

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT SIAYA

ELC LAND APPEAL NO. E 009 OF 2026

MARGARET ALUOCH OKOTH
APPELLANT

VERSUS

VICTORIA DISTRIBUTORS
LIMITED **1ST RESPONDENT**
COUNTY GOVERNMENT OF SIAYA
2ND RESPONDENT
JULIUS AGUTU OCHAM
3RD RESPONDENT

RULING

1. This Court is tasked to determine the Notice of Motion application dated 2nd February 2026, filed by **Margaret Aluoch Okoth**, the Appellant/Applicant herein seeking the following orders; -
 - 1) Spent
 - 2) Spent
 - 3) THAT this Honourable Court be pleased to issue a stay of execution of the Judgement and Decree of the Honourable Limo B. Benjamin (PM), delivered in Siaya CMELC Case No. 161 Of 2018 on 9th January 2026, pending the hearing and determination of the preferred appeal.
 - 4) THAT costs of and incidental to this application do abide the outcome of the intended Appeal.
2. The application is premised on the grounds on its face and supported by the Affidavit sworn by the Applicant on 4th February 2026 and a Further Affidavit sworn on 23rd February 2026.
3. The 1st Respondent, **Victoria Distributors Limited**, opposed the application through a Replying Affidavit sworn by **John Wamono** on 20th February 2026.

4. The 3rd Respondent, **Julius Agutu Ocham**, filed a Replying Affidavit sworn on 23rd February 2026 in which he supports the application for stay of execution. The 2nd Respondent, the County Government of Siaya, opted not to participate in the application. The 3rd defendant informed the court they were not opposed to the application.
5. To put things into perspective a background of the case is pertinent. The Victoria Distributors Limited (the Plaintiff/1st Respondent) instituted suit in the Chief Magistrates Court at Siaya vide ELC No. 161 of 2018, claiming proprietorship over land known as Siaya Municipality Block 1/193, registered as I.R.N. 3937 LR No. 12045/161 (the suit property). The Plaintiff averred that it held a leasehold title over the suit property from 1st May 1982 for a period of 99 years at an annual rent of Kshs. 1,280/=, and that the 1st Defendant (the County Government of Siaya, successor to the defunct Municipal Council of Siaya) fraudulently and unlawfully reallocated the same to the 2nd and 3rd Defendants without its knowledge or consent.
6. The Applicant herein was the 3rd Defendant in the trial court. She entered a Defence under protest and filed a Counterclaim, averring that she lawfully acquired the suit property from the 1st Defendant around 2007 for valuable consideration, took vacant possession thereof, paid all requisite county rates and levies, and thereafter caused substantial developments on the suit property consisting of mixed residential and commercial units which she manages and from which she derives rental income. She averred that she has been in open, exclusive, continuous, and uninterrupted possession for approximately eighteen (18) years, and in her Counterclaim prayed for, inter alia, a

declaration of ownership, an order compelling the County Government to perfect her title, rectification of the land register, and a permanent injunction.

7. Following hearing, the Honourable Limo B. Benjamin (PM) delivered judgment on 9th January 2026 in favour of the Plaintiff/1st Respondent. The trial court declared that the defendants' actions in purporting to allocate the suit property were tainted with fraud and illegality, upheld the Plaintiff's proprietary rights, dismissed the Applicant's Counterclaim with costs, and directed the Defendants to vacate and surrender vacant possession of the suit property. A decree was formally extracted and sealed on 4th February 2026. The trial court had granted a temporary stay of execution for thirty (30) days on delivery of judgment, which period has since lapsed.
8. The Applicant filed a Memorandum of Appeal challenging the whole of the judgment on thirteen (13) grounds.
9. The Applicant avers that the trial court granted a temporary stay of execution for thirty (30) days which has since lapsed, thereby exposing her to imminent execution. She depones that unless this Court intervenes, the 1st Respondent may proceed to execute the decree, evict her from the suit property, interfere with developments thereon and defeat the very purpose of the appeal. The Applicant further contends that the appeal is arguable and raises serious questions of law and fact, including whether the trial court erred by grounding its judgment on fraud that was not specifically pleaded, particularized or strictly proved.
10. She also contends that the trial court erred by determining issues that did not arise from the pleadings, failing to analyze her Defence and Counterclaim, and upholding the 1st Respondent's

Certificate of Lease without interrogating the legality and procedural regularity of its acquisition. In her Further Affidavit, the Applicant clarifies that the Judgment was delivered on 9th January 2026 and not 2nd January 2026, and that the decree, though not expressly couched as an eviction order in isolation, is capable of execution in forms that would effectively dispossess her from the suit property.

11. The Applicant states that she has developed the property over eighteen (18) years at her own cost, that the property houses tenants, and that the rental income constitutes her primary and indispensable source of livelihood. She further states that the said income sustains her medical needs, particularly arising from high blood pressure and probable arthritis, and supports her children and grandchildren.
12. The Applicant argues that execution would immediately disrupt the rental income, displace tenants, destroy the substratum of the appeal and occasion substantial loss incapable of adequate compensation by damages. The Applicant also avers that the trial court has not supplied typed and certified proceedings, thereby delayed preparation and filing of the Record of Appeal, but undertakes to file the same promptly upon receipt.

THE 1ST RESPONDENT'S RESPONSE

13. The 1st Respondent opposes the application through the Replying Affidavit of John Wamono sworn on 20th February 2026. The 1st Respondent contends that it is the registered and lawful proprietor of the suit property and that the trial court properly upheld its proprietary rights over the same. It avers that the trial court issued final orders directing surrender of the suit property to the 1st Respondent, and that the Applicant ought not to

continue enjoying the property to the detriment of the registered owner.

14. The 1st Respondent argues that the property is commercial in nature and that the Applicant has been collecting rent from tenants occupying the property despite the 1st Respondent being the adjudged proprietor. The 1st Respondent, however, acknowledges the practical reality that execution, including eviction and demolition of developments, may cause substantial loss. It therefore does not oppose stay in principle, but seeks protective conditions. In particular, the 1st Respondent proposes that all rental income collected from the suit property be deposited into a joint interest-earning account in the names of the advocates for the Applicant and the 1st Respondent pending the hearing and determination of the appeal.

15. The 1st Respondent relies on **Charles Wahome Gethi Versus Angela Wairimu Gethi [2008] eKLR** for the proposition that it is not enough for an applicant to merely state that they reside on land; they must demonstrate the substantial loss likely to be suffered. The 1st Respondent also relies on **Butt Versus Rent Restriction Tribunal [1982] KLR 417**, urging this Court to exercise discretion in a manner that preserves the appeal but also protects the successful litigant from prejudice.

THE 3RD RESPONDENT'S POSITION

16. The 3rd Respondent, Julius Agutu Ocham, supports the application. He deposes that the appeal raises substantial and arguable issues of fact and law, particularly regarding the trial court's finding that he sold or transferred the suit property to the Applicant. He states that his evidence before the trial court was that although he was initially allocated the suit property, he

neither accepted the allocation nor took possession thereof, and that he did not sell or transfer the property to the Applicant. According to the 3rd Respondent, the correctness of the trial court's contrary finding is a central issue deserving appellate interrogation. He further deposes that unless stay is granted, the substratum of the appeal risks being altered or destroyed, thereby rendering the appeal nugatory.

SUBMISSIONS

17. The application was heard by way of written submissions.

Applicants Submissions

18. The Applicant Submissions are dated 13th March 2026 filed through Messrs. Mayabi & Associates Advocates. It is submitted that the appeal is arguable and raises serious questions relating to fraud, pleadings, root of title, possession, development, the doctrine of lis pendens and failure to consider the Applicant's Counterclaim. Counsel further submits that the Applicant has demonstrated substantial loss, since execution would result in eviction, disruption of rental income, loss of developments, displacement of tenants and destruction of the substratum of the appeal.

19. It is further submitted that the application was filed without unreasonable delay, the Judgment having been delivered on 9th January 2026 and the present application filed on 2nd February 2026. On security, Counsel submits that the Applicant is willing to abide by any reasonable conditions that this Honourable Court may impose.

1st Respondents Submissions

20. The 1st Respondent submission are dated 13th March 2026 filed through Messrs. Emukule & Company Advocates. It is submitted that a successful litigant is entitled to enjoy the fruits of

judgment and that stay should not be granted in a manner that allows the Applicant to continue collecting rent exclusively. Counsel submits that if stay is granted, the rental proceeds should be preserved in a joint interest-earning account so that the successful party on appeal may access the accumulated rent and interest. The 1st Respondent therefore urges the Court, if inclined to grant stay, to impose conditions that safeguard its adjudged proprietary interest.

ANALYSIS AND DETERMINATION

21. I have keenly considered the Notice of Motion application, the Supporting Affidavit, the Further Affidavit, the Replying Affidavits, the written submissions, the Judgment and Decree appealed against, the Memorandum of Appeal, the cited authorities and the relevant provisions of the law.
22. At this interlocutory stage, the Court is not called upon to determine the appeal on its merits. The Court's limited task is to determine whether the Applicant has satisfied the legal threshold for grant of stay of execution pending appeal.
23. Two main issues commend for determination:
 - a) Whether the orders an order for stay of execution should issue of the Judgment and Decree delivered on 9th January 2026 in Siaya CMELC No. 161 of 2018 pending the hearing and determination of the appeal.
 - b) Who bears the costs of the Notice of Motion application dated 2nd February 2026?

Whether the orders an order for stay of execution should issue of the Judgment and Decree delivered on 9th January 2026 in Siaya CMELC No. 161 of 2018 pending the hearing and determination of the appeal.

24. The jurisdiction of this court to grant a stay of execution pending appeal is founded upon Order 42 Rule 6 of the Civil Procedure Rules, 2010. Order 42 Rule 6(2) expressly provides as follows:

"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."

25. Arising from the above powers to grant stay of execution is discretion but the court must look into the prospect of substantial loss to the applicant if the stay is refused; the absence of unreasonable delay in bringing the application; and any such security as the court may order.

26. The court will also be guided by the case of **Butt vs Rent Restriction Tribunal [1982] KLR 417**, in which the Court of Appeal laid down the following principles:

"The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is: if there is no overwhelming hindrance, the stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's decision. 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 Applicants at the end of the proceedings. The court, in exercise of its discretion whether to grant or refuse an application for stay, will consider the special circumstances of the case and its unique requirements."

27. In **Vishram Ravji Halai vs Thornton & Turpin (1963) Ltd [1990] KLR 365**, the Court of Appeal reiterated that the guiding consideration is preservation of the right of appeal as a constitutional entitlement, ensuring that it is not rendered hollow by enforcement of a decree that an appellate court might ultimately reverse. The court ought not to allow the administration of justice to result in a situation where a party who succeeds on appeal finds that the subject matter of the dispute has been irreversibly altered or destroyed during the pendency of the appeal.

28. On the standard for substantial loss, the Court of Appeal in **Charles Wahome Gethi vs Angela Wairimu Gethi [2008] eKLR** held:

"...it is not enough for the Applicants to say that they live or reside on the suit land and they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent executes the decree in this suit against them."

29. Similarly, in **Mukuma Versus Abuoga [1988] KLR 645**, the Court held that substantial loss is what must be prevented by preserving the status quo because such loss would render

the appeal nugatory. Also see The **Gatirau Peter Munya Versus Dickson Mwenda Kithinji & 2 Others [2014] eKLR** and **Kenya Shell Limited Versus Benjamin Karuga Kibiru & Another [1986] KLR 410,**

30. In dealing with the question of substantial loss I must look at the effect of the judgement delivered by the trial court. What stands out are the orders of vacant possession which clearly will mean the eviction of the applicant. The orders for permanent injunction will also result in eviction whichever way you consider them.

31. The Applicant herein has particularized and substantiated her case for substantial loss: the suit property is a developed commercial and residential property from which she earns rental income as her primary livelihood; that income sustains her medical needs and the welfare of her dependants; she has been in occupation for eighteen years and has invested substantially in developing the property; and her health conditions make eviction a concrete and immediate threat to her physical wellbeing. Execution would occasion loss that is irreversible, incapable of full compensation by damages, and extending beyond mere financial harm.

32. The court notes that there is no contestation that the land is developed land occupied and commercially utilized by the Applicant for approximately eighteen (18) years. Land, in the Kenyan context, is not an ordinary commodity. It is often tied to livelihood, identity, settlement, investment and family security. The decree appealed against is not purely monetary and touches directly on possession, occupation, surrender of

vacant possession and proprietary entitlement over the suit property. If execution proceeds, the Applicant may be dispossessed, tenants may be removed, developments may be interfered with,

33. In the circumstances of this case, this Court finds that immediate execution would substantially alter the substratum of the appeal. This court is satisfied that the threshold for substantial loss is met.

34. On security, the Applicant has indicated willingness to abide by such conditions as this Court may impose. The 1st Respondent has proposed that rental income from the suit property be deposited into a joint interest-earning account in the names of the advocates for the Applicant and the 1st Respondent. However, it is noteworthy that security is meant to guarantee due performance of such decree as may ultimately be binding upon an applicant.

35. The Court of Appeal in Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 expressed itself as follows:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the

court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another...'

36. However, this Court is equally alive to the peculiar circumstances disclosed at paragraphs (i) and (j) of the grounds upon which the Notice of Motion application is premised. The Applicant has averred that she caused the development of mixed residential and commercial units on the suit property, that the premises house tenants whose livelihoods would be disrupted by execution, and that she relies on the rental income for herself and several grandchildren, thereby exposing them to serious financial risk if execution proceeds.
37. In my view these developments in themselves should suffice as sufficient security provided the status quo is maintained to ensure the character of the suit property is not changed or the same are not disposed in any manner. I think this creates a fair balance for the two competing interests: the 1st Respondent's legitimate interest as a decree holder whose proprietary rights have been affirmed by the trial Court, and the Applicant's interim need to meet basic sustenance, medical needs and support obligations pending appeal.

38. This Court therefore finds that the Applicant has satisfied the legal threshold for stay of execution pending appeal.
39. As to timeliness of filing the Appeal the judgment of the trial court was delivered on 9th January 2026 and this application was filed on 2nd February 2026, within the currency of the trial court's own temporary stay. I see no unreasonable delay.
40. In the interest of fairness and economy, this Court is of the considered view that the costs of this application ought to abide the outcome of the appeal and be borne by the party who ultimately fails at the appellate level.
41. The upshot of the foregoing is that the Appellant/Applicant has made out a compelling case for the grant of a stay of execution pending the determination of the appeal.
42. The application is disposed on the following terms; -
- 1) THAT the Notice of Motion application dated 2nd February 2026 be and is hereby allowed.
 - 2) THAT there shall be a stay of execution of the Judgment and Decree delivered by Hon. Limo B. Benjamin (PM) in Siaya CMELC No. 161 of 2018 on 9th January 2026 pending the hearing and determination of ELC Appeal No. E009 of 2026.
 - 3) THAT pending the hearing and determination of the appeal, the Appellant/Applicant, her agents, servants, employees or any person claiming through them are hereby restrained from selling, transferring, charging, leasing, subdividing, alienating, demolishing, wasting, further developing or otherwise dealing with the suit property in a manner that may alter its character or defeat the appeal.
 - 4) THAT the costs of this application shall abide the outcome of the Appeal.

Orders accordingly.

Dated at Siaya this 5th Day of May 2026

HON. JUSTICE A. E. DENA

JUDGE

5/05/2026

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

Mr. Okoth holding brief for Mayabi for the Appellant Applicants

Ms Okoth for 3rd Respondent

Mr Emukule for the 1st Respondent

Court assistant: Nelima Janephar