



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**ELC NO. 30 OF 2015**

**ROSETILA ATHIENO WERIMO (Suing  
as the legal representative of the Estate of  
WELIMO OTSWILA  
PLAINTIFF/APPLICANT**

**= VERSUS =**

<b>SUSY</b>	<b>AYUMA</b>	<b>OKWOMI</b>	<b>.....</b>	<b>1<sup>ST</sup></b>
<b>DEFENDANT/RESPONDENT</b>				
<b>LIMUS</b>	<b>PETER</b>	<b>NAMBIRO</b>	<b>.....</b>	<b>2<sup>ND</sup></b>
<b>DEFENDANT/RESPONDENT</b>				
<b>MICHAEL</b>	<b>ONYANGO</b>	<b>RANYINYA</b>	<b>.....</b>	<b>3<sup>RD</sup></b>
<b>DEFENDANT/RESPONDENT</b>				
<b>GEORGE</b>	<b>WILLIAM</b>	<b>WASIKEH</b>	<b>.....</b>	<b>4<sup>TH</sup></b>
<b>DEFENDANT/RESPONDENT</b>				
<b>TEDDY</b>	<b>DUMSANE</b>	<b>NDONDI</b>	<b>.....</b>	<b>5<sup>TH</sup></b>
<b>DEFENDANT/RESPONDENT</b>				

**COUNTY GOVERNMENT OF BUSIA .. 6<sup>TH</sup>**

**DEFENDANT/RESPONDENT**

**LAND REGISTRAR BUSIA ..... 7<sup>TH</sup>**

**DEFENDANT/RESPONDENT**

### **RULING**

1. The applicant herein filed the notice of motion dated 27<sup>th</sup> March 2025 seeking the following orders: -

- i) Spent
- ii) spent
- iii) Interim order of stay of execution of the judgment delivered on 18<sup>th</sup> February 2025 pending hearing and determination of the intended appeal;
- iv) Costs be provided.

2. The application is premised on the grounds on its face and supported by the affidavit of the applicant sworn in support of thereof in which the grounds are reiterated. The grounds taken up in support of the application are that the applicant was dissatisfied by the judgment delivered on 18<sup>th</sup> February, 2025; that the applicant has since filed an appeal at the Court of

Appeal, which is arguable; that the application was filed timeously and that unless stay of execution is granted, the respondents may execute the decree issued in their favour thereby rendering the appeal nugatory.

3. In the affidavit sworn in support of the application, the applicant has annexed a copy of official receipt showing that she paid for the appeal on 26<sup>th</sup> March 2025 (outside the period of time prescribed for filing an appeal to the Court of Appeal).
4. The application is opposed by the 2<sup>nd</sup> respondent on the ground that the applicant would not suffer any prejudice if stay is denied because she is residing on another parcel of land, Marachi/Kingandole/1116.
5. The 5<sup>th</sup> respondent opposes the application on among other grounds, that the instant application is merely a delaying tactic and that the applicant has not met the conditions for being granted the orders sought.

6. The application is also opposed by the 6<sup>th</sup> respondent on the grounds that it is scandalous, vexatious, an abuse of the process of the court; that the appeal on which the application is hinged is statutorily time barred and that it will suffer great prejudice if the application is granted.
7. In a rejoinder, the applicant filed a further affidavit, sworn on 16<sup>th</sup> September 2025 in which she depones that the judgment appealed from directly affects her proprietary right in the suit land; that the suit land is her only source of livelihood and shelter; that unless stay is granted, the respondents may proceed with execution, disposal or further alienation of the suit property, which would permanently dispossess her of her inheritance thereby occasioning her substantial loss.
8. The applicant filed submissions dated 4<sup>th</sup> April 2025 and supplementary submissions dated 16<sup>th</sup> September 2025, which I have read and considered.

9. The 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents filed submissions, which I have also read and considered.

10. Upon considering the application, the responses thereto and the submissions I find the issues arising to be as follows: -

- i) Whether the appeal is statutorily time barred hence incapable of forming the basis of the application for stay pending appeal;
- ii) Subject to (i) above, whether the applicant has satisfied the conditions for grant of an order of stay pending appeal?
- iii) What order(s) should the court make?

11. On whether the appeal is statutorily time barred hence incapable of forming the basis of the application for stay pending appeal, the 6<sup>th</sup> respondent has submitted as follows: -

**“The Notice of Appeal was filed and served out of time without leave of Court hence fatally defective, hopeless, for dismissal; offends Section 66 of the Civil Procedure Act as read with Order 42 Rule 6(4);**

**Rule 77 (1) and (2) and Rule 79 of the Court of Appeal Rules.”**

12. The 6<sup>th</sup> respondent further submits that the applicant ought to have sought leave to file and serve a notice of appeal out of time as provided for under **section 95** of the Civil Procedure Act.
13. It is the 6<sup>th</sup> respondent’s case that failure by the applicant to comply with the law effectively, renders the notice of appeal invalid *ab inotio* and the instant application fatally defective. In that regard, the 6<sup>th</sup> respondent has placed reliance on the case **Mwawasi v Shako Civil Application E053 of 2023 (2024) KECA (632) KLR (7 June 2024) (Ruling)** and the case **Mistry Premji Ganji (Investments) Ltd v Kenya National Highways Authority (2019) eKLR.**
14. Regarding this issue, despite the issue of time bar having been raised in the 6<sup>th</sup> respondents replying affidavit, the applicant did not address it in his further affidavit, sworn 16th September

2025. The appeal hereto being from a superior court to the Court of Appeal, the applicant was under a legal obligation to file a notice of appeal within 14 days from the date of the judgment. In that regard **see Rule 77** of the Court of Appeal Rules, 2022 which provides as follows: -

**“77 (1) A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court;**

**(2) Each notice under subrule (1) shall, subject to rule 84 and 97, be lodged within 14 days after the date of the decision against the decision for which the appeal is lodged...”**

15. As to whether failure to file a notice of appeal within the timelines stipulated in **rule 77** renders the appeal time barred and the instant application fatally defective, the proviso in **Rule 86** of the Court of Appeal suggests that it does not. In that regard, see the said rule which provides as follows: -

**“A person affected by an appeal may, any time, either before or after the institution of the appeal, apply to the court to strike out the notice or the appeal, as the case may be on the ground-**

- a. That no appeal lies;**
- b. That some essential step in the proceedings has not been taken or has not been taken within the prescribed time.**

**Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or record of appeal, as the case may be.”**

15. In the instant application, the 6<sup>th</sup> respondent has not demonstrated that it brought an application for striking out the notice of appeal filed by the applicant, either within the time provided by law for doing so or at all. That being the case, it lost its opportunity to strike out the appeal on the alleged time bar. For that reason, I return a negative verdict to the first issue.

16. On whether the applicant has made up a case for being granted the orders sought, by dint of the provisions of **Order 42 Rule 6(2)** the applicant is required to demonstrate that .....
17. The instant application was filed barely a month after the decision appealed from was made hence there was no inordinate delay in filing it.
18. As to whether unless stay is granted the applicant may suffer substantial loss, the applicant is apprehensive that unless stay of execution is granted, the respondent may deal with the suit property in a manner prejudicial to her interest should she win the intended appeal.
19. On security for costs, the applicant has neither made an offer nor demonstrated willingness to provide security for costs. Be that as it may, the subject matter of the appeal being land, I am convinced that if stay of execution is not granted pending appeal, the respondents may deal with the suit property in a

manner prejudicial to the applicant's interest in it thereby occasioning her substantial loss or otherwise loss incapable of being compensated through award of damages.

20. In balancing the rights of the parties, the applicant's right of appeal and the respondents' right to enjoy the fruits of their judgment, I am of the considered view that the scales of justice tilt in favour of preserving the status quo which obtained at the time of delivery of the impugned judgment. That status can only be maintained or preserved by way of staying execution of the judgment and/or decree appealed from pending the hearing and determination of the appeal.
21. That being my view of the application before me, I exercise the discretion vested in me in favour of the applicant on condition that the applicant shall within 21 days from the date of delivery of this ruling deposit in court Kshs.150,000/- being security for costs, failing which the application for stay shall be deemed to have being dismissed with costs at the expiry of the 21 days.

22. Unless the applicant fails to comply with the order for security of costs, within the time given above, the cost of the application shall abide the outcome of the appeal.

23. Orders accordingly.

**Ruling dated, signed and delivered virtually at Busia this 30<sup>th</sup>  
day of April, 2026**

**L. N. WAITHAKA**

**JUDGE**

**In the presence of;**

Mr Augustine Owino for Rosetila Werimo Applicant

N/A for the Respondents

Court Assistant; Tracy