

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC APPEAL NO. E068 OF 2025

JANE BOSIBORI NYANGWESO APPELLANT/APPLICANT

VERSUS

JIM ANGWENYI OMBATI 1ST RESPONDENT

BENARD ABUTA ONG'ETA 2ND RESPONDENT

THE LAND REGISTRAR NGONG 3RD RESPONDENT

RULING

(In respect of the Notice of Motion application dated 12th November 2025 seeking a stay of execution pending appeal pursuant to Order 42 Rule 6 of the Civil Procedure Rules)

1. This ruling is in respect of the Notice of Motion application dated 12th November 2025 filed by the Appellant/Applicant, Jane Bosibori Nyangweso. In the said application, the Applicant essentially seeks the following substantive orders from this Court:

- a. SPENT
- b. SPENT

- c. **THAT** this Honourable Court be pleased to grant an order of stay of execution of the order made on 23rd October 2025 and any other consequential orders therein in **Ngong MCELC No. E003 of 2023** pending the hearing and determination of the Appeal.
- d. **THAT** the costs of this application be provided for.
2. The application is premised on the grounds set out on the face of the Motion and is supported by the Supporting Affidavit of the Applicant, Jane Bosibori Nyangweso, together with the Further Supporting Affidavit of Ombati Peterson Onywoki, Advocate.
3. The core of the Applicant's case is that the orders of 23rd October 2025, which set aside the substantive interlocutory injunction delivered by **Hon. P. Achieng** on 25th May 2023, were obtained irregularly through a calculated scheme involving deceit, concealment of material facts, and fraud. The Applicant deposes that the suit property, **KJD/OLCHORO ONYORE/3701**, was purchased through joint matrimonial efforts in 1994 and serves as her primary residence. She contends that the 1st Respondent, her husband, purportedly sold

the property to the 2nd Respondent behind her back on 5th December 2022.

4. The Applicant's grievance regarding the impugned orders is two-fold. First, she avers that the 2nd Respondent's application dated 9th October 2025 was purportedly served via email on 13th October 2025 upon her then-advocate, the late Mr. Henry Oyugi, who had passed away ten days earlier on 3rd October 2025. Consequently, she was never legally served. Second, she maintains that on the return date of 23rd October 2025, an "imposter" masquerading as an Advocate named "Ombati" appeared and conceded to the application. This is supported by the affidavit of Mr. Ombati Peterson Onywoki, who deposes that he never held brief for the late Mr. Oyugi nor appeared in Court on that day, rendering the resulting orders a product of grave sharp practice.
5. The 2nd Respondent, Bernard Abuta Ong'eta, opposes the application through a Replying Affidavit sworn on 8th December 2025. He maintains he is a *bona fide* purchaser for value without notice, having purchased the property after conducting a search and a physical inspection which allegedly revealed only a farmhand. He asserts he

was furnished with a Decree Absolute from a 2021 divorce cause and a spousal consent. Regarding the events of 23rd October 2025, the 2nd Respondent denies any fraudulent scheme, stating he served the Applicant's known counsel in good faith without knowledge of his death. Critically, he claims that the person who appeared and conceded to the application was the 1st Respondent (Jim Angwenyi Ombati) appearing in person, and not an imposter advocate.

6. In a Supplementary Affidavit dated 27th March 2026, the Applicant rebuts these assertions. She contends that the divorce decree was obtained secretly in 2021 without service while she and the 1st Respondent were still cohabiting. She further challenges the 2nd Respondent's "due diligence," noting that the property's Green Card should have alerted him to her long-standing interest. Most significantly, she dismisses the 2nd Respondent's claim that the 1st Respondent appeared in person on 23rd October 2025 as a mere "afterthought," pointing out that the official court record by **Hon. Charles Ariba Kutwa** explicitly refers to an appearance by an "Advocate" named Ombati, not a litigant in person. The Applicant

maintains that without the intervention of this Court, she faces imminent and forceful eviction based on orders obtained.

Directions

7. The court directed that the application be canvassed by way of written submissions. The submissions of which have been duly considered in the writing of this ruling.

Issues for Determination

8. The central issue for determination is whether the Applicant has satisfied the legal threshold for the grant of an order of stay of execution of the trial court's orders dated 23rd October 2025, pending the hearing and determination of the intended appeal, as contemplated under Order 42, Rule 6 of the Civil Procedure Rules.

Analysis and Determination

9. The legal framework guiding grant of a stay of execution pending appeal is primarily anchored on **Order 42, Rule 6 (2)** of the **Civil Procedure Rules, 2010**, which prescribes the conditions precedent for such an order. The rule 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."

10. In interpreting this provision, the Court is guided by the fundamental "Oxygen Principle" enshrined in **Sections 1A and 1B** of the **Civil Procedure Act**, which requires the Court to act in a manner that achieves the just, expeditious, and cost-effective determination of every civil proceeding. Furthermore, the Court must ensure that an appeal is not rendered academic or "nugatory," a principle reinforced by the Court of Appeal in *Nduati & 2 others v Malenya & another (Civil Appeal (Application) 761 of 2022) [2024] KECA 182 (KLR)*, where it was held:

"The court has the power to grant a stay of execution and/or injunction in order to preserve the subject matter of the appeal, so that the appeal is not rendered nugatory. The applicant must

show that the appeal is arguable and that if the stay is not granted, the appeal would be rendered nugatory.”

11. In assessing whether the Applicant will suffer **substantial loss**, the Court notes that the subject matter is the Applicant’s primary residence, a property she deposes to have occupied since 1994. The impugned orders of 23rd October 2025 set aside an existing injunction and granted vacant possession to the 2nd Respondent. If execution proceeds, the Applicant faces immediate eviction. Courts have consistently held that the loss of a home is a unique form of substantial loss that cannot be quantified in monetary terms. This position was recently reaffirmed in *Chepkonga v Kuikui & 2 Others (Civil Application E061 of 2023) [2024] KECA 631 (KLR)*, where the court noted:

“Substantial loss is a relative term... where the property in question is a matrimonial home or a party’s only place of residence, the court is more inclined to find that eviction constitutes substantial loss that justifies a stay of execution.”

12. The Applicant’s fear that her appeal will be rendered a "nugatory" exercise is well-founded. If she is evicted and the property is further

alienated or altered before her appeal, which challenges the integrity of the sale and the very conduct of the proceedings, is determined, a successful appeal would offer her no practical relief.

13. On the question of **unreasonable delay**, the Court observes that the Applicant did not sit on her rights. Following the orders of 23rd October 2025, she sought redress in the trial court on 6th and 10th November 2025. When the trial court (Hon. Charles Ariba Kutwa) declined to certify her motion as urgent and fixed a hearing for January 2026, she moved this Court on 12th November 2025. This timeline demonstrates an active and diligent pursuit of legal remedies.

14. Crucially, the Court must address the **arguability of the appeal**. The Applicant's allegations of "sharp practice" and fraud, specifically that her deceased advocate was "served" ten days after his death and that an imposter appeared in his stead are not mere trivialities. These allegations touch upon the core of the right to a fair hearing.

15. In *Cooperative Bank of Kenya Ltd v Amasi [2023] KEHC 27147 (KLR)*, the court emphasized that where the integrity of the judicial process is in question, the court must lean toward preservation:

“A stay of execution is meant to prevent the court’s process from being used to occasion an injustice... where there are serious allegations of fraud or procedural irregularity that could vitiate the finality of the judgment, the status quo must be maintained.”

16.The contradiction between the trial court’s record (mentioning an "Advocate") and the 2nd Respondent’s claim (that the 1st Respondent appeared in person) is an issue that must be ventilated on appeal. To allow execution while such a cloud hangs over the proceedings would be to endorse a potential subversion of justice.

17.Finally, regarding **security for costs**, the Court notes that the Applicant is currently in possession of the property. In cases involving land where the applicant is already in occupation, the preservation of the property itself often serves as a form of security for the substratum of the suit. However, to balance the interests of the Respondents, the court may in appropriate circumstances order a reasonable sum to be deposited or a guarantee provided.

18.The court finds and holds that the Applicant has successfully demonstrated that she stands to suffer substantial loss through eviction

from her home, that her appeal raises profound and arguable issues regarding the legality of the trial court's proceedings, and that she has moved this Court without delay. This court is duty bound to ensure that the appeal is not rendered a mere shell. The balance of convenience strongly favors maintaining the *status quo* to ensure that the "corridors of justice" are not used to facilitate the alleged "sharp practices" described by the Applicant. The court does not consider a security appropriate or necessary in this case

19. Accordingly, this court finds that the applicant's notice of motion dated 12th November 2025 is merited and proceeds to make the following orders:

A. **THAT** an order of stay of execution of the orders and directions delivered on 23rd October 2025 in **Ngong MCELC Case No. E003 of 2023** be and is hereby issued pending the hearing and determination of the Appeal.

B. **THAT** the status quo regarding the occupation, possession, and use of the suit property known as **KJD/OLCHORO ONYOIRE/3701** as it existed prior to 23rd October 2025 be

maintained until further orders of this Court or the determination of the Appeal.

C. **THAT** the costs of this application shall abide by 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:

Mr. Ombati for the Appellant/Applicant

Ms. Njoroge h/b for the 1st Respondent

Ms. Kilima h/b for the 2nd Respondent

N/A by the 3rd Respondent

Court Assistant: Alex

M.D. MWANGI
JUDGE