core of this dispute.
- 20 The applicant annexed a) Ruling delivered on 10/11/2025. b) Ruling delivered 24/10/2025. c) Orders issued on 20/08/2025. d) Copy of Judgment. He avers that it is in the interest of justice that this application be heard urgently to preserve the integrity of the appeal and prevent miscarriage of justice and undertakes to abide by conditions imposed by the court.

Respondents Reply to the application dated 12/11/2025

- 21 The application was also opposed by the 1st respondent Maurice Oduor sworn on 28th November 2025.
- 22 It is deponed that the costs of the suit SIAYA MCELC NO. 69 OF 2019 were awarded to the 1st and 4th Defendants therein and the indication in the judgement awarding the costs to the 1st and 2nd Defendants was merely a clerical error since the 2nd Defendant never participated in the suit, only the 1st and 4th Defendant participated in the

case as indicated in the judgment. The clerical error can be easily remedied.

- 23 That the clerical error issue is quite evident and the same cannot form the basis of an application for stay. The Applicant is better advised to pay the costs incurred in the lower court before continuing with the instant appeal as thirty (30) days have lapsed since the award of the same.
- 24 The deponent further states without prejudice to the foregoing that he will aver during the hearing of the appeal that the alleged revocation of the Grant of Letters of Administration and Confirmation of Grant issued to DOLROSA AKINYI OCHIENG in KISUMU MCSUCC CAUSE NO. 195 OF 2016 was obtained ex-parte, stealthily and without the service and/or knowledge of the 3rd Respondent, WILLIAM OCHIENG' OGWANG who is the administrator to the estate of DOLROSA AKINYI OCHIENG. That neither of the parties herein were served or made aware of the application for the revocation of the said grant despite their interest in the suit property therein. The Advocate on record for the Applicant herein was the same Advocate appearing in the succession matter indicating malice and/or bad faith on the applicants part by deliberately failing to serve the 1st respondent herein as an interested party in the succession case.
- 25 That the administrator in the succession case above one DOLROSA AKINYI OCHIENG died a long time ago and as such the application for revocation of the grant issued to

her is suspect as no party was served and the matter proceeded unopposed. That in view of the open bias in the conduct of counsel regarding the manner of obtaining the order of setting aside the succession proceedings that had been decided at the High Court, it would be an abuse of the court process to purport to admit the document that is obviously malicious and aimed at derailing the judgment of the lower court which was just in the circumstances.

- 26 It is deponed that the intended attempt to get additional evidence in the instant Appeal will have no bearing on the present appeal as the same will proceed on the basis of evidence tendered during trial.
- 27 The deponent reiterates that he opposes the application since the Applicant had already applied for stay of execution of judgment and decree vide his application dated 05/11/2025. Further the applicant already has an order of stay in the subordinate court and there is no need for wasting precious judicial time in this application - a copy of the order is attached.
- 28 That no irreparable harm, substantial loss or prejudice will be occasioned on the Applicant if the orders sought are not granted. The application is termed as frivolous, vexatious, bad in law and abuse of the court process and should be dismissed with costs.

SUBMISSIONS

- 29 The court issued directions that both applications be heard concurrently for time management. Both applications were to be heard by way of written submissions. The applicant filed submissions dated 2/3/2026 which submissions only addressed the application of 12/11/2025. The same were filed out of time without leave of the court. The 1st Respondents submissions are dated 9/02/2026. The 4th Respondent did not file submissions.
- 30 It is noteworthy that this matter came up before me on 4/02/2026 to confirm compliance with the court's directions on filing of submissions. Counsel for the Applicant was absent though the date had been fixed in his presence. The court however noting that a replying affidavit had been filed I did grant the liberty to the 1st Respondent to file submissions within 7 days otherwise the court would still rely on what was on record.
- 31 The 7 days above expired on 18/2/2026. The matter came up on 23/3/2026 when I deferred judgement and the applicant never sought leave for his submissions dated 2/3/2026 to be admitted as duly filed. The firm of Aziz & Associates had filed their Notice of change of advocates by 11/12/2025. It is not enough for counsel to apologise within submissions for the delay and state they were unwell. This is very unprocedural. The court will therefore not consider the submissions but will rely on the application and its supporting affidavit and the law.

ANALYSIS AND DETERMINATION

- 32 I have considered the foregoing. I will handle the applications simultaneous on the main issue of stay of execution. I will then later make a determination on the admission of the ruling delivered by the Court in Kisumu.
- 33 The application has been brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules and Sections 1A,1B, 3, 3A, 63(e) of the Civil Procedure Act.
- 34 The powers of the court to grant orders of stay of execution are donated by Order 42 Rule 6 of the Civil Procedure Rules, which provides as follows; -

“(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 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.

35 It is evident from the above provisions that jurisdiction to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant. See **Amal Hauliers Limited Vs Abdulnasi Abukar Hassan (2017) eKLR & Butt Vs Rent Tribunal (1982) KLR 417.**

36 The court has also noted **the case of Raeli Hydro Systems Limited v Ouko [2024] KEHC 5124 (KLR)**, cited by the 1st respondent rehashing the above conditions.

37 The court in **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, stated as follows; -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, it does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be

prevented by preserving the status quo because such loss would render the appeal nugatory.”

- 38 Arising from the above, substantial loss is the main parameter to be demonstrated by an applicant desiring orders of stay of execution of the decree of the court.
- 39 The burden of proof lay on the applicant to prove that he will suffer irreparable loss if the execution of the judgement of the trial court is not stayed. He has deponed that he is reasonably apprehensive that the suit property is likely to be exposed to adverse dealings by the 1st Respondent, including, sale, transfer or mortgage to third parties which in turn would affect the substratum of his appeal thus rendering it nugatory.
- 40 The respondents have submitted the dismissal order is a negative order which is not capable of execution and placed reliance on the case of **David Kipruto Chingi & another vs Director of Public Prosecutions & 2 others [2016] eKLR**, where the court observed that an application seeking stay of execution of a negative order was bound to fail.
- 41 I have perused the judgement of the trial court. The court held that the plaintiffs had failed to prove his case against the 1st and 4th defendants to the required standard of balance of probabilities. The court noted that the 1st defendants title is not impeachable. That the 1st defendant is in possession of the suit property legally and shall hold

it exclusively in peace. The trial court then awarded costs to the 1st and 2nd defendant.

42 The applicant has not denied that the 1st defendant is in occupation of the suit property. However, his apprehension is that the land will be transferred and or charged to other parties. Mine is to look at the effects of the sale to a third party during the pendency of the appeal and or even charging of the same to a financial institution who both would not be parties to the appeal. Indeed, in both cases the judgement of the court cannot be actualised should the appellant succeed. The suit property which will be the substratum of the appeal will be out of the reach of the appellate court thus rendering the appeal nugatory. What then will be required of the successful party in the appeal would be to probably file a suit against the respondent and the financial institution which in my view could have been avoided at this stage.

43 The court is guided by the decision of the Court of Appeal in the case of In **Reliance Bank Ltd vs. Norlake Investments Ltd [2002] I EA 227**, the Court expressed that an appeal would be rendered nugatory if refusal to grant an order of stay to the applicant would cause such hardship as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.

44 It has been urged by the respondent that the appeal stands no chances of succeeding but it is now established

that an arguable appeal need not be one that must necessarily succeed.

- 45 It has been urged by the respondent that the court must also look at the respondent and ensure that he enjoys the fruit of his judgement. The 1st respondent is in possession and the judgement of the trial court is in his favor. I see no prejudice that will be suffered by the 1st Respondent if the application is allowed to avoid rendering the appeal nugatory.
- 46 The respondents have submitted the dismissal order is a negative order which is not capable of execution and placed reliance on the case of **David Kipruto Chingi & another vs Director of Public Prosecutions & 2 others [2016] eKLR**, where the court observed that an application seeking stay of execution of a negative order was bound to fail. I think this has been answered by my foregoing analysis. Moreover, I note there was an order for costs that was made in favor of the 1st and 2nd respondent.
- 47 I have noted the submissions on the issue of costs and these were introduced following the application dated 12/11/2025. However, from the judgement it is clear that costs were awarded to the 1st and 2nd defendant. The costs have been taxed. On whether the same shall be sustained is a matter for canvassing at the hearing of the main appeal including the issue of error on the face of the record if at all. However, the danger of execution by the 4th defendant could be imminent. I have noted the

applicant's readiness to abide by the terms of this court. An order for deposit of security will suffice.

- 48 Based on the foregoing I would allow the application for orders of stay of execution but with conditions.

Whether the Applicant has demonstrated sufficient grounds for court to grant leave for production of additional evidence in appellate court?

- 49 The applicant herein seeks leave from this Court to produce additional evidence not tendered at the trial court; being a ruling from KISUMU MCSUCC NO. 195 OF 2016 delivered on 10th November, 2025.

- 50 The court will consider 1) Whether the Applicant has met the statutory threshold to warrant the grant of leave to adduce additional evidence and 2) Whether the grant of such leave will prejudice the Respondent or otherwise.

- 51 Section 78 of the Civil Procedure Act Chapter 21 of the Laws of Kenya makes provision on the duties of an appellate court and reads; -

Powers of appellate court

1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d)to take additional evidence or to require the evidence to be taken;

(e)to order a new trial.

(2)Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

52 Arising from the above provisions therefore an appellate court is vested with power to grant leave for production of additional evidence where appropriate.

53 There also a number of judicial decisions that have enunciated the parameters to be considered by the court in granting such leave.

54 The Supreme Court of Kenya in the case of **Muhammed Abdi Muhammed v Ahmed Abdulahi Muhhamed & 3 Others [2018] eKLR**, stated thus;

79.Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

(a)the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;

(b)it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;

(c)it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;

(d)Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;

(e)the evidence must be credible in the sense that it is capable of belief;

(f)the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;

(g)whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;

(h)where the additional evidence discloses a strong prima facie case of willful deception of the Court;

(i)The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.

(j)A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.

(k)The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

55 The Supreme Court re-validated the above principles in the case of **Attorney General v Zinj Limited (Petition 1 of 2020) [2021] KESC 63 (KLR) (Civ) (5 March 2021) (Ruling);**

56 Applying and guided by the foregoing principles I will proceed to determine whether the Applicant has met the prescribed threshold to warrant the grant of leave to adduce additional evidence, either in the manner sought or at all.

57 The evidence sought to be admitted is the ruling of Kisumu Magistrate's Court in Succession Cause No. 195 of 2016 (In the Estate of William Ochieng Ogwang delivered

10th November, 2025. The same is stated to have revoked the Grant of Letters of Administration and Confirmation of Grant issued to the late Dolrosa Akinyi Ochieng. The applicant contends that the said revocation Ruling is new, material, and decisive evidence that renders the Grant inoperative under Section 76 of the Law of Succession Act which will invalidate the sale to the 4th Respondent on 21st October, 2016, and subsequent transfer to the 1st Respondent.

- 58 My understanding of the above is that firstly the new evidence supports the application for stay of execution but which I have already addressed in my determination of the application for stay of execution. Secondly that this evidence will invalidate the judgement of the trial court wherein the court found the titles impeachable. This is anchored on the provisions of section 76 of the Law of Succession Act.
- 59 Back to the parameters set out by the Apex Court. The question that arises is whether this is new evidence? It is new for the reason that the ruling did not exist at the time of the delivery of the trial court judgement. The ruling was delivered 10th November, 2025 and the trial court judgement on 20/5/2025.
- 60 However it is noteworthy that the admission of new evidence should be done in exceptional circumstances. I will therefore consider whether this information is new in

the real sense of the word. I have seen the ruling revoking the grant and it reveals that the summons for Revocation of Grant are dated 18th September,2024. The same were filed under certificate of urgency where a Mr. Ndicho appeared for the applicant. It has been alleged by the 1st respondent that this is the same counsel representing the applicants in this matter. This has not been denied. The pendency of the summons for revocation cannot therefore be termed as new except the outcome thereof.

- 61 What is disturbing to me is the fact that this information was never disclosed to the trial court yet it was filed during the pendency of the proceedings in the lower court as late as September 2024. I have perused the judgement and the same does not reveal the court was privy to the said information. I have also looked at the length of time it has taken for the summons of revocation to be filed under certificate of urgency in September 2024 and not earlier.
- 62 Further I have seen the respondent's response to the said order and the grounds they indicate they will raise on appeal key among them the orders having been made exparte, lack of service on a party who is interested in the matter by virtue of purchase. In my view this court would not be the competent court to investigate these issues. The right forum would be where the orders were issued. The ruling further discloses that there is filed succession case NO 20 of 2018 in the High Court which this court is not privy to.

63 I think admitting the evidence will not bring any clarity to the issues but is more likely to cause prejudice to the respondent in the appeal since he did not participate in the succession proceedings of the ruling. Further I have also expressed concern at the bonafides on the part of the applicant who failed to make a disclosure of the fact that they had moved to file summons for revocation of grant.

64 The upshot of the foregoing is that I decline to grant leave as prayed.

65 The following orders therefore issue to dispose of Notice of Motion application dated 3rd June 2025 and 12/11/2025.

1) There be an order of stay of execution of the Judgement delivered on 20th May, 2025 by Hon. Benjamin Limo and all the consequential orders and decree. To preserve the substratum of the appeal the status quo of the register of the suit property Central Alego/Hono/1560 shall be maintained by the prohibition of registration of any disposition, charge or interests pending the hearing of the appeal

2) To safeguard the respondents' interest, an order hereby issues that the applicant Appellant shall, within 45 days from the date of delivery of this ruling, deposit the amount of 150,000/- with the court pending the hearing and determination of the appeal.

3) In default of 2) above the order of stay of execution will automatically lapse.

- 4)** The application dated 12/11/2025 is dismissed to the extent that the prayer for leave to produce and rely on the ruling dated 10/11/2025 in Kisumu Magistrates Court Succession No. 195 of 2016 revoking the Grant is declined.
- 5)** The costs of both applications shall abide the outcome of the appeal.

Orders Accordingly

DATED at SIAYA this 10th Day of April 2026

HON. JUSTICE A. E. DENA
JUDGE
10/4/2026

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

Mr. Omondi for Applicant/Appellant

Mr Akira Holding Brief for Mr. Nyaanga Respondent

Court assistant: Dorothy Awuor