



**Onyuna v Odongo & 3 others (Environment and Land Appeal  
E044 of 2024) [2025] KEELC 3979 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 3979 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIIAYA  
ENVIRONMENT AND LAND APPEAL E044 OF 2024**

**AE DENA, J**

**JANUARY 30, 2025**

**BETWEEN**

**SAMUEL OCHIENG ONYUNA ..... APPELLANT**

**AND**

**GEORGE OMONDI ODONGO ..... 1<sup>ST</sup> RESPONDENT**

**DONALD OCHIENG OWANG' ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY LAND SURVEYOR ..... 3<sup>RD</sup> RESPONDENT**

**SIIAYA COUNTY LAND REGISTRAR ..... 4<sup>TH</sup> RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. B. Limo (PM)  
given at Siaya on 25<sup>th</sup> October, 2024 in Siaya ELC Case No. E057 OF 2023)*

**RULING**

1. The subject of this ruling is the application dated 12/11/24 seeking the following verbatim orders
  1. Spent
  2. That this Honourable Court be pleased to grant a Stay of Execution of the Judgment and Decree delivered on 25<sup>th</sup> October, 2024 in Siaya Chief Magistrate's Court IN ELC No. E057 Of 2023 pending hearing and determination of this Application inter partes.
  3. That this Honourable Court be leased to grant a Stay of Execution of the Judgment and Decree delivered on 25<sup>th</sup> October, 2024 in Siaya Chief Magistrate's Court In ELC No. E057 Of 2023 pending hearing and determination of this Application inter partes.
  4. Spent
  5. That the costs of this application be provided for.



2. The application is anchored on the following grounds;-
  - a. That a Memorandum of appeal has been filed in the Environment and Land Court of Kenya at Siaya against the Judgment of the Trial Magistrate delivered on the 25<sup>th</sup> October, 2024 in Siaya Chief Magistrate's Court In ELC No. E057 of 2023.
  - b. That appeal raises valid issues for determination by the Environment and Land Court Judge on the question of cancellation of the Applicant's title.
  - c. That if this appeal is not heard on priority basis and stay orders issued, the Applicant's Appeal will be rendered nugatory and the Applicant will suffer irreparably.
  - d. That the defendant/Applicant is willing to furnish such security as the Honourable Court may order for the due performance of the decree
3. The application is supported by the affidavit sworn on 12/11/24 by Samuel Ochieng Onyuna, the Appellant and the Defendant in Siaya ELC Case No. E057 of 2023. The Applicant/Appellant being aggrieved of the judgement delivered by the trial court depones that the Plaintiffs therein may execute the judgement to his detriment and loose Land Title No. East Gem/Nyamninia/2649. That he has since filed an arguable Appeal before this court. The Memorandum of Appeal is attached. The Applicant further depones that if an Order of Stay is not issued to preserve the substratum of the Appeal, the Plaintiffs/Respondents will most likely proceed and execute hence rendering the already filed appeal nugatory. The Applicant states he is ready and willing to furnish security as may be directed by Court. That the Plaintiff/Respondent will not suffer any prejudice if an order of stay is granted but the Defendant/Applicant on the other hand will suffer irreparable loss if the order of stay sought in this Application is granted.
4. The application is not opposed. The Respondents were served through their Advocate in the lower court. In this regard an affidavit of service sworn by Molly Atieno Mumbo process server was filed on 17/01/25. The court was satisfied with service.
5. The application coming up for hearing on 21/01/25 was argued orally by Mr. Okanda counsel on record for the applicant. Counsel asserted that the judgement herein had the effect of cancelling the Applicants title and should the Land Registrar the 3<sup>rd</sup> Respondent in the Appeal implement the order it will deny the applicant his right to ownership. That the Applicant will demonstrate during the hearing of the Appeal that the Plaintiff never adduced any iota of evidence to warrant the cancellation of the title. That the Plaintiff purchased the suit property from the 1<sup>st</sup> Respondent and duly paid the consideration but the 1<sup>st</sup> Respondent later sold the property to the 2<sup>nd</sup> Respondent without disclosure that it was not available for sale. That there are sufficient reasons for the court to issue stay orders to preserve the subject matter of the appeal. Counsel prayed that the Appeal be allowed.

### **Determination**

6. The main issue of determination is whether the application has met the requirement for grant of orders of stay of execution.
7. The application has been filed under the provisions of Section 1A, 1B & 3A of the *Civil Procedure Act* and Order 42 rule 6 of the Civil Procedure Rules.
8. Order 42 Rule 6 of the Civil Procedure Rules, states 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 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 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.

9. It is trite law that the power conferred to the court to grant orders of stay of execution is discretionary. But this discretion must be exercised judiciously. The Court of Appeal in *Vishram Ravji Halai v Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, stated thus;-

“whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 (sic) rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.”

10. The Court in the case of *Butt & Rent Restriction Tribunal* [1982] KLR 417 stated an applicant must satisfy, That substantial loss may result to him unless the stay is granted, the application has been made without delay and the applicant has given security or is ready to give security for due performance of the decree.

11. Arising from the above, the court is therefore guided accordingly. The main requirement is for an applicant to prove they will suffer substantial loss should the decree be executed. The court in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, had this had this to say on what constitutes substantial loss; -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.” (Emphasis is mine).

12. I have read the judgement of the court and have noted the learned Hon Magistrate final finding that the title being held by the 1<sup>st</sup> Defendant who is the appellant/applicant being East Gem/Nyamninia/2649



herein is invalid and the order for the same to revert back to the 1<sup>st</sup> Plaintiff as registered proprietor of the suit property and cancellation. I think the Appellants fears as to loss of his right upon cancellation is valid. I also take judicial notice of the dangers of further transactions upon such cancellation which could complicate issues. There is sufficient cause to preserve the substratum of the appeal herein. In this regard I take the cue from the dictum in *Butt & Rent Restriction Tribunal (supra)* where court further stated thus:-

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal if successful from being nugatory.”

13. As to the timeliness within which this application was filed, I note that the impugned judgement was delivered on 25/10/24 and the application filed on 12/11/24. It is my finding that the application has been filed expeditiously.
14. On the requirement for security, the Applicant has deponed that they are ready and willing to furnish such security as the Honorable court may order for the due performance of the decree. However the decree herein is not a monetary decree. I will not issue any orders for security.

### **Disposition**

15. For the foregoing reasons the Appellants Notice of Motion application dated 12/11/24 is allowed in the following terms:-
  1. That this Honourable Court be pleased to grant a Stay of Execution of the Judgment and Decree delivered on 25<sup>th</sup> October, 2024 in Siaya Chief Magistrate’s Court In ELC No. E057 of 2023 pending hearing and determination of this Appeal.
  2. That Costs of the application will abide the outcome of the appeal.

**DELIVERED AND DATED AT SIAYA THIS 30<sup>TH</sup> DAY OF JANUARY 2025**

**A.E. DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Okanda for the Applicant

No Apperance for the Rest of the Parties

Court Assistant Ishmael

**A.E. DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Will the Appeal be rendered nugatory? The aspect of an appeal being rendered nugatory must be hinged on the basis of whether or not the appeal is arguable on appeal and not whether the appeal will be successful. The court should only be concerned with the question of whether or not the appeal will be rendered nugatory. An arguable appeal only needed to raise a single *bona fide* point worthy of consideration and need not be one that must necessarily succeed as was held in the case of *Co-operative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya) [2015] eKLR*.

