



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ELCLA E019 OF 2025

LUCY WAIRURI KIHARA.....
APPELLANT

VERSUS

RAHAB WARIARA WANJEMA
(ADMINISTRATIX OF THE ESTATE OF SAMUEL
WANJEMA KANGANYA)
RESPONDENT

RULING

1. By Notice of Motion dated **6/03/2025** by the Appellant brought under Section 1A, 1B, 3A, 77,78 and 79 of the Civil Procedure Act, Order 42 Rule 6, 43 and 51 of the Civil Procedure Rules. She seeks orders that:

1) THAT the firm of FAITH RW & Co. Advocates be granted leave to come on record to represent Appellant.

2) That this Honorable Court be pleased to issue an order of stay of execution of the Judgment and Decree delivered by Hon. P Muholi on 21/11/2024

in Githunguri ELC No. 25 of 2019; Samuel Wanjema Kanganya versus Lucy Wairuri Kihara.

3) THAT the Court do grant a temporary stay of execution of the Judgment delivered on 21/11/2024 urgently until the Application is heard and determined.

4) THAT in the alternative of prayer 3 and 4 above, this Court be pleased to issue status quo to preserve the status of GITHUNGURI/IKINU/4170 and all parcels that were subdivided from GITHUNGURI/IKINU/503 pending hearing and determination of this Appeal.

5) THAT the Applicant and or Appellant be granted leave for extension orders so that he can get certified Court document to file Record of Appeal and the annexed Memorandum of Appeal be deemed as filed upon the payment of the Court Requisite Court fees.

6) THAT the Court do make an order of stay of execution of the Judgment made on 21st November 2024 pending the hearing and determination of the Intended Appeal.

7) THAT the costs of this application be provided.

2. The application is based on the grounds on the face of the application and supported by an Affidavit sworn by the

Appellant. The grounds of the application can be summarized as being that:

3. On 21/11/2024 the Honorable Principal Magistrate P Muholi delivered a Judgment in **Githunguri ELC No. 25 of 2019** in favour of the Respondent herein and according to the Appellant this put her at risk of being evicted from the ancestral property where she has her matrimonial home since the year 1986.
4. She also stated that the trial Court did not issue stay orders and the Appellant stands to suffer irreparable damages and untold suffering if this Court does not issue **URGENT** temporary status quo order to preserve **GITHUNGURI/IKINU/4170** pending hearing and determination of the intended appeal.
5. She averred that the Applicant has filed and attached intended Appeal against the Judgment of the Learned Trial Magistrate **Hon. Peter Muholi** delivered on 21/11/2024 and that if the orders are not granted then an Appeal will be rendered nugatory and academic.
6. In opposition to the instant application the Respondent Rahab Wariara Wanjema swore a Replying Affidavit on **14/10/2025**. She deposes that the said application is fatally defective since the Applicant failed to seek leave of Court to file an application for filing an appeal out of time and without leave there is no competent appeal on record. Further that the Judgment was delivered on 21/11/2024 and the Applicant

did not comply with strict statutory timelines of lodging an Appeal.

7. That the application is scandalous, frivolous, vexatious and is an abuse of the Court process since the Appellant has filed similar cases raising the same issues between same parties which has been litigated through multiple cases. According to the Respondent this is forum shopping and also the application is *res judicata*.
8. She insists that the Appellant's averments are baseless, misleading and made to vex the Respondent who has a Judgment in their favour. The issue of occupation was canvassed before trial Court and the Court found in favor of the Respondent.
9. According to the Respondent, the Applicant has not proved that she will suffer substantial loss because it has to be proved strictly not merely alleged. The Respondent urged the Court to dismiss the application with costs to the Respondent.
10. The Court has considered the Notice of Motion dated 6/03/2025, the Replying Affidavit in opposition thereto dated **14/10/2025**. The Court is of the opinion that the following issues arise for determination in the matter.
 - a) Whether the Applicant is entitled to an order for change of Advocates.
 - b) Whether the application for injunction is incompetent under Order 42 of the Rules.

- c) Whether the Applicant has made out a case for extension of time to file an Appeal out of time.
- d) Whether the Applicant has made out a case for the grant of an injunction.
- e) Who shall bear the costs of the application?

Analysis and Determination

a) Whether the Applicant is entitled to an order for change of Advocates

11. The Court has considered the submissions and material on record on this issue. It is evident that the said prayer is based upon Order 9 Rule 9 of the Rules which stipulates as follows:

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after Judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

12. It is also evident that such order for change of Advocates may be granted upon application which

application should be served upon the outgoing Advocate. The material on record indicates the application was served upon **Messrs King'angi & Mutahi Advocate LLP** and they did not file a Response in respect of the said application.

13. Consequently, in terms of prayer No. 1 the same is not opposed by the outgoing Advocates. Thus, leave for the firm of **Faith RW Advocates** to come on record on behalf of the Applicant in the intended Appeal is granted.

b) Whether the application for injunction is incompetent under Order 42 of the Rules

14. The Court has considered the submissions and material on record on this issue. The application for injunction is based upon Order 42 Rule 6 which stipulates as follows in the relevant subsections:

“(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.

(3) Notwithstanding anything contained in subrule (2), the Court shall have power,

without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”

(5) An application for stay of execution may be made informally immediately following the delivery of Judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate Court or tribunal has been complied with.”

15. The Applicant holds the position that the Court has jurisdiction especially under Order 42 Rule 6(6) to grant an interim injunction pending Appeal. However, the Applicant did not address Court on the import of the proviso in the sub rule which stipulates that an Applicant must have complied with the procedure for filing an Appeal from the decision of the trial Court or Tribunal. The procedure for instituting an

appeal against the decision of the Magistrates' Court is stipulated in Order 42 Rule 1 of the Rules as follows:

“(1) Every Appeal to the High Court shall be in the form of a Memorandum of Appeal signed in the same manner as a pleading.

(2) The Memorandum of Appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”

16. From the material on record there is no doubt that the Applicant has not filed a Memorandum of Appeal as required by law. In fact, one of the prayers she is seeking is leave to file the Appeal out of time. The Court is of the opinion (which opinion is based on law) that it can only grant an injunction pursuant to its appellate jurisdiction hence it cannot grant such an order in the absence of an Appeal. Accordingly, the Court finds and holds that the prayer for a temporary injunction is incompetent and so is the prayer for status quo sought.

c) Whether the Applicant has made out a case for the grant of a temporary injunction

17. This issue is answered in the negative in view of the Court's finding and holding on the competency of the prayer for injunction. It shall therefore not be necessary to determine whether the Applicant has satisfied the

requirements for the grant of an injunction. The Court has already held that the jurisdiction to grant such an order is appellate hence the same cannot be exercised in the absence of an Appeal.

d) Whether the Applicant has made out a case for leave to appeal out of time

18. The Court has considered the submissions and material on record on this issue. In the case of **Mwangi V Kenya Airways Ltd [2003] KLR 486**, the applicable principles were summarized as follows:

“Over the years, the Court has, of course set out guidelines on what a single judge should consider when dealing with an application for extension of time under Rule 4 of the Rules. For instance in Leo Sila Mutiso Vs Rose Hellen Wangari Mwangi (Civil Application No. Nairobi 255 of 1997 unreported), the Court expressed itself thus;

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also settled that in general the matters which this Court takes into account in deciding whether to grant an extension are; first, the length of the delay. Secondly, the

reason for the delay: third (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the Respondent if the application is granted.”

19. The Court has considered the length of delay in filing the instant application. There is no doubt that the decree sought to be challenged out of time was passed by the trial Court on **21/11/2024**. The instant application was filed on or about 6/03/2025 which was four months. There is no doubt that such delay was prolonged.

20. The Applicant's explanation for the delay was that her Advocate was awaiting proceedings does not make sense since she could have filed the Memorandum of Appeal as sought in the lower Court file. The Court has noted that the firm of **Faith RW & Co. Advocates** did not file any Affidavit to confirm the Applicant's explanation when they requested the Githunguri Magistrates' Court to furnish them with certified copies of the proceedings and Judgement for purposes of Appeal. The Court is thus not satisfied that an honest and reasonable explanation for the delay has been furnished by the Applicant.

21. The other aspect for consideration is the Respondent's submission of the multiple cases filed which I have considered and realized that the matters being litigated have been before various Environment and Land Courts.

Potentially standing the risk of having the matter marked as *res judicata*. The Court is thus of the view that allowing the application for extension of time to file an Appeal out of time would be prejudicial to the Respondent. Accordingly, the Court finds and holds that the Applicant has failed to make out a case for the extension of time.

e) Who shall bear costs of the application?

22. Although costs of an action or proceeding are at the discretion of the Court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap. 21). As such, a successful litigant should ordinarily be awarded costs unless, for good reason, the Court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The Court finds no good reason why the successful litigant should be deprived of costs. Accordingly, the Respondent shall be awarded costs of the application.

Disposal Orders:-

23. The upshot of the foregoing is that the Court finds no merit in the Applicant's Notice of Motion dated 6/03/2025 save for the prayer for change of Advocates. Accordingly, the Court makes the following orders for disposal of the application:

a) Leave is hereby granted to have the firm of FAITH RW & Co. Advocates to come on record to represent Appellant after Judgement.

b) The rest of the orders sought in the Notice of Motion dated 6/03/2025 are hereby declined.

c) Costs of the application to the Respondent.

DATED, SIGNED AND DELIVERED AT THIKA THROUGH MICROSOFT TEAMS ON THIS 11TH DAY OF NOVEMBER, 2025.

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**MOGENI J
JUDGE**

In the presence of:-

Ms. Wafula for the Appellant

Mr. King'ang'i for the Respondent

Mr. Melita - Court Assistant

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**MOGENI J
JUDGE**