

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. E072 OF 2025

JANE KATHUREAPPELLANT/APPLICANT

VERSUS

NAFTALLY MUTEMBEI 1ST
RESPONDENT

LEWIS MWIRIGI2ND RESPONDENT

EDWARD MUNENE3RD RESPONDENT

RULING

1. What is before me is the Notice of Motion Application dated **3rd October 2025**; brought pursuant to the provisions of **Sections 1A, 1B, 3 & 3A of the Civil Procedure Act Cap 21, Laws of Kenya; Order 51 Rule 1 of the Civil Procedure Rules and Articles 40 and 159 of the Constitution 2010**; and wherein the Applicant has sought the following reliefs:

- (i) *That this Application be certified as urgent and the same be heard Ex-xparte in the first instance.*
- (ii) *That the Honourable court be pleased to issue an order of stay of execution of judgment, decree and all subsequent orders in Nkubu PM ELC NO. 44 of 2019 [Jane Kathure Ezekiel vs Naftaly Mutembei & 2 other] pending hearing and determination of this application and the main appeal inter-partes.*
- (iii) *That the Honourable court be pleased to issue an order of inhibition, inhibiting any dealings in relation to L.R No. Nkuene/Mitunguu/2301 and any subsequent subdivisions*

pending the hearing and determination of this application and the main appeal inter partes.

- (iv) That the honourable court be pleased to issue an order of injunction barring the respondents, whether by themselves, their agents, assigns, servants or successors in title, from entering in any way dealing with L.R No. Nkuene/Mitunguu/2301 and any subsequent subdivisions pending hearing and determination of this application and the main appeal inter partes.*
 - (v) That the honourable court be pleased to issue an order directing the officer commanding station (OCS) Mitunguu police station to ensure compliance with prayer NO. 4 above.*
 - (vi) That the honourable court be pleased to issue any other or better relief as shall meet the end of justice.*
 - (vii) That the costs of this application be borne by the respondents.*
2. The subject Application is premised on the various grounds which have been enumerated in the body thereof. Furthermore, the application is supported by the affidavit of the applicant [Jane Kathure], sworn on 3rd October 2025 and to which the deponent has annexed various documents, including a copy of the Judgment of the subordinate court delivered on 27th August 2025; the decree arising therefrom and a copy of the green card in respect of L.R No. Nkuene/Mitunguu/2301 [the suit property].
3. The subject application was served upon the respondents. However, despite service, the respondents herein neither filed grounds of opposition nor a replying affidavit. Moreover, the respondents herein did not participate in the hearing of the application.

4. The instant application came up for hearing today [22nd October 2025], whereupon learned counsel for the applicant sought to canvass the application by way of oral submissions. To this end, the court gave directions and the application proceeded for hearing. Furthermore, the submissions canvassed on behalf of the applicant are on record.
5. Briefly, learned counsel for the applicant adopted the grounds at the foot of the application; and reiterated the contents of the supporting affidavit and the annexures thereto. In addition, learned counsel for the applicant highlighted two key issues, *namely*; the applicant's appeal is likely to be rendered nugatory unless the orders sought are granted; and the applicant has established a sufficient basis to warrant the grant of the orders sought.
6. Having reviewed the subject application; the supporting affidavit; and upon consideration of the oral submissions made on behalf of the applicant, I come to the conclusion that the determination of the subject application turns on three [3] key issues, *namely*; whether the applicant has established a basis for the grant of an order of stay of execution pending appeal or otherwise; whether the applicant has demonstrated a basis for issuance of an order of inhibition; and whether the applicant is entitled to an order of temporary injunction or otherwise.
7. Regarding the first issue, *namely*; whether the applicant has established a basis for the grant of an order of stay of execution pending the hearing and determination of the appeal, it is imperative to highlight that any applicant, the current applicant not *excepted*, is obligated to demonstrate three key elements before partaking of an order of stay of execution pending the hearing of an Appeal. Firstly, it is incumbent upon the

applicant to establish and demonstrate the existence of a sufficient cause. [see order 42 Rule 6 (1) of the Civil Procedure Rules 2010].

8. Additionally, an applicant desirous to procure an order of stay is called upon to establish and prove substantial loss. For good measure, substantial loss constitutes the cornerstone upon which an order of stay of execution is granted. Absent proof and substantiation of substantial loss an order of stay of execution cannot issue. [see **Kenya Shell Ltd vs Benjamin Karuga Kibiru & another (1986) eKLR; James Wangalwa vs Agnes Naliaka Cheseto (2012) eKLR**, respectively.
9. Finally, it was also incumbent upon the applicant to exhibit readiness to provide such security as the court may deem appropriate. To this end, it behooves the appellant to advert to readiness; and willingness to provide security as a show of good faith and bona-fides.
10. With the foregoing in mind, it is now appropriate to revert to the subject matter and to discern whether the applicant has satisfied the key ingredients/elements underpinning the grant of an order of stay of execution pending the hearing of an Appeal. To start with, the suit property was admittedly registered in the names of the applicant and the respondents. Moreover, the instrument of registration does not show whether the registration was on the basis of joint tenancy or tenants in common. For good measure, the copy of the green card is silent on the shares of the respective parties.
11. To the extent that the instrument of registration is silent, the position of the law is to the effect that such registration creates a presumption of tenancy in common. [see Section 91 (2) of the Land Registration Act].

In this regard, there is no gainsaying that the judgment of the subordinate court sought to be appealed against prima facie accords with the law.

12. Flowing from the foregoing, the question that arise is whether the appeal demonstrates a basis/sufficient cause worthy of interrogation during the plenary hearing. To my mind, the appeal beforehand does not exhibit sufficient cause, taking into account the explicit meaning and import of section 91 (2) of the Land Registration Act.

13. Other than the foregoing, there is the question of substantial loss. The learned magistrate, being alive to the provisions of section 91 (2) of the Land Registration Act; decreed that the suit property be sub-divided into four equal portions; and thereafter, the resultant portions be registered in the names of each individual. This means that the appellant/applicant shall be entitled to her pro rata share of the suit property; taking into account the law.

14. In this regard, the question that comes to the fore is what loss the applicant shall be disposed to suffer. I am afraid that the applicant herein shall not suffer any loss, let alone substantial loss. Absent proof of substantial loss, no orders of stay of execution can issue and or be granted.

15. Turning to the second issue, *namely*; whether a basis has been established to warrant the grant of an order of inhibition or otherwise, it is important to recall and reiterate that such an order can only issue to protect known legal or equitable interests. To this end, there is no gainsaying that an applicant must demonstrate the interests [if any] held over the suit property.

16.I have observed that the suit property was registered in the names of the applicant and the respondents as tenants in common. This means that every individual person is entitled to their own share. For good measure, this is the import of the decision of the learned trial magistrate.

17.My understanding of the doctrine of tenancy in common is to the effect that each and every shareholder owns a distinct portion in respect of the property, *save* for the fact that the title is one. In this regard, it then means that the applicant herein cannot seek to inhibit the rights accruing to the co-tenants. Moreover, the grant of such an order is likely to occasion injustice to the co-tenants. [See the decision in *Josephine vs the Attorney General (2015) eKLR* wherein the Court of Appeal expounded on the concept of joint tenancy; and tenancy in common].

18.In my humble view, the applicant herein has not laid a basis to warrant the issuance of an order of inhibition. If anything, the prayer for inhibition appears to be antithetical to the provisions of Section 91 (2) of the Land Registration Act.

19.Next is the issue as to whether an order of temporary injunction can issue or otherwise. Suffice it to state that an order of temporary injunction pending the hearing and determination of an appeal is governed/regulated by the provisions of Order 42 Rule 6 (6) of the Civil Procedure Rules 2010.

20. Nevertheless, there is no gainsaying that an applicant seeking such an order is enjoined to demonstrate and prove the same ingredients that were highlighted in the case of *Giella vs Cassman brown Ltd (1973) E.A.* For good measure, such an applicant must demonstrate the existence of a prima facie case, irreparable loss or demonstrate that the balance of convenience tilts in favour of granting the orders.
21. In addition, it is imperative to state that the conditions under reference must be established sequentially. The position under reference was highlighted in the case of **Hutchings Biemer Limited versus Barclays Bank Limited and Others [2006] Eklr.**
22. Has the applicant established a basis for the grant of an order of temporary injunction? I am afraid that the appeal by the applicant does not espouse any genuine and arguable legal issue. Notably, the suit property was registered in the names of the appellant and the respondents. Moreover, the instrument of registration does not indicate the nature of the shares available to either party. In this regard, the presumption is one of tenancy in common.
23. Guided by the foregoing presumption, the subordinate court decreed that the suit property be sub-divided into four equal portions and thereafter same be transferred into the names of each individual owner. It is the said order that has been appealed against. The question that arises is whether the appeal beforehand weighed, or juxtaposed against section 91 (2) espouses any prima facie issue.

24. In my humble view, the appeal by the appellant appears [I say appears] to be academic. The issue to be canvassed for determination by this court is apparent on the face of the law. In this regard, I am afraid that the applicant has not established a genuine and arguable appeal.

25. Having come to the conclusion that the applicant has not established a prima facie case/appeal, it is not necessary to venture forward and discuss the question of irreparable loss. Notably, the court could only venture forward and deal with irreparable loss if the applicant had surmounted the hurdle of a prima facie case. [See the holding of the Court of Appeal in the case of *Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86.*]

26. In view of the foregoing observations, and taking into account the provisions of Section 91 (2) of the Land Registration Act; and the ratio in the case of *Josephine vs the Attorney General (2015) eKLR*, I come to the conclusion that the applicant has failed to establish a basis to warrant the grant of the reliefs sought.

FINAL DISPOSITION.

27. For the reasons which have been highlighted in the body of the ruling, it must have become apparent that the subject application is bereft of merits. Moreover, the and the relief[s] sought appear to be contra the provisions of Section 91 (2) of the Land Registration Act.

28. In the upshot, the final orders that commend themselves to the court are as hereunder;

- (i) **The Application be and is hereby dismissed.**
- (ii) **No orders as to costs.**

29.It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS 22ND DAY OF
OCTOBER 2025**

**OGUTTU MBOYA, FCIArb;CPM [MTI-EA].
JUDGE**

In the presence of:

C/A Hussein/Mukami

Mr. Munene Kirimi for the Appellant/Applicant

No appearance for the Respondent