

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**  
**ELC LAND APPEAL NO E045 OF 2025**

EUNICE

NJERI

IKIGU.....APPELLANT/APPLICANT

VERSUS

MARGARET W. MUCHINA (Sued on  
behalf of GITAU MUCHINA) .....1<sup>ST</sup> RESPONDENT  
MUKINYE FARMERS CO-OPERATIVE SOCIETY.....2<sup>ND</sup>  
RESPONDENT

**RULING**

1. This ruling is in respect of the Appellant/Applicant’s Notice of Motion application dated 16<sup>th</sup> July, 2025, seeking the following orders:
  - a) *Spent*
  - b) *Spent*
  - c) *Spent*
  - d) *THAT pending the hearing and determination of the appeal, this Honourable Court be pleased to stay execution of the ex-parte judgment delivered on 13<sup>th</sup> April 2022, and any consequential orders arising therefrom.*
  - e) *THAT the costs of this application be provided for.*
  
2. The application is supported by the annexed affidavit of Eunice Njeri Ikigu, the Appellant/Applicant sworn on 16<sup>th</sup> July, 2025, where she deponed that the trial court delivered a ruling on 8<sup>th</sup> July, 2025, declining to set aside the *ex-parte* judgment entered on 13<sup>th</sup> April, 2022, in

CMELC No 157 of 2019. She stated that she has filed an appeal challenging the said ruling/order.

3. The Applicant further deponed that she is the legal and registered proprietor of Land Parcel No. GILGIL/KARUNGA Block 5/228 and has been in continuous, peaceful occupation of the same for over two decades. The Applicant deponed that prior to her ownership in the year 2000, the property, which was registered in 1990, was previously owned by her parents. The Applicant further deponed that the 1<sup>st</sup> Respondent has never occupied the suit property and unless the orders of stay are granted, she will be unlawfully evicted causing irreparable harm and loss, further that the appeal would be rendered nugatory if execution proceeds.
4. Margaret W. Muchina, the 1<sup>st</sup> Respondent, filed a Replying Affidavit sworn on 9<sup>th</sup> September, 2025, and urged the court to hold that the Affidavit of Eunice Njeri Ikigu sworn on 16<sup>th</sup> July, 2025, in the United Kingdom is incompetent for lack of compliance with the mandatory provisions of Section 106 (B) of the Evidence Act (Cap 80, Laws of Kenya). She deponed that the Applicant has not satisfied the legal requirements for a grant of stay of execution of a judgment, which was delivered on 13<sup>th</sup> April, 2022, over three years ago. She urged the court to dismiss the application with costs.

#### **APPELLANT/APPLICANT'S SUBMISSIONS**

5. Mr. Cheruiyot, counsel for the Appellant filed submissions dated 15<sup>th</sup> September, 2025, and identified the following issues for determination:

- a) Whether the Supporting Affidavit should be struck out?*
- b) Whether the Applicant has satisfied the threshold for grant of stay of execution?*

6. On the first issue, counsel submitted that the Applicant upon filing the application subsequently filed a certificate dated 17<sup>th</sup> July, 2025 addressing all the issues raised by the 1<sup>st</sup> Respondent to technically defeat the application. On the question of the said certificate not being filed together with the application, counsel submitted that the omission squarely lies with counsel and the Applicant should not be punished for counsel's inadvertence. Counsel submitted that the certificate has been filed and placed on record, and relied on Order 19 Rule 7 of the Civil Procedure Rules and the case of **George Gabriel Kiguru & Another vs Republic [2022] KEHC 2650 (KLR)**.
7. On the second issue, counsel relied on provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules and submitted that if the ex-parte judgment is executed and the stay orders are not granted, her family will be evicted and there will be irreversible dispossession of her proprietary rights contrary to Article 40 of the Constitution of Kenya.
8. Counsel submitted that there is a likelihood of substantial loss and relied on the cases of **RWW vs EKW [2019] KEHC 6523 (KLR)** and **Ellen Wangari Mburu vs Patrick Kinuthia Kiiga [2021] KEELC 735 (KLR)**. Counsel also relied on Article 50 (1) of the Constitution of Kenya and submitted that denial of the right to a fair hearing coupled

with imminent eviction amounts to grave prejudice which cannot be compensated by damages.

9. On whether the application was filed without undue delay, counsel submitted that the ruling was delivered on 8<sup>th</sup> July, 2025, and the Appellant promptly filed the present application on 17<sup>th</sup> July, 2025. On security for the due performance of the decree, counsel submitted that the subject matter is land and the requirement for the Applicant to provide security for the due performance of the decree does not arise. Counsel submitted that land being a fixed and immovable asset will always be available for purposes of enforcing the decree.
10. It was counsel's submission that the Applicant remains ready and willing to abide by such terms as this Honourable Court may deem just, including the provision of security and urged the court to allow the application as prayed.

### **1<sup>ST</sup> RESPONDENT'S SUBMISSIONS**

11. Mr. Karanja, counsel for the 1<sup>st</sup> Respondent submitted that judgment in this case was delivered on 13<sup>th</sup> April, 2022 and it is over three years and six months now and no appeal has been lodged or filed in this court against the said judgment. Counsel submitted that in the absence of a pending appeal against the Judgment of 13<sup>th</sup> April, 2022, the Court would not have jurisdiction to entertain an Application for stay of

Execution. Counsel relied on the cases of **Dardanelli & 6 others vs Tilito & 3 others [2025] KELC 392** and **Kenya Shell vs Kibiru & Another (19986) 1KLR 410**.

12. Counsel further relied on Order 42 Rule 6 (2) of the Civil Procedure Rules and that submitted that the Applicant will not suffer any substantial loss if the orders sought are not granted and that she has not offered any security for due performance of the decree. Mr. Karanja relied on the cases of **Miriam Muthini Isaiah vs Monica Waruguru Kimani Nakuru High Court ELC No 280 of 2018**, **Karungu vs Masira & Another KEELC 5683 (KLR)** and **Fazal vs Lias [2024] KEHC 8175 (KLR)**, and urged the court to disallow the application with costs to the 1<sup>st</sup> Respondent.

#### **ANALYSIS AND DETERMINATION**

13. The issues for determination is whether this court should stay execution of the ex-parte judgment delivered on 13<sup>th</sup> April 2022, and whether the Applicant's supporting affidavit should be struck out.
14. The 1<sup>st</sup> Respondent stated that the supporting affidavit sworn on 16<sup>th</sup> July, 2025, by Eunice Njeri Ikigu, sworn in the United Kingdom is incompetent for lack of compliance with the mandatory provisions of Section 106 (B) of the Evidence Act (Cap 80, Laws of Kenya). I notice that the Affidavit was notarized as required by law and counsel submitted that the certificate has been filed and placed on record, and relied on Order 19 Rule 7 of the Civil Procedure Rules and the case of

**George Gabriel Kiguru & Another vs Republic [2022] KEHC 2650 (KLR).** The jurat of the affidavit also indicated that it was sworn in England and notarized by a Notary Public. This cures the anomaly hence the affidavit is competent.

15. Additionally, the applicant stated that the trial court delivered a ruling on 8<sup>th</sup> July, 2025, declining to set aside the ex-parte judgment entered on 13<sup>th</sup> April, 2022, in CMELC No 157 of 2019, of which she states that she has filed an appeal challenging the said ruling/order.

16. On the issue as to whether the Applicant has met the condition of stay of execution, Order 42 Rule 6 of the Civil Procedure Rules 2010 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 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. An Applicant seeking orders of stay of execution must meet the criteria set out under Order 42 Rule 6 of the Civil Procedure Rules. On the issue of whether the Applicant filed this application timeously, the ruling that has given rise to this application was delivered on 8<sup>th</sup> July 2025, and the Application was filed on 16<sup>th</sup> July 2025, therefore there was no inordinate delay in filing this application.

18. The Respondent pegged the issue of delay on the Judgment that was delivered on 13<sup>th</sup> April 2022, and not the application that was dismissed on 8<sup>th</sup> July 2025. The ruling indicates that the Applicant had filed an application seeking to set aside ex-parte judgment and stay of execution, which was dismissed. In the case of **Jaber Mohsen Ali & another v Priscillah Boit & another [2014]** the court held as follows:

*“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay*

*depending on the judgment of the court and any order given thereafter.”*

19. The Applicant further informed the court that if the ex-parte judgment is executed and the stay orders are not granted, her family will be evicted and there will be irreversible dispossession of her proprietary rights contrary to Article 40 of the Constitution of Kenya.

20. The issue of substantial loss was discussed in the case of **Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988)I KAR 1018** where the Court of Appeal stated that:

*“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdiction for granting stay”*

21. Similarly, the issue was also discussed in the case of **Bungoma Hc Misc Application No 42 of 2011 James Wangalwa & Another vs. Agnes Naliaka Cheseto** that:

*“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”*

22. In the case of **Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63**, the court held that:

*“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”*

23. The Applicant submitted that she is the registered owner of the suit land and that they risk being dispossessed if the judgment is implemented. The grant of stay of execution orders is discretionary and the court must look at the circumstances of each case. The discretion should be exercised judiciously to serve the interest of justice. An appeal should not be rendered nugatory or be left to proceed as an academic exercise when a stay is not granted and the execution process is implemented.

24. In the case of **Absalom Dova vs. Tarbo Transporters [2013] eKLR** the court held that:

*“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The*

*court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination”.*

25. I have considered the Application, the submissions by counsel and find that, it would be in the interest of justice to grant a conditional order of stay of execution in the following terms:

- a) An order of stay of execution is hereby issued pending the hearing and determination of this Appeal.*
- b) The Appellant to deposit Kshs 300,000/ in a joint interest earning account of the Advocates on record within 30 days failure to which the stay lapses.*
- c) Appellant to file and serve the Record of Appeal within 60 days.*
- d) Costs to abide by the outcome of the Appeal.*

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 21<sup>ST</sup> DAY OF NOVEMBER 2025.**

**M. A. ODENY  
JUDGE**