

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC APPEAL NO. E069 OF 2025

HADIJA KISIOKI

APPELLANT/APPLICANT

VERSUS

NZENGA MUTINDA

RESPONDENT

RULING

*(In respect of the Notice of Motion application dated 15th November 2025
seeking a stay of execution pending appeal)*

Introduction

1. This ruling pertains to the Notice of Motion application dated **15th November 2025**, brought by **Hadija Kisioki** (hereinafter "the Applicant"), seeking a stay of execution of the Judgment and Decree delivered by Hon. Esther Kimilu, Chief Magistrate, on **21st October 2025** in Loitokitok ELC Case No. E014 of 2024.

2. The impugned judgment granted the Respondent, **Nzenga Mutinda**, vacant possession of the suit property, Loitoktok/Rombo A/681 and restrained the Appellant/Applicant from further occupation. Additionally, the trial court awarded the Respondent general damages in the sum of Kshs. 300,000/=, plus costs and interest.
3. In the application under consideration, the Applicant seeks the following primary reliefs:
 - a. An order for stay of execution of the Judgment/Decree dated 21st October 2025 pending the hearing and determination of the appeal filed as **ELC Appeal No. E069 of 2025**.
 - b. A temporary injunction restraining the Respondent from evicting the Applicant, interfering with her possession, or alienating the suit land pending the determination of the appeal.
4. The application is supported by the Applicant's Supporting Affidavit sworn on **15th November 2025** and a Further Affidavit sworn on **12th March 2026**.
5. The application is premised on several grounds, notably that:

- a. The Applicant has been in possession of the suit property for over **40 years** and faces imminent and forceful eviction, which would render her and her family homeless.
 - b. The intended appeal is arguable and raises substantial questions of law and fact, including allegations of fraud in title acquisition, violation of the **Law of Succession Act**, and the **Land Registration Act**.
 - c. Unless a stay is granted, the appeal will be rendered nugatory, causing the Applicant irreparable loss.
6. The Respondent filed a Replying Affidavit on **15th December 2025**, opposing the application on the grounds that it is procedurally defective for failing to move the trial court first. The Respondent further contends that the Applicant has failed to demonstrate substantial loss or provide security for costs as required under **Order 42 Rule 6(2)** of the Civil Procedure Rules.

Directions

7. The application was canvassed by way of written submissions. Both the appellant and the respondent complied and their submissions have been duly considered in the writing of this ruling.

Issues for Determination

8. The sole issue for determination is whether the application meets the threshold for the grant of stay pending appeal.

Analysis and Determination

9. Before delving into the merits of the application, the court notes the Respondent's contention that the application is procedurally defective for failing to move the trial court first. While this Court observes that it is often good practice to seek a stay from the court that delivered the judgment, it is a settled principle of law that the High Court (and courts of equal status) possess concurrent jurisdiction with the Subordinate Court to entertain such applications.
10. The Court observes that **Order 42 Rule 6(1)** of the **Civil Procedure Rules** does not create a mandatory sequence of hierarchy that precludes an appellate court from hearing an application for stay filed directly before it, provided an appeal or a notice of appeal has been lodged.
11. Indeed, the legal position is that 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. Therefore, the choice of forum does not render the application incompetent. The Applicant is at liberty to move either court at the first instance.

12. The substantive threshold for the grant of a stay of execution is anchored in **Order 42 Rule 6(2)** of the **Civil Procedure Rules**, which provides:

*"No order for stay of execution shall be made under sub rule (1) unless— (a) the court is satisfied that **substantial loss may result to the applicant** unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."*

13. In this matter, the Applicant asserts that she has resided on the suit property for approximately 40 years. The judgment of the trial court entails her eviction and the potential demolition of her home. In ***Silverstein v. Chesoni [2002] 1 KLR 867***, the court emphasized:

"The issue of substantial loss is the cornerstone of an application for stay... the court must be satisfied that the loss is not just any loss, but one that is substantial and which cannot be compensated by damages."

14. Eviction from a long-term residence where one's livelihood and family stability are rooted constitutes the very definition of substantial loss. Once structures are demolished or possession is shifted, it is often extremely difficult and expensive to restore the *status quo ante* should the appeal succeed.

15. A stay is also intended to preserve the integrity of the appellate process. The Applicant challenges the Respondent's title on grounds of fraud and non-compliance with the **Law of Succession Act**, asserting that the land was ancestral and not subject to the alleged sale.

16. The court's role at this juncture is not to determine the merits of the appeal but only to see if it is "arguable." In *Reliance Bank Ltd v. Norlake Investments Ltd [2002] 1 EA 227*, it was held:

"The court in considering an application for stay of execution is not required to find that the appeal will succeed, but only that it is arguable and that it is not frivolous."

17.If the Respondent is permitted to execute the decree and perhaps alienate the land to a third party, the intended appeal, which touches on the core validity of the title, would be rendered a mere academic exercise. To prevent the appeal from being rendered nugatory, the *status quo* must be maintained.

18.The application was filed on **15th November 2025**, following a judgment delivered on **21st October 2025**. The Applicant acted without unreasonable delay exercising the requisite diligence to protect her interests.

19.The law requires that the Applicant provides security to ensure the Respondent is not prejudiced by the stay. The judgement appealed from includes a monetary award in general damages. The purpose of security for the due performance of the decree is to ensure that the Respondent is not prejudiced by the delay in enjoying the fruits of the judgment should the appeal fail.

20. While the Applicant argues that her occupation is sufficient security, the Respondent is entitled to some assurance regarding the monetary aspect of the judgment.

21. Upon careful consideration of the rival positions, the court finds that the Appellant/Applicant has met the threshold for the grant of a stay of execution. Accordingly, the court makes the following orders:

- a) **A stay of execution** of the Judgment and Decree delivered on **21st October 2025** in **Loitokitok MC ELC Case No. E014 of 2024** is hereby granted pending the hearing and determination of **ELC Appeal No. E069 of 2025**.
- b) The stay in Order (a) above is **conditional** upon the Appellant/Applicant depositing the sum of **Kshs. 100,000/=** as security into a joint interest-earning account in the names of the Advocates for both parties within **Forty Five (45) days** of this ruling.
- c) The Costs of this application shall abide the outcome of the appeal.

It is so ordered

Dated, Signed and Delivered Virtually this 30th Day of April, 2026.

M.D. MWANGI
JUDGE

In the virtual presence of:

Ms. Gatimu for the Appellant/Applicant

Ms. Gitonga for the Respondent

Court Assistant: Alex

M.D. MWANGI

JUDGE

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