

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS APPLICATION NO. E009 of 2025

EDWARD THEURI GICHUKI1ST

APPLICANT

CATHERINE WANGUI THEURI 2ND

APPLICANT

VERSUS

**DAVIDSON WARUTERE
T/A WARUTERE ADVOCATES**

.....**RESPONDE**

NT

RULING

1. This is a ruling over a Miscellaneous Application filed seeking for stay and leave to file appeal out of time. The first applicant is a prisoner and a client of the Respondent. He appears to have defended the applicant who unfortunately is serving time at the Nyeri Maximum Security Prison. While the applicant was serving time, the respondent sought to enforce his fees of Ksh 60,000/= through a suit in the lower court.

2. He then purported to have served the in charge of a prison, purported to be Kingo'ng'o Prison, where one Kinyua introduced the applicant who declined to accept service. He

did not file any other service. The applicant has now learnt that the fees is being enforced through execution against his parcel of land Tetu/Muthuani/Gitathini/2615. Though indicating to be enforcement of fees using a title deed, it is not a land dispute. It appears judgment was entered while the applicant is facing a jail term.

3. A replying affidavit has been filed setting out the alleged service. I may not comment on the same. However Order 5 Rule 18 provides as follows:

Where the defendant is confined in a prison, the summons shall be served on him personally in the presence of the officer in charge of the prison.

4. I have perused the application and noted that the delay in filing an appeal is not deliberate. It is excusable. Leave shall therefore be granted for the applicant to file appeal out of time. The same shall be filed within 30 days.

5. Further, given that the applicant is in prison, leave is granted to him to sue as a pauper.

6. The next issue is whether to issue stay of execution. The applicant has shown that he has an appeal which has high chances of success. The purported execution has not been accompanied with forms related to transfer of immovable property and requisite leave that is required. There is no way of knowing the status of the applicant's land. However, Order 42 Rule 6 (10 and (2) requires as follows:

(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 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

7. The amount in dispute is 60,000/=. The said land is still good security. However, the court does not know the status of the suit land since the owner is in prison. In order to preserve the substratum of the case, the Land Registrar should register an inhibition on the suit land until the intended appeal is heard and determined.

8. The Land Registrar is to reverse any entry on the suit land creating any interest since 2021 to date.

9. Costs will be in the intended appeal.

Determination

10. I therefore make the following orders: -

- a) Leave shall therefore be granted for the applicant to file appeal out of time from the judgment and decree in Nyeri CMCC No. 197 of 2021. The intended appeal shall be filed within 30 days.
- b) Further, given that the applicant is in prison, leave is granted to him to sue as a pauper, in respect of the intended civil appeal.
- c) There be stay of execution of the judgment and decree in Nyeri CMCC No. 197 of 2021 pending hearing of the intended appeal.
- d) In order to safeguard the outcome of the intended appeal pendente lite, an order is hereby issued reversing any purported execution of the decree in Nyeri CMCC No. 197 of 2021 over land parcel number Tetu/Muthuani/Gitathini/2615 in purported execution over fees.
- e) The Land Registrar Nyeri County to register an inhibition over land parcel number Tetu/Muthuani/Gitathini/2615.
- f) The applicant is equally restrained from transferring his interest over land parcel number

Tetu/Muthuani/Gitathini/2615 pending hearing and determination of the intended appeal.

- g) The Respondent to file in court, in this file, a certified copy of the register, within 15 days.
- h) The original title deed be deposited in court within 15 days.
- i) Mention on 28.01.2026 to confirm compliance. Production order to issue.

DELIVERED, DATED and SIGNED at **NYERI** on this **13th** day of **November, 2025**. Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of: -

Applicant present

No appearance for the Respondent

Court Assistant – Michael