

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ELC APPEAL CASE NO. E016 OF 2025

**DCK WOMEN GROUP (THROUGH ITS REGISTERED OFFICIALS
MARGARET NYOKABI MUCHIRI AND
NANCY WANGARI GITHITU).....
.....APPELLANT**

VERSUS

**GEORGE MUCHIRI MUCHUNA.....1ST
RESPONDENT
THE REGISTRAR OF LANDS.....2ND
RESPONDENT
THE HON. ATTORNEY GENERAL.....3RD
RESPONDENT**

RULING

1. Coming up for determination is a Notice of Motion Application dated 16th September, 2025 brought pursuant to the provisions of Order 42 and Order 51 of the Civil Procedure Rules, 2010, Section 3A of the Civil Procedure Act and all enabling provisions of the law wherein the Applicant/Appellant seeks orders restraining the Respondent (sic) whether by himself or by his servants, employees, agents or anybody acting on his behalf under his name from altering, amending and/or dealing adversely with the records relating to title numbers Gilgil/Gilgil Block 1/314 and Gilgil/Gilgil Block 1/315 or any part thereof the pending the hearing and determination of the Appeal.
2. The said application was supported by the grounds therein as well as on the Supporting Affidavit of an equal date sworn by Margaret Nyokabi Muchiri the Appellant's Chairlady who deponed that the Applicant was the registered proprietor of land parcels known as Gilgil/Gilgil Block 1/314 and

Gilgil/Gilgil Block 1/315 (the suit properties) wherein the Respondent had obtained title deeds to the suit properties fraudulently and without following due process thus depriving them of their land.

3. That the judgement in the Naivasha Chief Magistrates Court in Land Case No. E062 of 2021 had been delivered on 27th August 2025 wherein aggrieved by the court's decision, they had filed an Appeal setting out the grounds under which they sought to challenge the same. That nonetheless, the Applicant's members who continue to reside, occupy and utilize the suit property risk being evicted from the suit property as the Respondent was likely to deal adversely with the title documents by altering, transferring and/or sub-dividing the suit property to their detriment.
4. That their Appeal has high chances of success hence it was imperative for the Honourable Court to protect the suit property pending the hearing and determination. That they stood to suffer irreparable loss and damage unless the orders sought was allowed.
5. In response and in opposition to the Plaintiff/Applicant's Application, the 1st Respondent's Advocate Gladys Atieno Oduor, swore an untitled Affidavit on the 26th September 2025 in which she deponed that the instant Application was frivolous, scandalous, an abuse of the court's process and lacked merit for which it ought to be dismissed with costs as it was intended to frustrate, deny and delay the 1st Respondent from enjoying the fruits of the trial court's Judgement which was correctly decided. That the Applicant lacked sufficient evidence to prove that title No. Gilgil/Gilgil Block 1/314 and Gilgil/Gilgil Block 1/315 had been fraudulently acquired.
6. That the Applicant's allegations were baseless since none of its alleged members resides on the suit property which were registered in the 1st Respondent's name. That in any case, the filed Appeal had nil chances of succeeding hence the same was a waste of time. That it was in the interest of justice that litigation comes to an end for which the law

required that the Applicant furnish security of cost. She thus prayed that the instant Application be dismissed with costs.

7. In a rejoinder, through the Applicant's Supplementary Affidavit sworn on the 1st October 2025 by its Chair, Margaret Nyokabi Muchiri, the Applicant deponed that the 1st Respondent's Replying Affidavit was incurably defective and incompetent as the 1st Respondent's Advocate had no locus standi to swear an affidavit since it was trite law that Advocates on record should not depone to contentious matters of fact, save for purely formal and procedural issues within their personal knowledge.
8. That subsequently, the Affidavit sworn by the said advocate had offended the provisions of Order 19 rule 3(1) of the Civil Procedure Rules, 2010 hence the same was fatally defective. That in the absence of a competent affidavit in opposition, her application dated 16th September 2025 remained unopposed, and should be allowed.
9. The 2nd and 3rd Respondents did not participate in the Application herein.
10. The Application was disposed of by way of written submissions as herein under summarized.

Applicant's Submissions.

11. The Applicants Submissions dated 1st October 2025 was to the effect that the 1st Respondent's Replying Affidavit sworn on the 26th September 2025 by his Counsel offended the provisions of Order 19 rule 3 of the Civil Procedure Rules. That Counsel had descended into the arena and elected to swear an affidavit on contested facts. That subsequently, the 1st Respondent's Replying Affidavit was incompetent and must be disregarded and struck from the record.
12. That the Application before the court was seeking to preserve the suit properties pending the hearing and determination of the appeal pursuant to the provisions of Order 42 of the Civil Procedure Rules, where the Applicant ought to demonstrate the substantial loss to be suffered if the

orders were not granted and wherein the court may order provision of security.

13. That the judgement being appealed against was one which had dismissed the Appellant's suit and was not one where a monetary sum had been awarded. That in any case, the orders sought had been declaratory in nature hence the claim for security was unsubstantiated as it did not apply in the instant case.
14. That the record in the trial court would affirm that the land in question was meant for a larger group of people, who had collectively purchased the same with the intent to subdivide it among themselves. That accordingly, it was a matter that directly affected a large group of people who believed that their land had been illegally and fraudulently taken away from them and who risked being dispossessed of the said land and rendered homeless, a larger part of the group having already been in occupation of the land where they awaited issuance of the title deeds.
15. That the Applicant was thus apprehensive that were the orders sought were not allowed, the Respondents may embark on evicting them from the suit property and/or deal adversely with the same by selling/disposing to unsuspecting third parties thus occasioning the Applicant to suffer substantial loss.
16. That the appeal raised triable issues and land being a very emotive issue, that it would be prudent to allow the application, preserve the suit land and allow the parties an opportunity to be heard on appeal.

1st Respondent's Submission

17. The 1st Respondent's submissions dated 15th October 2025 was based on one (1) issue for determination to wit; whether the prayers sought by the Applicant should be granted. However, before delving into the issue for determination, I note that the 1st Respondent's submissions went into the substance and the merit of the Appeal hence I will only consider portions that are relevant to the instant Application.

18. The 1st Respondent placed reliance on the decided case of **Julius Musili Kyunga v Kenya Commercial Bank Limited & Another [2012] eKLR** on the conditions for the grant of injunctions pending appeal to submit that the Applicant had not established an arguable case. That the Applicant had not sufficiently proved the existence of an arguable appeal having failed to challenge the documents that had he had produced at the trial which included a copy of the title deed indicating that he was the rightful owner of the suit parcels of land.
19. That secondly the Applicant had not demonstrated that substantial loss would occur if the injunction was not granted. That whereas the Applicant had stated that its members were residing in and utilizing the suit property and therefore risked being evicted, the said allegation was unsubstantiated because he and other persons he had authorized, were in occupation of the said suit properties and therefore there was no risk of eviction.
20. He placed reliance in the decided case of **Feisal Amin Janmohammed t/a Dunya Forwarders v Shami Trading Co. Ltd, Mombasa High Court Civil Appeal No. 65 of 2013 [2014] eKLR** to submit that the Applicant had not demonstrated the substantial loss they would suffer as opposed to the denial of his right to fully utilize the suit property were the orders sought herein granted. He thus urged the court to find Application dated 16th September 2025 unmerited and to dismiss the same with costs.

Determination.

21. Having considered the application before the court herein, the opposition thereto, the submissions by both parties, the authorities cited and the applicable law, the Applicants bring their application seeking an order from the court to restrain the 1st Respondent whether by himself or by his servants, employees, agents or anybody acting on his behalf under his name from altering, amending and/or dealing adversely with the

records relating to title numbers Gilgil/Gilgil Block 1/314 and Gilgil/Gilgil Block 1/315 or any part thereof pending the hearing and determination of the Appeal on the claim that they were the rightful registered proprietors of the suit parcels of land. That they were aggrieved by the judgment and have lodged the current Appeal. That they are genuinely apprehensive that the 1st Respondent will proceed to adversely deal and/or evict them from the suit parcels if stay is not granted.

22. They believe their Appeal has high chances of success and they fear they will suffer irreparable loss, if the Application is not granted and they being a group of individuals are evicted from the suit parcels of land. That the orders sought had been declaratory in nature hence the claim for security was unsubstantiated as it did not apply in the instant case.
23. The 2nd and 3rd Respondents did not participate in the Application wherein the 1st Respondent in opposition, through his Replying Affidavit sworn by his Counsel, sought for the dismissal of the same with costs. The reason being that the Appeal had no chances of success, none of the Applicants' alleged members resided on the suit properties which were registered in his name and therefore they would not suffer any loss. Lastly that the Applicant had not provided any security. That the application was devoid of any merit and sought to deny him the fruits of his judgement.
24. To begin with, it is notable that the Replying Affidavit was sworn by the 1st Respondent's Counsel M/S Gladys Atieno Oduor, who the Applicant/Appellant argued lacked the *locus standi* to swear the affidavit because she was testifying to contentious matters of fact that were not within her personal knowledge as an advocate, but rather facts that concerned a dispute over land ownership and occupation, matters that should have been attested to by her client, the 1st Respondent.
25. Order 19 Rule 3(1) of the Civil Procedure Rules, provides as follows;

Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

26. This rule governs how affidavits used in interlocutory proceedings like a Notice of Motion should be framed, particularly regarding the source of information wherein Affidavits shall be confined to such facts as the deponent is able of his/her own knowledge to prove save that on interlocutory application statements of his belief may be admitted, provided that the grounds thereof are stated.
27. The well-established principle flowing from this rule is that advocates should not depone to contentious matters of fact in proceedings where they are representing a party. They should confine their affidavits to matters of procedure, law, or formal issues within their personal knowledge for example confirming a document was filed, explaining a delay etc. Since these are contested facts relevant to the core dispute of ownership, occupation and merit of the appeal I am in agreement with the Applicant that the affidavit offends the provisions of Order 19 Rule 3(1) of the Civil Procedure Rules, and is fatally defective Counsel having descended into the arena of the dispute, and therefore is incompetent and should be struck out.
28. The Supreme Court of Kenya in the case of **Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 56 (KLR) (Election Petitions) (26 September 2022) (Judgment)** had observed as follows at paragraph 136.

“This court cannot countenance this type of conduct on the part of counsel who are officers of the court. Though it is elementary learning, it bears repeating that affidavits filed in court must deal only with facts which a deponent can

prove of his own knowledge and as a general rule, counsel are not permitted to swear affidavits on behalf of their clients in contentious matters, like the one before us, because they run the risk of unknowingly swearing to falsehoods and may also be liable to cross-examination to prove the matters deponed to.”

29. In essence the application is therefore undefended for which I shall determine it on its merit. The judgment herein that led the Appellants/Applicants to seek for orders of injunction pending the hearing and determination of their intended Appeal was delivered by the trial court on the 27th August 2025 wherein the court had dismissed the Applicants’ Suit with cost for being unmeritorious.
30. The Applicants contend that unless the court grants an injunction, pending the hearing and determination of their intended Appeal, the 1st Respondent would proceed to execute the trial court’s judgement and evict them from the suit parcels of land.
31. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates 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 orders set aside. Prima facie case in a Civil Application

includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

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."*

32. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to wit:

- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
- ii. The application is brought without undue delay and
- iii. 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.

33. Subsequently, I find two issues arising for determination, namely:

- i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
- ii. What orders should this Court make.

34. I must state at this juncture that the trial court in its judgement of 27th August 2025 dismissed the Applicant/Appellant's suit with costs for being unmeritorious. This in essence was a negative order, incapable of

execution hence cannot be stayed. The judgment herein having been negative in nature; I find that there had been no orders flowing from it in respect of which a stay order could validly be granted. However, I find that the Applicants herein have sought that there be a preservative order restraining the 1st Respondent from adversely dealing with the suit parcels of land in respect of their occupation of the same and pending the hearing and determination of their intended Appeal.

35. The Court of Appeal in the case of **Mwalimu & 6 others v Halal & another (Civil Application E091 of 2022) [2023] KECA 634 (KLR) (26 May 2023) (Ruling)** had at paragraph 17 held as follows:

“In this case, however, the applicant, in prayer 3 of the Motion seeks an order for status quo in respect of Title No. Mombasa Island Block XV/29 & 31. Whereas we have no jurisdiction to stay a negative order, this Court in exercise of its inherent and original jurisdiction has power to grant such orders as will preserve the substratum of the appeal by an order for maintenance of the status quo. In this case, there is no doubt that, whether rightfully or wrongfully, the Applicants have been in possession of the suit property for more than two decades. In our view, this Court ought to issue orders which would best serve the interest of justice in line with the overriding objective of the Appellate Jurisdiction Act in Sections 3A and 3B of the said Act...”

36. Further, to this holding and the provisions of Section 1A (2) and 1B of the Civil Procedure Act, this court is enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. Subsequently, the Court ought to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal

footing. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.

37. The Applicants herein have argued that they would suffer substantial loss since failure to grant the orders sought would pave way for the execution of the trial court's judgement which would result in their eviction from the suit property.

38. In the case of **Mukuma v Abuoga (1988) KLR 645** the court had held as follows;

"Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory."

39. Indeed, it trite that the Court has to balance the interest of the Applicants who are seeking to preserve the substratum pending the hearing of the Appeal so that their Appeal is not rendered nugatory, and the interest of the 1st Respondent if any. However, whereas the impugned judgement herein had dismissed the Applicants/Appellants' suit which is a negative order incapable of being stayed, the same had paved way for dealing with the suit parcel of land including evicting the Applicants from the same. This being the case, and while keeping in mind that the Applicants are allegedly in occupation and/or in possession of the suit properties, and further that in exercising the court's discretion, the court should always opt for the lower rather than the higher risk of injustice, I find that the Applicants have proved that substantial loss may result unless a preservatory order was issued.

40. As to whether the instant Application has been brought without undue delay, it is not contested that judgment was delivered on 27th August 2025 wherein the application and Memorandum of Appeal were filed on 16th September 2025 (approximately 20 days later). I find that the Appeal and the present application for stay of execution has been filed without undue delay.

41. On the last condition as to provision of security, I find that Order 42

Rule 6 (2)(b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he or they in this case, must furnish security to guarantee the due performance of such decree or order as may ultimately be binding on them. The security is not to punish the judgment debtor and although the Applicants herein have not pledged their readiness to furnish the court with such security for the due performance of the Decree that may ultimately be binding upon them for reason that the judgment was a dismissal of the suit and not an award of a monetary sum, the impugned judgement herein had dismissed their suit with costs thus attaching a monetary aspect to it thus it was not correct to state that that the judgment was a dismissal of the suit and not an award of a monetary sum, the court therefore still retains discretion to order security for costs of the appeal to ensure the Respondent is protected if the Appellant fails.

42. In the case of **Arun C. Sharma vs. Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others [2014] eKLR** the court had held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

43. In the end, I find that there would be no prejudice occasioned to the 1st Respondent if the preservatory orders of maintenance of status quo pending Appeal was granted so as to balance out the interests of the successful litigant and the Applicants' unfettered right to file an appeal to fully ventilate their grievances, I shall therefore allow the Applicant's Application dated the 16th September, 2025 on the following terms;

- i. The status quo pertaining on the ground as of the date of this Ruling in respect of occupation in the Land Parcels No. Gilgil/Gilgil Block 1/314 and Gilgil/Gilgil Block 1/315 be maintained pending the hearing and determination of the Applicants intended Appeal.
- ii. The Appellants/Applicants do deposit a sum of Kshs. 500,000/= in court as security for due performance of the decree herein within 30 days from the date of the Ruling.
- iii. The Appellants/Applicants to compile, file and serve a record of appeal upon the Respondent within 30 days from the date hereof.
- iv. In the event of default of any of the aforementioned conditions, the preservative order herein granted shall lapse without further reference to the court.
- v. The costs of this application shall abide the outcome of the Appeal.

Dated and delivered at Naivasha via Teams Microsoft this 4th day of December 2025.



M.C. OUNDO

ENVIRONMENT & LAND COURT- JUDGE