



REPUBLIC OF KENYA



KENYA LAW
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**Kamau & 3 others v Waitiki (Environment and Land Appeal
E067 of 2025) [2025] KEELC 6125 (KLR) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6125 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E067 OF 2025
JM ONYANGO, J
SEPTEMBER 18, 2025**

BETWEEN

**ARTHUR KAMAU 1ST APPELLANT
JOHNSON NJUGUNA 2ND APPELLANT
EPHRAIM NGWIRI 3RD APPELLANT
PETER MWAURA 4TH APPELLANT**

AND

JULIUS CHUMBI WAITIKI RESPONDENT

RULING

1. The Appellants was moved the court vide a Notice of Motion dated 2nd April 2025, supported by the Affidavit of Arthur Kamau, sworn on 9th June 2025, under sections 1A,1B and 3A of the [Civil Procedure Act](#), Order 40 rule 1, Order 42 rule 6 of the Civil Procedure Rules and Articles 159, 48, 46 and 47 of [the Constitution](#) of Kenya, seeking the following Orders:
 1. Spent.
 2. Spent.
 3. Spent.
 4. That an order of temporary stay of execution of the Ruling delivered on 29.05.2025 and the Orders issued on 30.04.2025 by Hon. L. L Gichecha in Kikuyu E084 of 2024: Julius Chumbi Waitiki vs Arthur Kamau & 3 Others be issued pending hearing and determination of the appeal.
5. That the costs of this application be provided for.



2. The Application is based on a Supporting Affidavit and a Further Affidavit sworn by Arthur Kamau, the 1st Appellant/Applicant, on 9th June 2025 and 22nd July 2025, respectively. The Deponent states that the Applicants have filed an appeal, as they are dissatisfied with the Ruling delivered on 29th May 2025 and orders allegedly issued on 30th April 2025. He further states that the Applicants believe that the impugned orders were made in circumstances that violated the principles of civil procedure and the rules of natural justice.
3. The 1st Applicant asserts that the land parcel formerly known as Karai/Gikambura/646 belongs to the Applicants, while the Respondent owns the adjacent plot, referred to as Karai/Gikambura/6382. He explains that in 2006, the Applicants had subdivided their land into six portions, which resulted into a gated community-like area. He adds that the subdivision compelled them to set aside portions of their own land to create a private access road serving the plot owners, and not the general public.
4. He contends that after subdividing his own plot, the Respondent failed to make provision for an access road, which led him to wrongly claim a right to use the Applicants' private road, erroneously declaring it to be public.
5. He states that after failing to resolve the matter with the local chief, the Respondent initiated legal action at the Kikuyu Law Courts. He further states that the Respondent sought orders to have the Applicants' gate and fence demolished and to have the road declared public.
6. The 1st Applicant raises significant concerns about their legal representation, alleging that their previous advocates (Wangari Mugo & Associates) entered into a consent order to have a Surveyor and Land Registrar determine boundaries on the suit property, without their knowledge. He contends that a site visit was conducted and a report was prepared without the Applicants' involvement or input, and that the firm of Wangari Mugo & Associates Advocates subsequently ceased acting on their behalf.
7. He further argues that the trial court committed grave procedural errors by scheduling a Ruling without hearing oral arguments or written submissions from the parties. He highlighted that the court order directing demolition of his fence and gate was dated 30th April 2025, while the Ruling was delivered on 29th May 2025, which he described as a travesty of justice.
8. Finally, he expresses apprehension that, unless this court intervenes urgently, the Respondent will proceed to demolish his gate and fence, rendering the appeal meaningless. He believes that the appeal has a high chance of success due to the procedural irregularities and the nature of the orders granted.
9. The Respondent opposes the application through his Replying Affidavit sworn on 15th July 2025. It is his position that he instituted the suit in the lower court to secure his constitutional rights. He clarifies that at no point in his Complaint or Notice of Motion Application did he seek to restrain the Applicants from using the disputed road. He adds that their current claims are a deliberate attempt to mislead the court and delay justice.
10. He confirms that the lower court issued Consent Orders on 4th February 2025, which stated that a Government Surveyor and Land Registrar would conduct a site visit to determine the status of the road, and that the resultant costs would be shared by both parties. He depones that his advocates notified the relevant government officers of the said Orders and inquired about their availability for the site visit. He states that a letter to that effect was also served upon the Applicants' advocates.
11. He further states that a site visit was scheduled for 11th March 2025. However, neither the Applicants nor their counsel attended. The visit proceeded in their absence, and he bore the full cost of KShs 50,000 for the government officers.



12. He depones that the Government Surveyor subsequently prepared a report, dated 13th March 2025, which confirmed that the disputed road is public. He contends that the Applicants have failed to comply with the court order to refund their share of the surveyor's fee of Kshs 25,000, thus violating the court's sanctity and prejudicing him.
13. He raises a the point that the Applicants were represented by Musanga Sitti & Company Advocates, and not by the firm of M/s Wanjiru Mugo & Company Advocates, as alleged. He relies on a Notice of Change of Advocates dated 5th May 2025, annexed to the Affidavit.
14. He further states that the Applicants and their advocate failed to attend the hearing scheduled on 16th April 2025. He adds that the Applicants' advocates came on record before the delivery of the impugned Ruling, hence they ought to have taken the necessary steps to secure their rights. He relies on the Court of Appeal case of Indech vs Musambai and Habo Agencies Limited vs Wilfred Odhiambo Musingo to argue that litigants cannot solely blame their advocates for procedural failures and must take responsibility for following their case's progress.
15. The Respondent avers that the Applicants' obstruction has prevented him, from accessing his land and earning a livelihood as a farmer. Furthermore, he adds that he has been diagnosed with a terminal illness and that he requires urgent funds for treatment in India, which he intends to raise by selling his land. He depones that the Applicants' actions and the current court orders are frustrating the sale by blocking potential buyers' access to his land.
16. He notes that there is a discrepancy in the spelling of his name across various documents filed in court, hence he has sworn a separate Affidavit of Names to clarify that the said names refer to the same person. Finally, he urges this court to dismiss this Application, set aside the Orders of 17th June 2025, disallow the appeal, and award him costs.
17. The parties were directed to canvass the application by way of written submissions. The Applicants filed Written Submissions dated 22nd July 2025 through M/s E. Nyongesa Advocates and Associates, while the Respondent filed Submissions dated 25th July 2025 through the firm of M/s O J Advocates LLP.

Issues for Determination

18. Having examined the Application, the Replying Affidavit in response to the Application and the parties' respective submissions, the only issue that emerges for determination is whether a stay of execution of the impugned Order should be granted.
19. The court possesses the discretion to grant a stay of execution of a ruling/order pending appeal under Order 42 Rule 6 of the Civil Procedure Rules, but this discretion must be exercised with careful consideration and fairness.
20. Order 42 Rule 6 of the Civil Procedure Rules, stipulates that:
 - “(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 Applicants 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 Applicants”.

21. The fulfilment of the above-mentioned conditions is not merely procedural but essential to balancing the interests of both parties. The court must diligently assess the evidence of substantial loss and the timeliness of the application, alongside the provision of security, to ensure that the stay is granted only in deserving cases.
22. The first consideration is to determine whether the Applicants stand to suffer substantial loss in case the stay is not granted. It has been submitted for the Applicants that the Respondent obtained a Surveyor’s Report without involving the Applicants, purporting that the road situated on the Applicants’ property was a public road. Counsel for the Applicants has argued that demolition of the gate and fence on private property would occasion substantial loss to the Applicants and would amount to a violation of the rules of natural justice. It has been submitted that there is no justification for carrying out the demolition before the substantive dispute has been heard and determined.
23. Counsel has further submitted that the inherent value of the property, which includes its physical attributes, current use and potential use, is at risk of irreparable diminution. Counsel has argued that the effect of the impugned orders would be to redefine the nature and boundaries of the Applicants’ property, effectively excising portions in favour of the Respondent and vesting in him ownership rights protected under Article 40 of *the Constitution*. In the absence of a stay of execution, it has been argued, the disputed property risks material alteration through the intended demolition.
24. The Applicants’ counsel has added that, should the appeal succeed, the Applicants will suffer undue hardship in restoring their legal interest in the property, particularly in reconstructing the demolished gate and fence. This hardship, it has been submitted, will be aggravated if the Respondent exercises his rights under Article 40 of *the Constitution*, which could result in the creation of a permanent encumbrance on the property for his benefit.
25. It has finally been submitted that the substantive issue in this appeal is whether the road in question is private or public. Counsel has maintained that the appeal raises arguable grounds, including that the trial court allowed the Respondent’s Application without oral or written submissions from either party; that the Applicants’ evidence was not heard before the ruling; and that, despite this, the trial court made a declaration that the road was public.
26. Further, counsel has argued that the orders sought to be enforced were dated 30th April 2025, while the ruling was delivered on 29th May 2025, which made them inconsistent. The Applicants’ counsel has therefore urged this Court to allow the present Application in order to preserve the suit property pending the determination of the appeal.
27. I am in agreement with the Applicant’s counsel that allowing the Respondent to demolish the gate would render the appeal nugatory and would cause the Applicants substantial loss in the event they are successful in the appeal.



28. Regarding filing the application in time, the ruling of the trial court was delivered on 29th May 2025. This Application was filed on 11th June 2025, approximately 12 days after the impugned ruling was delivered. I find that the Application was filed within a reasonable time.
29. On the issue of security, the Respondent's counsel has submitted that the requirement for security under Order 42 Rule 6 (2) (b) of the Civil Procedure Rules is discretionary and is intended to guarantee due performance of the order. Counsel has relied on the decision in the case of Kenya Shell Limited vs Benjamin Karuga Kibiru & Another [1986] KLR 410 where the court emphasized that a stay of execution should only be granted where there is clear justification, and where failure to do so would render an appeal nugatory.
30. Security is not a punishment for appealing. It is a tool to ensure the appeal does not render the Respondent's successful judgment/ruling nugatory. The court is not mandated to demand security in every case. It is a power granted to the court to be exercised based on the circumstances of each case. See the case of Macro Tools and Explosives v Mamujee Brother Ltd 1988 KLR 730 cited in Westmont Holdings SDN v Central Bank of Kenya (2017) eKLR.
31. In some cases, the court may be satisfied that the appeal is meritorious and the applicant would suffer substantial loss, but ordering security would be unduly burdensome or impractical. The court has the leeway to grant a stay on other terms or even without security in rare, compelling circumstances. I find this to be one of those cases. The court must balance the right of the Respondent to enjoy the fruits of their judgment/ruling against the right of the Applicants to have their appeal heard without it being rendered meaningless.
32. Consequently, the application dated 2nd April 2025 is allowed in the following terms:
 - i. That a stay of execution of the Ruling and Order in Kikuyu-MCELC No. E084 of 2024 (Julius Chumbi Waitiki vs Arthur Kamau & Others) is hereby granted pending the hearing and determination of this appeal.
 - ii. The Applicants are directed to file their Record of Appeal within the next 30 days.
 - iii. That the costs of this Application shall be in the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF SEPTEMBER 2025.

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J. M ONYANGO
JUDGE

In the presence of:

1. Miss Mwangi for Mr. Mwongesa for the 1st Appellant
2. Mr Nyamumbo for the Respondent

Court Assistant: Hinga

