

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC OS NO 5 OF 2021

ROSE ALUOCH AROKO

NANZALA SIWENKOLO GONDA and KANDIRE NJERI

NAKATONDA GONDA (Suing as Personal

Representatives and Administrators of the Estate of

GONDA ELKANA

SYONGOHO(Deceased).....PLAINTIFF

VERSUS

ANGELINE NJERI

MACHARIA.....DEFENDANT/APPLICANT

RULING

Background

1. Before this court for determination is the Defendant's/Applicant's Notice of Motion Application dated 30th June, 2025 brought pursuant to the provisions of **Articles 50 and 159(2) (d) of the Constitution**, and **Order 42 rule 6 & Order 51 Rule 1 of the Civil Procedure Rules** seeking the following reliefs:

- i. Spent*
- ii. Spent*
- iii. Pending hearing and determination of the intended appeal herein, an order of stay of execution do issue staying the Judgement and*

Decree delivered by Hon. Justice E.M. Washe J. on 29th May 2025.

iv. This Honourable court do make the appropriate orders to preserve the subject matter of the intended appeal herein and for the expeditious hearing and determination of the intended appeal.

v. The costs of and incidental to this application to abide the outcome of the appeal.

2. The Motion is based on the grounds set out on the face thereof and supported by the affidavit of Angelina Njeri Macharia, the Defendant/Applicant herein, who deponed that judgement was delivered against her on 29th May 2025 by Hon. Justice E.M Washe J, in which he allowed the Plaintiff/Respondent's claim declaring her the lawful registered owner of the property known as Nairobi/ Block 91/31 – Golden Gate Estate South B (*suit property*) and directed that she vacates therefrom and in default she be evicted.
3. It is the Defendant's/ Applicant's case that the Respondent was also granted mesne profit payable at the rate of Kshs 60,000 per month from the date of the judgement until vacant possession was granted and in default, liberty to levy distress for any outstanding mesne profit that will become due after the 30 days from the date of this judgment.

4. Ms Macharia explained that she is aggrieved by the judgement and intends to prefer an appeal to the Court of Appeal; that she has in this respect already lodged a notice of appeal and requested for certified copies of the judgement, decree and proceeding and that she is exposed to imminent execution, which the Respondent has initiated through a letter dated 3rd June, 2025 demanding vacant possession pursuant to the judgment.
5. She averred that unless an order for stay of execution is granted, she will suffer undue prejudice as her elderly mother who has resided on the suit property for nearly 30 years and for whom it is the only home she has ever known stands to be rendered homeless, and that the property has deep sentimental and proprietary significance to them.
6. According to Ms. Macharia, the intended appeal raises arguable and non-frivolous points of law, *to wit*, the trial Judge erred by failing to apply the doctrine of *lis pendens*, disregarding binding court orders issued in earlier proceedings, and misapplying the principles of burden and standard of proof.
7. She explained that the substance of the appeal will be rendered nugatory should the Respondent proceed with execution, seeing as there are no stay orders to preserve the status of the suit property as she pursues the intended appeal.

- 8.** She stated that apart from lodging an appeal, she has also initiated efforts to engage the Respondent with a view to agreeing on terms for stay of execution pending appeal, including the payment of mesne profits. However, the Respondent has not responded, and she apprehends that eviction may proceed notwithstanding the intended appeal, which she maintains is arguable and raises substantial issues.
- 9.** The Applicant further deponed that she has demonstrated good faith, having previously complied with court orders in related proceedings by depositing mesne profits in a joint account as security pending appeal. She expressed willingness to abide by similar conditions in the present matter.
- 10.** In response, the Plaintiff/Respondent swore a replying affidavit on 21st July, 2025. She deponed that she is one of the Administrators of the Estate of Gonda Elkana Syongoh (deceased) and has authority and consent of the other Administrators and therefore competent to swear the Affidavit.
- 11.** She stated that the suit property has from 8th March, 2002 been registered in the name of Gonda Elkana Syongoh; that the said Gonda Elkana Syongoh is deceased and she, his widow and two daughters now represent him as substituted in this matter and that at the time of the delivery of the

judgment, the court granted stay of execution for 60 days subject to payment of mesne profits as ordered.

- 12.** According to the Plaintiff/Respondent, the Applicant has been aware of their claim to the property since the year 2002 and cannot now feign surprise at the outcome; that she has had more than ample time to make necessary arrangements to accommodate the current occupants of the property and that the law requires the Applicant to demonstrate that he would suffer loss in the event an order of stay is not granted.
- 13.** According to the Plaintiff, Having to vacate the premises and seek alternative accommodation elsewhere pending the Appeal, does not amount to loss; that in any event, the mesne profits ordered of Kshs.60,000 can easily avail accommodation for the Applicant elsewhere so as to free the property for their occupation and that the subject of the dispute is immovable property, which will remain available pending the determination of the appeal, and that, in the event the appeal succeeds, the Applicant stands to suffer no prejudice.
- 14.** It was also contended that the Respondent has been deprived of possession of the suit property and/or mesne profits for over twenty-three (23) years, largely due to subsisting court orders that have, at various times, shielded

the Applicant, notwithstanding that the property is duly registered in the name of the deceased.

- 15.** As regards arguability of the appeal, it was stated that the issues now raised in the intended appeal have been extensively litigated over the years. She explained that the case began as **CMCC No. 6427 of 2002, Gonda Elkana Syongoh vs Angelina Njeri Macharia** where the Respondent sought to evict the Applicant having been registered as the owner of the suit property pursuant to purchase of the same in an auction and which the Applicant denied, citing an existing case **HCCC No. 1804 OF 1999, Zahra Spares Limited & Angeline Njeri Macharia vs Fidelity Commercial Bank Limited**, and that the same was subsequently dismissed on 9th of July, 2004.
- 16.** Following that judgment, it was deposed that attempts were made to obtain restraining orders at the Court of Appeal vide **CACA NAI 82 OF 2004 and CACA NAI 266 of 2004**; that these applications were both nonstarters; that on 19th of July, 2006, the Court of Appeal marked them as finalized and that no appeal was filed by the Applicant over the court's decision of 9th July, 2004 dismissing her suit against the bank.
- 17.** In the meantime, the Applicant herein passed on and the Administrators of his estate sought to be substituted in the case, **CMCC 6427 of 2002**; that the case was heard inter

partes and judgment delivered on 10th June 2019; that the Applicant herein aggrieved by the said judgment filed an Appeal being **ELC Appeal No. 47 of 2019, Angeline Njeri Macharia V Rose Aluoch 3 Aroko & 2 Others** and that the Appeal was determined with the court remitting the matter back to the lower court for fresh trial.

- 18.** It is the Plaintiff's case that upon the matter being remitted to the lower court, it was found that it had exceeded the pecuniary jurisdiction of that court, necessitating its transfer to this court. Consequently, the dispute, now spanning approximately twenty-three (23) years, was heard afresh and ultimately determined by this court, culminating in a judgment delivered on 29th May 2025 and that in the circumstances, it is evident that the matter has been fully ventilated in all its aspects and conclusively determined, leaving no arguable issues outstanding.
- 19.** She urged the court to recognize that the Applicant is making attempts to tug at the courts heartstrings improperly invoking sentimental considerations relating to occupation of the property. She maintained that such considerations cannot override the Respondent's lawful proprietary rights, particularly in a case involving a property acquired through a valid statutory sale.
- 20.** The Applicant filed a supplementary affidavit on 27th October, 2025. She deponed that in her response, the

Respondent did not dislodge the cogent grounds put forth in the application now before court and its supporting affidavit.

- 21.** In particular, she urged, the replying affidavit does not contradict the reality that in the event that she is evicted from the suit property, she will suffer substantial irreparable loss given the demonstrated sentimental attachment to the house which is her parents' matrimonial home.
- 22.** Also undisputed is the fact that save for the brief period between 23rd August, 2002 when the Respondent obtained ex parte eviction order and 9th October, 2002 when those orders were set aside, it is her mother who has all along been on the suit property.
- 23.** Save for her purely commercial interest, Ms Macharia noted, the Respondent has never been in occupation of the suit property; that he has not demonstrated any prejudice, incapable of compensation that she is likely to suffer if the Applicant remains in occupation and that in any event, any such loss is already adequately mitigated by the ongoing payment of a monthly sum equivalent to mesne profits in the amount of Kshs 60,000.
- 24.** She averred that it is not in dispute that, should the intended appeal succeed, it would effectively dislodge the Respondent's interest in the suit property, which was

acquired through the impugned auction. Consequently, permitting eviction to proceed in the interim would risk rendering the intended appeal nugatory, as any subsequent reversal by the Court of Appeal would be of little use if the eviction has already been effected.

- 25.** She urged that the Respondent has not placed before the court any material to substantiate the assertion that the intended appeal is frivolous or unarguable and that in the circumstances, the court cannot disregard the real possibility that the intended appeal may well succeed.
- 26.** Ms. Macharia submitted that the Applicant remains ready and willing to furnish such security as the court may require, as she has consistently done, pending the hearing and determination of the intended appeal.
- 27.** She further deposed that the Respondent's repeated assertion that she could secure alternative accommodation using an amount equivalent to the mesne profits payable is misguided and fails to appreciate the true nature of her interest in the suit property.
- 28.** She emphasized that her occupation is grounded in a deep sentimental attachment, the property being her parents' matrimonial home, an interest that cannot be replicated or adequately compensated by relocation elsewhere and that in the exercise of its discretion, the court ought to consider the practical consequences of refusing a stay.

29. In particular, she pointed out that allowing eviction to proceed would likely result in a multiplicity of proceedings in the event the intended appeal succeeds, as she would be compelled to institute fresh proceedings to recover possession. Conversely, should the appeal fail, the Respondent would be able to realise her interest in the property without the need for further litigation.

30. Both parties filed submissions and a list of authorities which I have considered.

Analysis and determination

31. Having considered the pleadings, and submissions, the sole issue that arises for determination is whether the Defendant/Applicant has satisfactorily demonstrated the conditions warranting the grant of stay of execution pending Appeal?

32. The law with respect to stay of execution pending appeal is found under **Order 42 Rule 6(1) and (2)** 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 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 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.”

33. In *Vishram Ravji Halai vs Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365*, the Court of Appeal, discussing the High Court’s [read ELC’s] jurisdiction under this Order stated:

“The Superior Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

34. What arises from the foregoing is that the grant of orders of stay of execution is subject to the court’s discretion, the court in this respect being guided by the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules**. The question of how the court should exercise this discretion was extensively discussed by the Court of Appeal in **Butt vs Rent Restriction Tribunal [1982] KLR 417** as follows:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an

appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

35. Further to the above, this court is now enjoined to give effect to the overriding objectives in the exercise of its powers as expressed in **Section 3** of the **Environment and Land Court Act** and **Section 1A** of the **Civil Procedure Act**, to wit the just, expeditious, proportionate and affordable resolution of disputes.

- 36.** By way of a brief background, the Plaintiff/ Respondent instituted the present suit seeking *inter-alia* permanent injunctive orders restraining the Applicant from interfering with the suit property, eviction orders as against the Applicant and mesne profits.
- 37.** The Respondent's case was that it purchased the property from Fidelity Bank pursuant to which it was registered in his names on 8th March, 2002. At the time of purchase, the Applicant was in occupation and refused to cede possession prompting the institution of the suit. In response, the Applicant asserted that at the time of purchasing the property, the suit property was under active litigation and there were injunctive orders in force. She asserted that the registration of the property in the Respondent's name was undertaken fraudulently.
- 38.** The matter proceeded to full hearing and, in a judgment delivered on 29th May 2025, the court found in favour of the Respondent, declaring him the lawful proprietor of the suit property. The court further ordered the Applicant to give vacant possession and issued a permanent injunction restraining her from any dealings with the property. In addition, the Respondent was awarded mesne profits in the sum of Kshs 60,000 per month from the date of the judgment.

- 39.** Aggrieved by this decision, the Applicant intends to appeal to the Court of Appeal. She asks this court to stay the execution of the aforesaid judgment and the decree arising therefrom pending determination of the pending appeal.
- 40.** Turning to the question of whether the parameters for stay have been satisfied, the court observes that the Applicant has deponed to, and made submissions on, the merits of the intended appeal, asserting that it raises arguable grounds. This position has been vigorously contested by the Respondent, who maintains that the proposed grounds are not arguable.
- 41.** It is, however, necessary to clarify that this court's jurisdiction to grant a stay of execution pending appeal is anchored on **Order 42 Rule 6** of the **Civil Procedure Rules**. This provision does not make the arguability of the appeal one of the conditions precedent for the grant of a stay. This position is well-founded. It would be both procedurally improper and logically untenable for this court to assess the arguability of an appeal arising from its own decision. The court will disregard any arguments under this head.
- 42.** Moving to the pre-requisites under **Order 42 Rule 6(2)**, the court will begin with the aspect of sufficient cause. What constitutes the same was explicitly discussed by the court in

Antoine Ndiaye vs. African Virtual University [2015] eKLR, which persuasively stated:

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:

- a) The application is brought without undue delay;***
- b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and***
- c) 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”.***

43. The court concurs. In determining whether the sufficient cause has been established, the court will examine whether the Applicant has satisfied the three mandatory prerequisites for the grant of stay pending appeal.
44. The question of what amounts to unreasonable delay depends on the circumstances of each case. As observed in ***Jaber Mohsen Ali & another vs Priscillah Boit & another [2014] eKLR***, even a one-day delay may be deemed unreasonable depending on the nature of the orders issued and the timelines set by the court.
45. In the present case, the judgment was delivered on 29th May 2025, the notice of appeal was filed on 3rd June 2025, and the present motion filed on 30th June 2025, all within approximately one month. In the circumstances the court is satisfied that the application was filed timeously and without undue delay. Indeed, the Respondent has also conceded as much.
46. Moving to the aspect of substantial loss, the same was discussed in ***Rhoda Mukuma v John Abuoga [1988] eKLR***, as follows:

“Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being - (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has

given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory...”

47. Similarly, the court in Century Oil Trading Company Ltd vs Kenya Shell Limited as cited in Muri Mwaniki & Wamiti Advocates Vs Wings Engineering Services Limited [2020] eKLR, held:

“The word 'substantial' cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words 'substantial loss' must mean something in addition to all different from that.”

48. The courts have also held that substantive loss must be demonstrated. This position was articulated by the Court of Appeal in Kenya Shell Limited vs Benjamin Karuga Kibiru & another [1986] eKLR thus:

“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an Appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

49. The court in ***James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR*** held that the mere commencement or completion of execution does not, of itself, amount to substantial loss, as execution is a lawful process. An applicant must therefore demonstrate additional factors showing that execution would create a state of affairs that irreparably affects the core of the appeal and renders it nugatory.
50. The court is equally mindful of the need to strike a balance between the competing interests of the parties. While an applicant seeks to preserve the subject matter so that the appeal is not rendered nugatory, a respondent is entitled to the fruits of a valid judgment. As aptly stated in ***Machira t/a Machira & Co. Advocates v East African Standard [2002] eKLR***, the court must avoid unduly favoring one party over the other and instead exercise its discretion in a

manner that upholds the overriding objective of doing justice and preventing abuse of the court process.

- 51.** It is the Applicant's contention that she stands to suffer substantial loss if stay is not granted. She asserts that she is exposed to imminent eviction pursuant to the judgment, which would not only dispossess her but also render her elderly mother who has resided on the suit property for nearly three decades, homeless.
- 52.** She further avers that the suit property constitutes her mother's matrimonial home and carries deep sentimental and proprietary significance, which cannot be adequately compensated by an award of damages.
- 53.** In response, the Respondent contends that no substantial loss has been demonstrated, arguing that eviction is a lawful consequence of the judgment and that the Applicant can secure alternative accommodation using the mesne profits payable. Further, the Applicant, having been paying mesne profits in compliance with the decree, is precluded from seeking a stay of execution.
- 54.** Having considered the rival positions, the court finds that the loss apprehended by the Applicant goes beyond the ordinary consequences of execution. It is not in dispute that the Applicant is in occupation of the suit property, which has for over a decade constituted her family home and her mother's matrimonial property. The impugned judgment

declared the Respondent the lawful owner and ordered vacant possession, thereby exposing the Applicant to imminent eviction.

55. In these circumstances, any disturbance of the prevailing status quo would occasion substantial hardship, loss, and dislocation to the Applicant and her elderly mother, consequences that cannot be adequately compensated by an award of damages. On the other hand, the Respondent would suffer no irreparable prejudice beyond the delay inherent in the determination of the appeal. Any loss of income from the property is ascertainable and can readily be compensated by an award of costs.

56. The court further notes that the suit property remains registered in the Respondent's name, and there is no risk of alienation. As regards the contention that partial compliance with the decree disentitles the Applicant from seeking a stay, the court is not persuaded. The payment of mesne profits constitutes compliance with an ancillary monetary component of the decree and does not amount to satisfaction or execution of the substantive relief, namely the delivery of vacant possession.

57. The two obligations are distinct in nature and effect. Whereas vacant possession irreversibly alters the status quo, the payment of mesne profits is a pecuniary obligation capable of restitution. In the event the intended appeal

succeeds, such sums are readily refundable and do not occasion irreparable prejudice. Accordingly, such partial compliance cannot be construed as a waiver of the right to seek a stay of execution.

58. Accordingly, this is not a case where the decree has been fully or substantially executed so as to render an order of stay futile within the meaning contemplated in **Jaribu Holdings Ltd vs Kenya Commercial Bank Ltd [2008] eKLR.**

59. Moving to the last issue regarding provision of security, its purpose was discussed by the court in **Arun C Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others [2014] eKLR,** thus:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor..... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume

the security must be one which can serve that purpose.”

60. In this respect, the Applicant states that she has demonstrated good faith by paying mesne profits and is willing to comply with a similar condition. The court finds this proposition satisfactory. Accordingly, the court is satisfied that the Applicants have met the requirement as to security.

61. In the end, the court finds that the Applicant has met the threshold for the grant of a conditional stay of execution pending appeal. For those reasons, the application is allowed as follows:

- i. There be a conditional stay of execution of this court’s judgement dated 29th May, 2025 pending the hearing and determination of the appeal before the Court of Appeal.**
- ii. The stay of execution is granted on condition that the Applicant continues to deposit the monthly sum of Kshs 60,000 on the 5th day of every month in a joint interest-earning account in the names of Counsel for the Applicant and the Respondent. In default, the stay will lapse.**
- iii. Parties to bear their own costs.**

Dated, signed and delivered virtually in Nairobi this 30th day of April, 2026.

O. A. Angote
Judge

In the presence of;

Ms Ochieng for Mr. Ataka for Defednant/Applicant

Mr. Wanyonyi for Plaintiff/Respondent

Court Assistant: Tracy

ORIGINAL