

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT GARISSA
ELC CASE NO. E005 OF 2025 (OS)

RAPHAEL MURIITHI KAIGIRA.....
APPLICANT

VERSUS

ELISHIBAH WAIRIMU KAMARA*(Being sued as the legal representative of the estate of Onesmus Kamara Mwaniki, Deceased)*.....**RESPONDENT**

AND

BARCLAYS BANK

LIMITED.....INTERESTED PARTY

RULING

Background

1. Before the Court for determination is the applicant's Notice of Motion application dated 5th June 2025 seeking, inter alia, an order of stay of execution of the eviction orders issued in Kerugoya MCELC No. 140 of 2018, and a stay of further proceedings therein pending the hearing and determination of this suit.
2. The application is supported on the Affidavit of Raphael Muriithi Kaigira, who avers that he is in occupation of

Land Parcel Mutira/Kirimunge/134 (the suit property), presently registered in the name of the late Onesmus Kamara Mwaniki, whose estate is represented by the Respondent.

3. The Applicant deposes that the suit property was originally registered in the name of his late father, Kaigiri Ruita, who had instituted Kerugoya MCELC No. 140 of 2018, challenging the registration of the said Onesmus Kamara. Upon his father's death, the Applicant's elder brother was substituted himself in the suit in place of his late father but failed to attend the hearing, resulting in the dismissal of the father's claim and the allowance of the Respondent's Counterclaim. Consequently, a decree was issued dismissing the entire suit and granting the Counterclaim in favour of the Respondent.

4. The Applicant avers that he was never a party to those proceedings, yet the eviction orders now being enforced target him. He contends that he has extensively

developed the suit property, and that the Respondent, being aware of his occupation, failed to join him in the Counterclaim as a Defendant. The Applicant further explains that after Judgment, he applied in the trial Court for stay of proceedings and execution, but that application was dismissed vide a Ruling dated 5th June 2025. He now urges this Court to stay execution pending the hearing of his Originating Summons for adverse possession, arguing that eviction before the suit is heard would cause him irreparable loss and the suit would be rendered nugatory.

5. The Respondent, Elishibah Wairimu Kamara, opposes the application. She avers that her late husband purchased the suit property from the applicant's father in 1973 for Kshs. 6,000, obtained consent from the Ndia Division Land Control Board, and was thereafter registered as the owner. She further avers that after her husband's death, she and her family were repeatedly prevented from accessing the land by the Applicant's father, which led to the litigation culminating in

Kerugoya MCELC No. 140 of 2018, where Judgment was entered in her favour. She further explains that following that decree, she obtained eviction orders, and that the trial court dismissed the Applicant's subsequent application to stay execution on 5th June 2025.

6. According to the Respondent, the present motion is a continuation of a pattern by the Applicant's family to delay enforcement of a lawful decree. She argues that no appeal has been filed against the Judgment or the Ruling of 5th June 2025, that the decree remains valid, and that the applicant, being a son and a person claiming under the original Plaintiff, is bound by that Judgment.

Parties Written Submissions

7. The application was canvassed by way of written submissions.

8. The Applicant's submissions dated 22nd July 2025 reiterate the grounds contained in the Supporting Affidavit. The Applicant submits that he is the one in actual occupation of the suit property, a fact that was within the Respondent's knowledge, yet she failed to include him in her Counterclaim in Kerugoya MCELC No. 140 of 2018. He argues that the eviction orders being executed were not directed at him, as he was not a party to those proceedings, and that his claim for adverse possession is independent of his late father's claim. The Applicant's Counsel contends that to evict the Applicant before his claim is heard would occasion grave injustice, given that he has made substantial developments on the property over a considerable period. It is further submitted that the Applicant was not aware of the earlier case and therefore could not have appealed against a decision in a suit where he was not a party. Counsel urges that the court preserve the status quo pending the hearing of the suit, so as not to render it nugatory.

9. The Respondent filed her submissions dated 14th August 2025. Counsel for the Respondent submitted that after Judgment was delivered in Kerugoya MCELC No. 140 of 2018, the Applicant filed an application in the trial Court seeking a stay of execution, which was dismissed by the Ruling of 5th June 2025. He argues that the present application is a repetition of the earlier application before the trial Court and constitutes an abuse of the Court process. Counsel maintains that the decree issued in the Lower Court expressly restrains the Plaintiff, his servants, or **“anyone claiming under him”** from interfering with the Respondent’s ownership and possession of the suit property, and that the Applicant, being a son of the original Plaintiff, falls squarely within that description.

10. The Respondent further submitted that the decree remains valid and has not been set aside or appealed against. Counsel contends that this Court cannot stay the Judgment of the Subordinate Court in the absence of an Appeal and that the orders sought would have the

effect of defeating a lawful decree issued by a Court with competent jurisdiction. Counsel describes the application as an attempt to buy time and perpetuate unlawful occupation of the Respondent's land. The Respondent thus prays that the application be dismissed with costs.

Analysis and Determination

11. I have carefully considered the application, the Affidavits on record, and the rival submissions of Counsel. The main relief sought by the Applicant is an order of stay of execution and stay of further proceedings in Kerugoya MCELC No. 140 of 2018, pending the hearing and determination of this suit.
12. From the record, it is not in dispute that Judgment was entered in Kerugoya MCELC No. 140 of 2018, whereby the suit filed by the Applicant's late father was dismissed and the Respondent's Counterclaim allowed, resulting in a decree for eviction. It is also not disputed that the applicant thereafter moved the Trial Court by

an application dated 6th March 2025, seeking orders similar to those now before this Court namely, a stay of execution and a stay of proceedings. That application was heard on its merits and dismissed vide a Ruling delivered on 5th June 2025.

13. The issue that arises for determination by this Court is whether it can entertain an application for stay of execution of a Lower Court's Judgment when a similar application has been heard and declined by the Lower Court, and no Appeal has been preferred against the Lower Court's Judgment and/or refusal to grant stay of execution.

14. It is a settled principle of Law that litigation must come to an end. A party aggrieved by the Ruling of a competent Court cannot re-litigate the same issue before another by instituting a fresh action. The proper recourse lies in appealing or seek a review of the matter under the Civil Procedure Rules, rather than filing a parallel application or suit in another forum.

Entertaining such a motion would offend the doctrines of res judicata and perhaps would constitute abuse of process. **Section 7 of the Civil Procedure Act** bars Courts from reopening matters that are directly and substantially in issue in a former suit between the same parties or those claiming under them, when such issues have been heard and finally determined by a competent Court.

15. The applicant acknowledges that the trial court had already ruled on an application where the Applicant sought to be joined in the suit as a necessary party and for stay of execution of orders issued in that suit before the Magistrate's Court pending the hearing and determination of the instant suit. In the suit before the Magistrate's Court the Plaintiff/Applicant's father was the Plaintiff and when he died the Plaintiff's brother applied and was substituted to represent his deceased father's estate. The Plaintiff being a son of the deceased, was a beneficiary of the deceased and was

deemed to be represented in the suit by his brother who substituted their deceased father.

16. Stay of Execution is provided for under **Order 42**

Rule 6 of the Civil Procedure Rules, which provides as follows:

6. (1) No appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except Appeal case of 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 sub rule (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.

17. Under **Order 42 Rule 6(2) of the Civil Procedure Rules**, an Applicant seeking a stay must demonstrate:

1) That substantial loss may result unless the order is made.

2) That the application has been brought without unreasonable delay, and

3) That security has been given for the due performance of the decree.

18. The rule contemplates a situation where an Appeal is pending from the decree sought to be stayed. In the present case, there is no Appeal lodged from the Judgment in **Kerugoya MCELC No. 140 of 2018**. The Applicant expressly states that he was not a party to that suit and therefore could not Appeal against it. Having taken that position, he cannot simultaneously seek to stay the execution of a decree arising therefrom. The law is clear that a stay of execution can only issue in respect of a decree by the same Court or by an Appellate Court. The Applicant's application for stay of execution before the Lower Court was declined. Having not appealed against the Lower Court's Ruling dated 5th June 2025 that declined to join him as a party in those proceedings, and to stay execution of the Judgment, he cannot properly come before this Court file a new suit and seek the same orders of stay that he was denied by that Court. The Applicant's option lay in lodging an Appeal against the Ruling.

19. In the suit before the Magistrate's Court the Plaintiff's father as Plaintiff had sought the cancellation of the title in respect of land parcel Mutira/Kirimunge/134 registered in the name of Onesmus Kamaara Mwaniki, deceased husband of the Defendant herein.

20. The Defendant in the suit before the Magistrate's Court filed a Counterclaim against the Plaintiff's deceased father where she prayed for orders that the deceased was a trespasser and that he together with his agents and/or servants be ordered to vacate and in default forcible eviction to issue and for permanent injunction. The Magistrate gave Judgment and issued a decree in favour of the Defendant in the Counterclaim on 28th February 2024. The Court on 16th May 2024 granted the Defendant an eviction order against the Plaintiff. The order was in the following terms:-

“That an eviction order be and is hereby issued to the Plaintiff/Respondent his servants, agents or anyone claiming under him out of land parcel No. Mutira/Kirimunge/134”.

21. It cannot be disputed that when the Plaintiff's deceased father instituted the suit in the Magistrate Court, he did so on behalf of himself and on behalf of his family. His children who included the Plaintiff could only claim through him and of necessity would be affected by any decision that would issue in such suit. The Plaintiff cannot therefore be acting sincerely in claiming he was not party to the suit in the Magistrate's Court case and the orders emanating therefrom could not affect him. The Plaintiff's averment that he was not aware of the suit before the Magistrate's Court is not sincere because after the death of the Plaintiff (their father), his brother was substituted as the legal representative and the family including the Plaintiff in the instant matter must have been involved as he would have been required to consent to the appointment of his brother to substitute their deceased father in the suit.

22. It is my determination therefore that the Notice of Motion dated 5th June 2025 is not sustainable and I dismiss the same with costs to the Respondent.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY
AT KERUGOYA THIS 12TH DAY OF NOVEMBER 2025.**

J. M. MUTUNGI
ELC JUDGE