



**Muriu v Gathia & 2 others (Environment and Land Appeal E126 of 2024) [2025] KEELC 6695 (KLR) (6 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6695 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E126 OF 2024**

**JM ONYANGO, J  
OCTOBER 6, 2025**

**BETWEEN**

**DORIS WANJIRU MURIU ..... APPELLANT**

**AND**

**KAMAU GATHIA ..... 1<sup>ST</sup> RESPONDENT**

**THIKA LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**STATE LAW OFFICE ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. What is before me for determination is the Appellant/Applicant’s Notice of Motion dated 5<sup>th</sup> November 2024 seeking the following orders:
  - i. Spent.
  - ii. Spent.
  - iii. That the honourable court be pleased to grant a stay of execution of the Decree in CMCC Thika No. 1640 of 2013 D (Kamau Gathia v Doris Wanjiru Muriu & 2 Others), pending the hearing and determination of the Appeal herein.
  - iv. That the honourable court be pleased to order that the draft Memorandum of Appeal attached herein be admitted into the court’s record and be deemed as duly filed.
  - v. That costs of this Application be provided for.
  - vi. That this honourable court be pleased to grant any other and further orders it deems fit to grant.



2. The Application is anchored on the grounds set out on the face of the Notice of Motion and the Supporting affidavit of Doris Wanjiru Muriu (the Applicant), sworn on 5<sup>th</sup> November 2024.
3. In the said Affidavit, she depones that she is aggrieved and dissatisfied with the ex-parte judgment and decree delivered on 1<sup>st</sup> October 2018 in CMCC Thika No. 640 of 2018, together with any subsequent orders.
4. She explains that she had instructed her advocates to apply for a setting aside the ex parte judgment through an application dated 17<sup>th</sup> October 2023. She adds that upon considering the said application, the trial court allowed it and directed her to pay costs of Kshs. 20,000 to the Respondent's advocates and to comply with Order 11 within 21 days from 21<sup>st</sup> May 2023. She contends that she complied with the said order. However, on 5<sup>th</sup> November 2024, the 1<sup>st</sup> Respondent's advocates informed the trial court that the amount of Kshs 20,000 was paid late and that the Applicant filed her defence after the stipulated 21 days period. As a result, the trial court reinstated its judgment delivered on 5<sup>th</sup> September 2018. The Applicant faults the court for reinstating the said judgment without considering her position.
5. The Applicant avers that, being dissatisfied with the said order, she filed a Memorandum of Appeal dated 5<sup>th</sup> November 2024. She believes that the Respondents are likely to execute the decree at any time unless this court orders a stay of execution. She maintains that her appeal has a reasonable chance of success, is not meant to delay justice, and has high prospects as the issues before the lower court had already been adjudicated in Nairobi High Court Civil Case No. 1685 of 1979.
6. The Applicant contends that if execution proceeds, she will suffer substantial loss, including the risk of being unable to recover her parcel of land or the monetary sum in question, even if her appeal ultimately succeeds. She emphasizes that the appeal would be rendered nugatory unless a stay is granted, and she would suffer irreparable loss and injustice.
7. The Application is opposed by the 1<sup>st</sup> Respondent through the Replying Affidavit sworn by him on the 13<sup>th</sup> March 2025. In the said Affidavit, he maintains that this Application is devoid of merit, scandalous, frivolous, and an abuse of the court process, and should therefore be dismissed with costs.
8. He explains that he filed the suit at the trial court in 2013 against the Applicant, who was the then registered owner of Land Parcel NGENDA/NYAMAGARA/772. He avers that despite being served with pleadings and summons to enter appearance, the Applicant failed to do so. Consequently, judgment in default was entered on 6<sup>th</sup> February 2014, and the matter proceeded for hearing to conclusion.
9. The 1<sup>st</sup> Respondent states that on 5<sup>th</sup> September 2018, judgment was rendered in his favour, declaring him the absolute owner of the suit land. He adds that a decree was issued, restraining the Applicant from interfering with his land, and a title deed was subsequently issued in his name. He has annexed copies of the title deed and decree.
10. He contends that the decree was executed in 2020 and that there is therefore nothing left to stay. He questions why the Applicant has waited over five years since the decree to seek stay of execution.
11. The Respondent argues that litigation must come to an end, pointing out that he has been in court over the matter from 2013 to 2023. Granting stay, in his view, would only delay justice further.
12. He further accuses the Applicant of contempt of court, noting that despite eviction orders and police assistance orders, she has continued to disobey court orders and remains on the land. He urges the court to compel her to first purge her contempt before seeking relief.



13. The Respondent also contends that the Application is incompetent as it offends Order 9 Rule 9 of the Civil Procedure Rules, since judgment had already been delivered and the Applicant was previously represented by a different firm of advocates.
14. The Applicant's counsel filed a Supplementary Affidavit sworn by one John Ndung'u Chege on 24<sup>th</sup> November 2024. He deposes that there had been an earlier matter in the High Court of Kenya at Nairobi, being High Court Civil Case No. 1658 of 1979, between the Applicant and the 1<sup>st</sup> Respondent concerning the same parcel of land, Ngenda/Nyamagara/772. He adds that the suit was heard and determined on merit, and a decree was issued in 1987. He notes that the 1<sup>st</sup> Respondent did not appeal against that High Court decision.
15. He avers that despite this, in 2013, the 1<sup>st</sup> Respondent filed Thika CMCC No. 640 of 2013, seeking to re-litigate the same subject matter, though this time he included the Land Registrar and the Attorney General as Defendants. Counsel maintains that the 1<sup>st</sup> Respondent did not serve the summons on the Applicant, yet proceeded ex parte, conducted formal proof, and obtained judgment and a decree on 1<sup>st</sup> October 2018.
16. He explains that in 2023, the 1<sup>st</sup> Respondent attempted to sell the suit property using that decree, which prompted the Applicant to move to court to set aside the judgment, citing the existence of the earlier High Court case and decree. However, the Applicant's attempts to seek justice in the lower court were unsuccessful as the case was dismissed on technical grounds.
17. Counsel deposes that by a ruling delivered in May 2024, the trial court directed the Applicant to pay throw away costs of Kshs 20,000 to the 1<sup>st</sup> Respondent within 21 days, and to file and serve her response within the same period, failing which the earlier judgment and decree would stand. Counsel added that although the Applicant paid the costs, her response was filed outside the stipulated time.
18. He states that on 5<sup>th</sup> November 2024, the court directed parties to explore settlement, but this failed as the 1<sup>st</sup> Respondent opposed the Applicant's plea to have the matter heard on merit. The trial court thereafter reinstated its earlier judgment and decree.
19. Counsel contends that the said determination violated the principles of natural justice, as the Applicant was condemned unheard, contrary to her rights under *the Constitution* of Kenya 2010. He further asserts that the 1<sup>st</sup> Respondent misled the trial court by concealing the fact of the earlier High Court suit between the same parties over the same property.
20. He adds that the Applicant now risks losing land parcel Ngenda/ Nyamagara/772, as the 1<sup>st</sup> Respondent has already taken possession and is in the process of transferring or selling the land. He urges the court to issue restraining orders against the 1<sup>st</sup> Respondent to stop any dealings with the property until the present appeal is heard and determined on its merits.
21. The Application was disposed of through written submissions with brief oral highlights. The Applicant filed written submissions dated 11<sup>th</sup> November 2024, while the 1<sup>st</sup> Respondent filed written submissions dated 13<sup>th</sup> March 2025.

### **Applicant's Submissions**

22. Counsel for the Applicant submitted that the appeal arose from the ruling of the trial court delivered on 5<sup>th</sup> November 2024. Counsel further submitted that the lower court suit had been filed in 2013 by the 1<sup>st</sup> Respondent against the Applicant, despite the fact that the same subject matter, ownership of land parcel Ngenda/Nyamagara/772 had already been litigated and conclusively determined in



Nairobi High Court Civil Case No. 1658 of 1979. Counsel argued that the 1<sup>st</sup> Respondent deliberately sought to defeat justice by re-filing the matter, this time joining the Thika Land Registrar and the Attorney General, even though there were no genuine claims against them. Their inclusion, he contended, was a device to create the impression that the matter involved different parties, which was misleading.

23. It was submitted that the 1<sup>st</sup> Respondent misled the lower court by concealing the fact that the same issues and parties had previously been litigated. Counsel invoked the equitable maxim that “he who comes to equity must come with clean hands,” and argued that the Respondent failed to meet this standard.
24. Counsel for the Applicant further contended that upon discovering the ex parte proceedings, she moved to court to set aside the judgment and present her case, but was ultimately denied a hearing due to procedural technicalities. Despite being ordered to pay throw away costs, which she did, her right to be heard on the merits was not accorded, and she was condemned unheard. As a result, her property rights were unlawfully curtailed.
25. On the law, counsel relied on the principle of res judicata provided for under Section 7, *Civil Procedure Act*, Cap 21. Counsel submitted that the matter had already been directly and substantially in issue in a former suit between the same parties, which had been heard and finally determined by a competent court. Reliance was placed on Civil Appeal No. 9 of 2021 eKLR and Constitutional Petition No. 301 of 2019 eKLR.
26. Counsel also relied on the Rules of natural justice and constitutional rights under Article 48 of *the Constitution* on access to justice and Article 50 on the right to a fair hearing, arguing that the Applicant had been denied these rights. Counsel contended that the trial court’s decision to reinstate the decree based on late compliance with directions violated the principle in Article 159(2)(d), which required justice to be administered without undue regard to technicalities. Reliance was placed on the cases of James Mangoli Musoo v Ezeetec Limited [2014] eKLR and Judicial Review No. E178 of 2023 eKLR.
27. On the prayer for a restraining order and injunction, counsel submitted that the Applicant was entitled to equitable relief in the form of restraining orders to prevent irreparable harm and to protect her property rights pending determination of the appeal. He relied on the principles in *Giella v Cassman Brown & Co. Ltd* [1973] E.A and the Court of Appeal decision in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, in support of his submissions. The two decisions required an applicant to demonstrate a prima facie case, irreparable harm, and balance of convenience.
28. Counsel concluded that the Applicant had demonstrated both in fact and in law that her rights were violated and that the trial court erred by reinstating the judgment without hearing her case on merit. He urged the court to grant the Applicant the reliefs sought in her application dated 5<sup>th</sup> November 2024.

### **1<sup>st</sup> Respondent’s Submissions**

29. Counsel for the 1<sup>st</sup> Respondent identified the following three issues for determination: (i) Whether the court should stay execution of the decree dated 5<sup>th</sup> November 2024; (ii) Whether the Application was filed out of time; and (iii) Who should bear the costs of the Application.
30. On whether this court should stay of execution, the 1<sup>st</sup> Respondent's counsel submitted that the Applicant had failed to demonstrate special circumstances warranting the grant of stay under Order 22 Rule 25 of the Civil Procedure Rules. Reliance was placed on *Burnet v Francis Industries* as cited in (*Kamaliza Security Guards v Zakem Constructions (K) Ltd* [2001] eKLR), where factors such as



the nature of the claim, the relationship of parties, strength of the claim, and prejudice to the plaintiff were identified as relevant in determining stay.

31. Counsel argued that the Applicant had not established any special circumstances nor offered to provide security as required by law. Reference was also made to Order 42 Rule 6 of the Civil Procedure Rules, which requires proof of substantial loss, filing without unreasonable delay, and provision of security. Counsel contended that judgment was delivered on 5<sup>th</sup> September 2018, while the application was only filed on 16<sup>th</sup> February 2024, five years later. This delay was said to be unreasonable, thereby disentitling the Applicant to equitable relief.
32. Counsel further cited *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, which held that mere execution does not amount to substantial loss, and that the Applicant must demonstrate other factors showing irreparable prejudice. In this case, it was submitted that the applicant had failed to establish such loss and was merely seeking to delay the 1st Respondent's enjoyment of the fruits of judgment.
33. Counsel also relied on *Century Oil Trading Company Ltd v Kenya Shell Ltd* [2007]eKLR, where Kimaru J emphasized that "substantial loss" must mean more than the ordinary consequence of losing property in execution, and that courts must balance the interests of the decree-holder with those of the applicant. It was argued that since there was no pending appeal, the Application was a waste of judicial time and an abuse of court process.
34. On costs, it was submitted that costs should follow the event, as the 1<sup>st</sup> Respondent had demonstrated entitlement. Reliance was placed on *DGM v. EWG* [2021] eKLR, citing *Party of Independent Candidate of Kenya & Another v Mutula Kilonzo & 2 Others* [2013] eKLR, which reaffirmed that the successful party is ordinarily entitled to costs unless good reasons exist to depart from the principle.
35. In conclusion, the 1<sup>st</sup> Respondent therefore urged the court to dismiss the Applicant's Application dated 5<sup>th</sup> November 2024 with costs, arguing that it lacked merit, was filed with inordinate delay, and amounted to an abuse of the court process.

### **Analysis and Determination**

36. I have carefully considered the Notice of Motion dated 5th November 2024, the affidavits sworn in support and in opposition, and the rival written submissions of counsel. From the record, the following issues arise for determination:
  - i. Whether the Application meets the threshold for grant of stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules.
  - ii. Whether the appeal discloses arguable grounds with a likelihood of success.
  - iii. Whether the draft Memorandum of Appeal should be admitted as duly filed.
  - iv. Who should bear the costs of the Application.

### **Whether the Application meets the threshold for grant of stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules**

37. The guiding principles on stay pending appeal are well settled under Order 42 Rule 6(2) of the Civil Procedure Rules and judicial precedents such as *Butt v Rent Restriction Tribunal* [1982] KLR 417. The Applicant must establish:
  - i. That she will suffer substantial loss unless stay is granted;



- ii. That the application has been brought without unreasonable delay; and
  - iii. That she is willing to provide such security as the court may order.
38. On substantial loss, the Applicant has averred that unless stay is granted, she stands to lose her proprietary rights in land parcel Ngenda/Nyamagara/772, which has already been transferred to the 1<sup>st</sup> Respondent. She has asserted that the appeal would be rendered nugatory as recovery may not be possible if execution is completed. The 1<sup>st</sup> Respondent, on the other hand, maintains that execution has long been completed, the decree implemented, and title issued in his name. In his view, there is therefore “nothing left to stay.”
39. From the evidence before me, it is not disputed that judgment in the lower court was delivered in 2018 and that a title deed has since been issued in favour of the 1<sup>st</sup> Respondent. That being so, the argument that the decree has already been executed cannot be ignored. However, the Applicant has demonstrated that she is still in possession of the suit property, which the Respondent contends is in contempt of prior eviction orders. In my view, this indicates that the dispute over possession and ownership is still alive. If execution were to proceed further through transfer, sale, or disposal of the land, the appeal would indeed be rendered nugatory. I am therefore persuaded that the element of substantial loss has been satisfied.
40. On whether there was delay in filing this Application, the judgment sought to be challenged was delivered on 5<sup>th</sup> September 2018. The present Application was filed on 5<sup>th</sup> November 2024, more than five years later. Ordinarily, such delay would be fatal. However, the Applicant has explained that she attempted to set aside the ex parte judgment in 2023, paid thrown away costs, and was denied the opportunity to defend on merits due to alleged late compliance. Those proceedings culminated in the ruling of 5<sup>th</sup> November 2024, which is the subject of the present appeal.
41. In the circumstances, the delay cannot be attributed to indolence alone. The Applicant has demonstrated that she was pursuing remedies before the trial court and only approached this court upon reinstatement of the decree in November 2024. I therefore find the delay excusable.
42. On security, the Applicant has not proposed security for due performance of the decree. Order 42 Rule 6(2)(b) is couched in mandatory terms. However, courts have held that the nature of the decree is relevant. The decree herein concerns ownership of immovable property. Considering the circumstances, an order for security in monetary terms may not serve justice, but the Applicant can be required to deposit a reasonable sum in court as security for costs of the appeal.

**Whether the appeal discloses arguable grounds with a likelihood of success.**

43. On whether the appeal is arguable, the Applicant raises weighty grounds, particularly the plea of res judicata under Section 7 of the *Civil Procedure Act*, citing Nairobi HCCC No. 1658 of 1979, where the same parties and subject matter were allegedly determined. If indeed the suit was res judicata, the trial court lacked jurisdiction to entertain it.
44. In addition, the Applicant claims violation of the right to be heard and reliance on procedural technicalities to shut her out. These issues raise bona fide questions of law and fact that warrant interrogation by this court at the appellate stage. I therefore find that the appeal is not frivolous but arguable.



**Whether the draft Memorandum of Appeal should be admitted as duly filed**

45. The Applicant has sought that the draft Memorandum of Appeal be admitted and deemed duly filed. Article 159(2)(d) of *the Constitution* obliges courts to administer justice without undue regard to technicalities. Given the explanations offered and in the interest of substantive justice, I find merit in this prayer.
46. Consequently, I am satisfied that the Notice of Motion application dated 5<sup>th</sup> November 2024 is merited and I grant it and make the following orders:
- a. There shall be a stay of further execution of the judgment and decree in CMCC Thika No. 640 of 2013 pending hearing and determination of the appeal, on condition that the Applicant deposits Kshs. 100,000/= in court within 30 days from the date hereof.
  - b. The Memorandum of Appeal shall be filed within 10 days
  - c. The Applicant is directed to compile, file and serve the Record of Appeal within 45 days.
  - d. In default of compliance with order (a) above, the stay granted shall automatically lapse.
  - e. Costs of this application shall abide the outcome of the appeal.

**DATED SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 6<sup>TH</sup> DAY OF OCTOBER 2025**

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**J. M ONYANGO**

**JUDGE**

In the presence of:

Mr. Ndungu Chege for the Applicant

Mr. Wachira for Mr. Kanyi for the Respondent.

Court Assistant: Hinga.

