

REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT SIAYA
ELC. MISCELLENOUS APPLICATION CASE NO. E034 OF 2025

MARGARET ADHIAMBO OMONDI.....
APPLICANT

=VERSUS=

CHARLES OTIENO MUGA.....1ST
RESPONDENT

DANIEL OCHIENG MUGA.....2ND
RESPONDENT

ROSELINE ADHIAMBO NDONGA.....3RD
RESPONDENT

CARTOGRAPHER, SIAYA LANDS OFFICES.....4TH
RESPONDENT

DISTRICT LAND REGISTRAR, SIAYA.....5TH
RESPONDENT

RULING

1 This Honorable Court is tasked to determine a Notice of Motion application dated 26th November 2025 by the proposed Appellant and which seeks for the following orders: -

- 1) SPENT
- 2) SPENT
- 3) THAT the Honorable issue orders for stay of execution of the decree/order/and or judgment delivered by the trial court as against Applicant on 2nd October 2025 by Hon. Benjamin Limo at Siaya Chief Magistrate Court. MCELC/E020/2020

herein pending hearing and determination of the intended appeal.

- 4) THAT the Honorable Court issue orders for stay of execution of the decree/order/and or judgment delivered by the trial court as against Applicant on 2nd October 2025 by Hon. Benjamin Limo at Siaya Chief Magistrate Court MCELC E020/2020 herein pending hearing and determination of the present application.
 - 5) THAT the Honorable Court be pleased to issue orders for stay of execution of the decree/order/and or judgment delivered by the trial court as against Applicant on 2nd October 2025 by Hon. Benjamin Limo at Siaya Chief Magistrate Court MCELC E020/2020 herein pending hearing and determination of the intended appeal in the court of appeal.
 - 6) THAT the Honorable Court be pleased to grant the applicant leave to appeal out of time against the judgment/decreed issued on 2nd October 2025 by Hon. Benjamin Limo at Siaya Chief Magistrate Court MCELC E020/2020 at Siaya Chief Magistrate Court in MCELC/E020/2020.
- 2 The application is premised on the Supporting Affidavit of Margret Adhiambo Omondi sworn on the 26th November 2025. The applicant avers that she was lately made aware of judgment delivered herein. The Certified copies of judgment and decree are annexed. That the said judgment was delivered when she was severely sick and was admitted in Hospital. That her former Advocates on record did not inform her of the progress of the case. She only realized the progress of the case when the 1st,

2nd and 3rd respondents went to evict her from the suit parcel. She annexes the Certified copy of discharge summary forms.

- 3 It is deponed that she was advised by her current advocates that the Judgment was entered and decree issued on 2nd October 2025 in favor of the Respondents against her. That having been dissatisfied with the terms of the judgment in its entirety and that Counsel has advised leave of the court to appeal out of the statutory timeline is required. She annexes a copy draft Memorandum of Appeal.
- 4 That there is reasonable belief and apprehension that the Respondents who has extracted a court order/decreed and shall proceed with execution of the said decree despite pendency of appeal thus making the outcome of the intended appeal nugatory.
- 5 The applicant avers that should the respondents begin execution of subordinate court's decree; she stands to suffer substantial and irreparable loss as the respondents have intention of unilaterally selling the suit land to third parties. That they have recently verbally threatened her to vacate yet she has constructed permanent houses on the suit land and residing on them for a period of 45 years. Her grandparents and other relatives are buried on the suit land rendering this appeal nugatory and futile to proceed therewith.
- 6 The applicant states that she is amenable to giving such security as the Honorable court may deem fit or meet such conditions as court may reasonably order for granting the stay of execution,

including depositing sum in a joint interest earning account by the corresponding Advocates.

- 7 It is her belief that the Appeal has overwhelming chances of success and the same should not be defeated by the Respondent's imminent execution of judgment and decree rendered by the trial court. That the respondents will not suffer prejudice if the application is allowed. However, she stands to suffer great ham and inconvenience if the present application is declined.
- 8 It is deponed that the application has been made timeously and that there is no unreasonable delay either on my part or my counsel on record and that she will expeditiously proceed with appeal process to avoid any delay to the conclusion of this matter. The applicant prays the application be allowed as prayed.

**REPLYING AFFIDAVIT ON BEHALF OF THE 1ST AND 2ND
RESPONDENTS**

- 9 The application is opposed by the replying affidavit sworn by Daniel Ochieng Muga sworn on 26/01/2026. The respondent avers that the prayer for stay of execution is misconceived and overtaken by events, the decree and/or orders issued having already been lawfully acted upon and substantially implemented.
- 10 That the suit was heard and determined. A copy of the decree is annexed. That pursuant to paragraph 4 of the decree (demarcation order), the Land Registrar, Siaya, issued a summons dated 6th November 2025 summoning all parties to attend the demarcation exercise on 21st November 2025. That

the said summons was duly served to the applicant by the land's office. The summons is attached.

- 11 That the demarcation exercise was duly conducted in the absence of the applicant who failed to attend on the said 21st November 2025. Present were the Land Registrar, the land surveyor, the Assistant Chief, and police officers. The Land Registrar confirmed completion of the survey by letter dated 5th December 2025. Copy of attendance/confirmation letter is annexed.
- 12 It is deponed that subsequently a surveyor's report was prepared after the exercise dated the 5th of December 2025 and a copy is annexed. That the only order in the decree capable of execution in the conventional sense, namely, the demarcation of boundaries under paragraph 4 has been fully complied with and completed. The exercise was carried out pursuant to the court order and is now overtaken by events.
- 13 That the remaining orders in the decree are declaratory on ownership and injunctive on permanent restraint from interference which are self-executing, prohibitive in nature, and do not require further positive acts of execution. Thus, there is no pending or prospective execution capable of being stayed.
- 14 It is reiterated there is nothing left to stay the subject matter sought to be stayed, the demarcation exercise has already occurred. Courts do not entertain moot applications or decide hypothetical or academic questions as these are a waste of judicial time.
- 15 The respondents' further states that Applicant has further failed to demonstrate any substantial loss as required under Order 42 Rule 6 of the Civil Procedure Rules, and none can arise

where execution has already taken place. No security has been provided either. That the Applicant cannot approbate and reprobate, having herself applied for demarcation of the suit property on or about 24th November 2025, and now seeks to stay the very process she invoked.

16 On the application for leave to file appeal out of time it is urged that the Applicant was, at all material times during the trial and at the time of delivery of judgment on 2nd October 2025, ably represented by advocates on record, whom she ought to have instructed to file an appeal within the prescribed timelines. The decree and judgement capture the presence of her advocate on record during the delivery of the judgement. The applicant has not discharged the burden of proof required to warrant enlargement of time as the discharge forms annexed do not demonstrate continuous admission or incapacity for the entire period between 25th September 2025 and 26th November 2025, nor do they establish that the Applicant was incapable of issuing instructions to her advocates.

17 It is urged that the Applicant should be put to strict proof by way of cogent medical evidence, including letters of admission, treatment records, and confirmation of continuous incapacity, none of which have been availed. Further that the Applicant had the benefit of an Interested Party, being her son, who was involved in the matter and who could equally have instructed counsel on her behalf within time.

18 On allegations of threats and intended disposal it is averred that at no time have the Respondents engaged, interacted, or communicated with the Applicant in any manner amounting to threats, and the Applicant has placed no evidence whatsoever

before this Honourable Court to support such claims. The allegation that the Respondents intend to sell, transfer, or dispose of the suit property is only known to the Applicant, as the Respondents have never engaged any third parties for such purposes. The Applicant only reported the alleged threats to the police on or about 14th January 2026, long after filing the present application, rendering the report a clear afterthought and not a genuine or contemporaneous concern.

19 Moreover the report relied upon by the Applicant itself notes that her homestead is situated on the Respondents' parcel, and that she has the option to voluntarily vacate, eviction being a consequence only of her own election not to comply with the law.

20 It is averred that the Applicant has a history of filing multiple frivolous and repetitive applications, and of invoking both the judicial and criminal justice systems with the sole intention of denying the Respondents the fruits of a lawful judgment. The application is termed as an abuse of court process.

SUBMISSIONS

21 The respondent informed the court they would rely on their replying affidavit. The court issued directions on filing of submissions on 3/3/2016 allowing the applicant to file submissions within 10 days. The directions were served by the court registry via email on 3/3/2026. As at 16/4/2026 when I sat to prepare this ruling the same were not record. I will proceed on the affidavits filed for and against the application and the submission.

ANALYSIS AND DETERMINATION

- 22 The following issues commend determination: -
- 1) Whether the court should exercise its discretion to enlarge time for filing of an appeal.
 - 2) Whether the application meets the requirements under Order 42 Rule 6 for grant of stay of execution.
 - 3) Who bears the Costs of this application?
- 23 The application is brought under the provisions of section, 79(g) section 3, and section 3A of the Civil Procedure Act, Order 50 rule 6, Order 22, Rule 22(1), Order 51, Rule 1, of the Civil Procedure Rules 2010.

Whether the court should exercise its discretion to enlarge time for filing of an appeal.

- 24 Jurisdiction to enlarge time is donated under the provisions of Section 79G of the Civil Procedure Act which reads; -

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time”.

25 In **Salat v Independent Electoral and Boundaries Commission & 7 others (Application 16 of 2014) [2014] KESC 12 (KLR) (Civ) (4 July 2014) (Ruling)** the Supreme Court of Kenya outlined some elements which the Court must consider while determining a question of expansion of time thus; -

Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court, Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court; Whether there will be any prejudice suffered by the respondents if the extension is granted; Whether the application has been brought without undue delay; and whether in certain cases, like election petitions, public interest should be a consideration for extending time.

26 From the provisions of the law the powers to extend time for filing of an appeal against an order or decree of a court is discretionary. The court must consider the reasons given for such delay and if the same are reasonable. There is no one jacket fits all and therefore every application is decided on its own circumstances.

27 Applying the guidance expounded in the caselaw above I will proceed to determine if the reasons furnished for not filing the

appeal within the required time is reasonable. The applicant depones she was seriously sick and was admitted in Hospital when the judgment was delivered. That her former Advocates on record did not inform her of the progress of the case. She only realized the progress of the case when the 1st, 2nd and 3rd respondents went to evict her from the suit parcel.

- 28 On the other hand the respondents contend that the decree and judgement reveal the presence of the applicants advocate on record during the delivery of the judgement. Further that the discharge forms annexed do not demonstrate continuous admission or incapacity for the entire period between 25th September 2025 and 26th November 2025, nor do they establish that the Applicant was incapable of issuing instructions to her advocates.
- 29 I think the reason given firstly is that the applicant was not aware of the judgement because her counsel on record then did not inform her. In my view therefore the rejoinder that counsel was present is not a good counter attack this includes the presence of the interested party because we are not told if he was present during the delivery of the judgement.
- 30 I will therefore focus on the discharge summary Form attached in proof of the applicant's indisposition and hospitalization. The same is from Ober Sub-County Hospital. It shows the date of admission as 30/09/2025 and date of discharge as 10/11/25. It can therefore be deduced the judgement was delivered when she was in hospital. It would appear that the doctor also

prescribed some follow up clinics for physiotherapy though it is not clear whether she attended. But I must still emphasize the deponents states she was not aware that judgement had been delivered.

- 31 I think I will not emphasize the issue. I have always taken the position where a litigant gives sickness as a cause for failure to comply with statutory timelines, I will leave it to her and her God as it is written in the book of proverbs that life and death is in the power of the tongue and whoever loves it shall enjoy of its fruits. I will make a finding that the reasons for the delay is reasonable. As to prejudice I do not see what prejudice the extension of time would cause the respondent vis a vis shutting out the applicant from exercising the right of appeal.
- 32 Moreover the 30 days required within which the appeal ought to have been filed elapsed on 2nd November 2025 without excluding weekends. The present application was filed on 26th November 2025 and to me I would not term this undue delay.
- 33 I will accord the opportunity for the intended appeal to be ventilated as opposed to burying it completely. Based on the foregoing the court shall exercise its discretion in favor of extending time for the applicant to file the appeal.

Whether the application meets the requirements under Order 42 Rule 6 for grant of stay of execution.

34 The principles guiding the grant of a stay of execution pending appeal are laid out under Order 42 rule 6(2) of the **Civil Procedure Rules** which provide; -

“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.

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 power 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 and Antoine Ndiaye v African Virtual University [2015] eKLR.

36 As to what constitutes substantial loss, Aburili J in the case of **Nicholas Stephen Okaka and Another (2022) eKLR Civil Appeal No. 3 of 2022** cited with approval the holding in the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, which held that: -

“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, 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 ... 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.”

37 The respondent has furnished evidence before this court that the trial decree has been affected as evidenced in the boundary demarcation report by Ministry of Lands dated

5/12/2025. This was in respect of order no. 2 of the decree. But having noted this I think what I must address applying the above caselaw if execution will lead to a state that will irreparably affect or negate the very essential core of the applicant as a successful party essentially this is what would render the appeal nugatory.

38 I think for me the report makes a finding that *'There was a well-defined old homestead within the spatial space of parcel No. 2203. This homestead was reported to be owned by the proprietors of parcel no. Siaya/Obambo/1353'*.

39 The implications of the above finding must be considered together with the rest of the orders in the decree. It stated the rest of the orders are self-executing. However, it is clear that Order No.2 declared the counterclaimers as the owners of parcel 2203 yet the appellants home is said to be within this parcel. Clearly the applicant's apprehension of eviction is real and justified and worthy of consideration by this court. As it is the counterclaimers are at liberty to do anything with the parcel 2203 including disposition. This would render the appeal nugatory should the appellant succeed.

40 I think based on the above I would grant orders of stay of execution just for the purpose of preserving the subject of the appeal and maintaining the status quo to the extent that the appellants homestead seems to be in the land that has been declared to belong to the adversary.

41 I have already made a finding that the application has been brought without unreasonable delay.

42 The applicant has undertaken to abide by any condition that this court may impose. This could refer to security. The jurisdiction to set the terms of security is the preserve of the court and not the parties. I think I will bond the appellant to keep the peace and desist from disturbing the decree holders in any manner during the pendency of this appeal as she awaits the outcome of this appeal. The decree holders shall also maintain the status quo.

43 The upshot of the foregoing is that the application dated 26th November 2025 is disposed in the following terms; -

1) That leave be and is hereby granted allowing the Applicant to file appeal against the judgement of judgment delivered by the trial court as against Applicant on 2nd October 2025 by Hon. Benjamin Limo in Siaya Chief Magistrate Court. MCELC/E020/2020.

2) The appeal shall be filed within 14 days of this ruling failure to which leave shall automatically lapse and the orders discharged.

3) That pending the hearing and determination of the intended appeal the status quo shall be maintained to the extent that there is a homestead belonging to the appellant which is situate within parcel LR Siaya/Obambo/2203.

4) The status quo on the register of parcel LR Siaya/Obambo/2203 shall also be maintained.

5) Both parties shall keep the peace

6) The costs of the application shall abide the outcome of the Appeal.

Dated at Siaya this 22nd Day of April 2026

HON. JUSTICE A. E. DENA

JUDGE

22/4/2026

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

Mr. Mulinge for Applicant

Ms Omondi Holding Brief for Ms. Nyambeki for 1st and 2nd Respondents

Mr Okoth Holding Brief for Ms. Essendi for 4th and 5th Respondent

Court assistant: Dorothy Awuor