



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CIVIL APPEAL NO. E113 OF 2025

JAMES MUTUGI WAMWIRUA.....1ST APPELLANT/APPLICANT
DAVID WANJOHI WAMWIRUA2ND APPELLANT/APPLICANT
(Suing as the Administrators of the Estate of Simon Githome Muono)

VERSUS

DAVID MUTURI MBAU.....RESPONDENT

RULING

[1] The applicant filed a Notice of Motion dated 10th September, 2025 seeking the following orders:

1. Spent.
2. Spent.
3. That pending the hearing and determination of this instant appeal, this Honourable Court be pleased to issue an Order of Stay of the judgment delivered on 25th September, 2025.
4. That the court do make such other orders as it may deem fit and just.
5. That the costs of this application be provided for.

[2] The application is based on the grounds on the face of the application and the supporting affidavit of the applicant. The applicant's case is that the Honourable S.M. Nyaga delivered a ruling on 25.09.2025 in Baricho SPM Succession Cause E093 of 2022. That being aggrieved by the said judgment he instructed his advocates on record to lodge an appeal on his behalf and wherein a Memorandum of Appeal was lodged in this Court's registry on 08.10.2025.

- [3] The applicant avers that the appeal is arguable and has a high probability of success. He will suffer substantial loss if the judgment delivered on 25th September, 2025 is allowed to stand as it will be a violation of interests since the same paves way for execution on a judgment entered on error.
- [4] Lastly, the applicant avers that the application herein will not occasion any prejudice to the respondents as a final and just determination of the issues between the parties will be made upon hearing of the appeal.
- [5] The respondent on 21st October, 2025 deposed to a Replying Affidavit and avers that the parties herein farm the land as distributed by Court. The Respondent herein has been in occupation of his portion of land measuring 0.022Ha during the proceedings at the trial court and as at now and has fenced and cultivated his portion. The status quo should be maintained pending the hearing and determination of the appeal.
- [6] Lastly, the respondent avers that applicants have not provide security for costs.
- [7] The applicant deposed to a further affidavit dated 4th November, 2025 that prior to the delivery of the impugned ruling dated 25th September, 2025, the respondent did not farm, have occupation of or utilize the suit property at all. Immediately after the delivery of the said ruling on 25.09.2025, the respondent extracted a certificate of confirmation of grant on the same day without any fresh application for summons for confirmation of grant.
- [8] Further, the respondent physically entered the property and attempted to place beacons therein. The appellant sought the intervention of Kiamaciri Police Station and the respondent was summoned by the investigating officer stationed at the Directorate of Criminal Investigations at Kiamaciri Police Station. The matter is still under active investigation by the Directorate of Criminal Investigations.

Applicant submissions

- [9] On substantial loss, the Applicants have demonstrated that immediately after the impugned ruling was delivered, the Respondent entered the suit property and attempted to beacon and fence off a portion thereof, contrary to the status prior to the ruling. The incident was reported at Kiamaciri Police Station, as evidenced by the annexed OB extract. If execution proceeds, the Applicants risk permanent loss of their beneficial entitlement to the estate of their late father, Simon Githome Muono, and the appeal will be rendered nugatory.

[10] On delay, the ruling was delivered on 25th September, 2025, and the present application was filed on 10th September, 2025, with the appeal lodged on 8th October, 2025. The Applicants acted with commendable promptitude and diligence.

[11] On security, the Applicants are ready and willing to abide by any terms as to security that this Honourable Court may impose.

[12] However, since this is a succession matter and the property in question forms part of the deceased's estate, it is respectfully submitted that no monetary security is appropriate. The estate should be preserved in situ, pending the determination of the appeal as was held *In re Estate of Gitau (Deceased)* [2021] eKLR.

Respondent submissions

[13] The Respondent made their submissions relying on Order 42 Rule 6 of the Civil Procedure Rules as follows:

*“From the Supporting Affidavit the Applicants fail to demonstrate what **substantial loss** they will suffer. The Respondent depones that **parties herein are in occupation of the suit land and each cultivating on their portion. It therefore follows that, the Applicants have to demonstrate which substantial loss they are to suffer if the Respondent's continues to cultivate his portion and them cultivating theirs.** In their submissions at paragraph 15, the Applicants shift their focus from the orders they are seeking to preservation of the estate. This is also seen at paragraph 11 of the supporting affidavit. All along during the subsequent mentions we have been submitting that the status quo be maintained, however the Applicants opposed the same. Your lordship, as earlier highlighted the confirmed grant was issued as a result of the ruling. **The Applicants made a grave blunder by failing to seek an order against the grant issued. It therefore follows that the Court has nothing to stay.** Without prejudice to the above, we humbly submit that the Applicants herein have failed to satisfy the conditions set forth by **Order 42 Rule 6(2)** and thus the application must fail.”*

Issue

[14] Whether stay of execution pending hearing and determination of appeal should be granted.

Analysis

[15] The principles governing stay of execution pending appeal in regular civil proceedings are set out in Order 42 Rule 6(2) of the Civil Procedure Rules. Although Order 42 Rule 6 has not been incorporated under Rule 63 of the Probate and Administration Rules so as strictly to apply to Succession Causes, courts invariably apply them by analogy and they are:

- i. Substantial loss may result unless the order is made;**
- ii. The application is brought without unreasonable delay; and**
- iii. The applicant must provide security for the due performance of the decree.**

[16] In succession matters, courts have also emphasised preservation of the estate pending appeal to avoid rendering appeals nugatory. In *re Estate of Gitau (Deceased)* [2021] eKLR, the Court held that security should be tailored to the context of succession and preservation of the estate is often the most appropriate form of security.

Substantial loss

[17] The applicants aver that immediately after delivery of the ruling of 25th September 2025, the respondent extracted a certificate of confirmation of grant on the same day and proceeded to enter the suit property, beacon it, and commence fencing. The incident was reported at Kiamaciri Police Station and is under investigation by the Directorate of Criminal Investigations. They argue that unless a stay is granted, the respondent's actions will alter the status quo, interfere with the estate, and render the appeal nugatory.

[18] The respondent contends that he has long been in occupation and merely continues farming the portion allegedly allocated to him by the trial court. The respondent does not dispute the extraction of the certificate and commencement of fencing immediately after the ruling.

[19] The Court is satisfied that the applicants have demonstrated a likelihood of substantial loss if the status quo is disturbed in the meantime.

Delay

[20] The ruling was delivered on 25th September, 2025. The Notice of Motion for stay was filed on 10th September, 2025 and the Memorandum of Appeal on 8th October, 2025. The application was filed promptly and without delay.

Security

[21] The applicants state they are willing to abide by any terms of security but argue that since the matter concerns immovable property forming part of a deceased's estate, monetary security would be inappropriate. They urge preservation of the estate in situ as adequate security.

[22] The respondent argues that no security has been offered.

[23] However, the availability of the Estate asset for distribution in accordance with the final orders of the Court is what should concern the Court when considering the issue of security for the due performance of the orders which may eventually be made against the appellant. An order for *status quo* to be maintained should therefore suffice as a condition preserving the property pending appeal.

ORDERS

[24] Accordingly, for the reasons set out above, the Court makes the following Orders:

1. The application for stay of execution is granted.
2. *Status quo* on the suit estate property shall be maintained.
3. The Record of Appeal shall be filed with sixty (60) days.
4. Directions as to hearing of the Appeal shall be taken on 23/4/2025.

[25] There shall be no order as to costs in the succession matter.

Order accordingly.

DATED AND DELIVERED THIS 11TH DAY OF DECEMBER 2025.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Ms. Mbakaya for the Appellant.

Mr. G. Kahiga for the Respondent/Applicant.