

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC CNO. E222 OF 2023

JAMES **MURIMI**
GITHINJI.....PLAINTIFF/RESPONDENT

-VERSUS-

MOHAMED **ALI**
HARED.....DEFENDANT/APPLICANT

RULING

1. Before this court for determination is the notice of motion dated 26th June, 2025 and the notice of motion dated 12th September, 2025 respectively. The notice of motion dated 26th June, 2025 is filed by the defendant/applicant, and it is expressed to be brought under **Sections 1A, 1B, 3, 3A and 63(e)** of the **Civil Procedure Act** as read together with **Order 42 Rule 6** and **Order 51 Rule 1** of the **Civil Procedure Rules**, seeking the following orders:-

1. ***Spent.***
2. ***That leave be granted to the firm of Odera Were to come on record for the defendant after delivery of the judgment.***
3. ***That this honourable court be pleased to stay execution and/or implementation of its decree and/or judgment issued on 24th March, 2025 pending the hearing and determination of this Application.***

4. That this honourable court be pleased to stay execution and/or implementation of its decree and/or judgment dated 24th March, 2025 pending the hearing and determination of the intended appeal.

5. That costs of this application be provided for.

2. The application is premised on the grounds set out on its face and in the affidavit of the defendant/applicant sworn on even date. The defendant/applicant deposed that being aggrieved by the decision of this court delivered on 24th March 2025, he appealed against the same vide a notice of appeal dated 26th June, 2025 filed under the firm of Hussein & Omar Advocates LLP.

3. He deposed that he holds a title deed over and resides on land parcel number 11379/3 wherein he has invested heavily by constructing a home. Further, that his title precedes in terms of order of issuance of the title deed held by the plaintiff/respondent. The defendant/applicant faulted the trial court for upholding the plaintiff's/respondent's title which was issued subsequent to his title. Further, that the subject property is a sub-division of 11379 out of which only three sub-divisions were created being the suit property, 11379/2 and 11379/1 and that the title deed held by the plaintiff/respondent is 11379/4, is an irregular and unlawful creation.

4. The defendant/applicant deposed that the trial court wrongly overruled his counsel's oral application made at the opening stage of the trial, when no witness had as yet testified, seeking adjournment of the proceedings in view of the existence of two other suits involving the same subject matter being **Petition 393 of 2008** and **Petition 47 of 2011**. Further, that the trial court moved forward the date of delivery of the impugned decision without notifying his counsel.

5. The plaintiff/respondent filed grounds of opposition dated 17th July, 2025 in opposition to the application. The plaintiff/respondent contended that the instant application offends the provisions of **Sections 77(2), 79(1) and 84(1)** of the **Court of Appeal Rules** as the intended appellant/applicant failed to lodge a notice of appeal before the Court of Appeal within 14 days, failed to serve him with the same, and the memorandum of appeal within sixty (60) days. Further, the instant application commenced some four months following the delivery of the impugned decision.

6. The plaintiff/respondent refuted the claim that two title deeds exist with respect to the suit property and asserted the existence of his title to the exclusion of any other. He described the suit

property as having been registered as **LR 15400/470 (I.R. 162475) (PLOT NO. 298)** which description differs from that supplied by the defendant/applicant herein being **LR 11379/3**. Further, that the instant application does not meet the threshold for the grant of a stay of execution of judgment and the proposed appeal is not arguable and is calculated to prevent him from enjoying the fruits of a successful judgment. In conclusion, that being an advocate of over 27 years standing, he is capable of reimbursing the costs of the intended appeal if successful.

7. The defendant/applicant filed a further affidavit sworn on 24th October, 2025. He reiterated the averments raised in his supporting affidavit. There would be no need to reproduce the same save to rehash its contents.
8. The notice of motion dated 12th September, 2025 is filed by the plaintiff/respondent, and it is expressed to be brought under **Sections 152E and 152F of the Land Act, and Order 22 Rules 6, 7 and 82 of the Civil Procedure Rules** seeking the following orders: -
 1. ***Spent.***
 2. ***That this honourable court be pleased to issue an order directing Clear Real Auctioneers duly licensed auctioneers to execute and enforce the eviction orders and attach movable goods for the awarded general damages of Kshs.1,000,000/- as issued in the decree dated 24th March, 2025.***

3. That the Officer Commanding Station (OCS) Kayole Police Station do provide adequate security and reinforcement to the said auctioneer during the eviction exercise.

4. That the honourable court be pleased to grant any other or better order/relief as shall meet the ends of justice.

5. That the costs of the application and the eviction exercise be borne by the defendant/respondent.

9. This application is premised on the grounds on its face and in the supporting affidavit of the plaintiff/respondent sworn on even date. The plaintiff/respondent deposed that the defendant/applicant occupying the suit property is in violation of the decree of this court dated 24th March, 2025 directing him to vacate and render general damages amounting to Kshs.1,000,000/-.

10. The defendant/ applicant opposed the application vide his replying affidavit sworn on 27th October, 2025. The defendant/applicant deposed that being dissatisfied with the judgment of this court delivered on 24th March, 2025, he has preferred an appeal against the aforesaid decision at the Court of Appeal as per the copy of the notice of appeal dated 26th March, 2025 and a letter requesting for proceedings marked

“**MAH2**”. Further, that the intended appeal raises arguable issues and has high chances of success.

11. The defendant/applicant deposed that the plaintiff/respondent purchased the suit property for Kshs.2,000,000/- which is the sole factor to be considered by the court in determining the amount to be provided as security by consequent to the decree dated 24th March, 2025. Further, that there was an unlawful consolidation of two parcels of land belonging to different owners resulting in the suit property.

12. Both applications were canvassed by way of written submissions. With regard to the notice of motion dated 26th June, 2025, the defendant/applicant filed his written submissions dated 27th October, 2025. While relying on the case of **Danji & 3 Others v Danji Bukhatiria Environment and Land Originating Summons 203 of 2012 (2015) KEELC 3920 KLR 15 May 2025) (Ruling)**, the defendant/applicant submitted that the plaintiff/respondent opted to file grounds of opposition rather than a replying affidavit in response to the application and as a result, his application is uncontroverted.

13. The defendant/applicant further submitted that he is entitled to the orders sought as he filed the notice of appeal, and that he has established that he stands to suffer substantial loss if the

reliefs sought are not granted, and that he is willing to abide by any conditions imposed by the court.

- 14.** The plaintiff/respondent filed his written submissions dated 7th November, 2025, where he raised two issues for determination as listed below: -

1. *Whether the threshold for an order of stay of execution pending appeal has been met.*

2. *Whether the appeal raised an arguable issue.*

- 15.** The plaintiff/respondent submitted that the defendant/applicant authored his own misfortune by constructing a house on the suit property in disregard of the demand letter by his advocates written in December, 2022 asserting his ownership rights over the property, which defeats the claim of substantial loss. Further, that a court order dated 13th April, 2023 stopping any constructing from taking place was served upon the defendant/applicant who overlooked the same, hurriedly erected a building on the suit property and settled therein with his family in May 2023. Further, that the defendant/applicant engaged a valuer and filed a valuation report dated 15th May, 2023 whereby, the value of the suit property was stated as Kshs.20,800,000/- and, on the basis of the foregoing report, caused the transfer of the same whose decision is sought to be stayed herein from the Magistrate's court to this court.

16. The plaintiff/respondent submitted that the intended appeal is not arguable as the defendant/applicant has not drawn a nexus between his ownership rights over the suit property and this court's finding that the defendant/applicant is a trespasser in respect of the suit property. Further, that the intended appeal raises issues touching on parties who were not involved in the suit whose decision is sought to be stayed by these proceedings namely Amboseli Court Limited and Kiambu Dandora Farmers Company.
17. With regard to the notice of motion dated 12th September, 2025, the defendant/applicant filed his written submissions dated 12th November, 2025. He submitted that the judgment of this court ought to be set aside *ex debito justitiae* as it was issued without notice, and that the date of its delivery was brought forward by the court without notifying his then counsel on record. He relied on the case of **Achieng V Omolo & Another Environment and Land No. E072 of 2024 (2025) KEELC 6872 KLP 9 October 2025 (RULING)**.
18. By the time of writing this ruling, the plaintiff/respondent had not filed his written submissions with respect to the notice of motion dated 12th September, 2025. Be that as it may, I have carefully analyzed and considered both applications, the replies

thereof and the respective submissions filed by the parties. The issue for determination in both applications is *whether they have merit, and whether each party is entitled to the respective orders sought*. I will begin with the notice of motion dated 26th June, 2025.

19. Pursuant to **Order 9 Rule 9** of the **Civil Procedure Rules**, and there being no opposition to the firm of Odera Were Advocates coming on record post judgment to represent the defendant/applicant, prayer 2 of this application is hereby allowed as it meets the requirements provided under the law.

20. **Order 42 Rule 6(2)** of the **Civil Procedure Rules** provides as follows:

“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.”

21. The preceding conditions are conjunctive rather than disjunctive entailing that all three conditions need to be satisfied by an

applicant seeking relief pursuant to **Order 42 Rule 6** of the **Civil Procedure Rules**.

22. In the case of **Daniel Maingi Muchiri v Jubilee Insurance Company Ltd [2017] [2017] KECA 114 (KLR)** the Court of Appeal stated as follows:

“Order 42 rule 6(2) allows the court to make an order of stay of execution only if it is satisfied that substantial loss may otherwise result; the application for stay of execution is made without undue delay; and such security as the court may order is given. (See Halai & Another v. Thornton & Turpin [1963] Ltd [1990] KLR 365).”

23. The plaintiff/respondent faulted the instant application for having been filed outside the mandatory sixty (60) days without the leave of court hence is incompetent. He argued that the impugned judgment was delivered on 24th March, 2025 while the application was filed on 1st July, 2025 and the defendant/applicant failed to advance any reasons for the delay in commencing the application.

24. This court is persuaded that the delay in commencing the instant application, following delivery of the impugned judgment, was not explained by the intended defendant/applicant. While he argued that there was no notice that was served upon his advocate, the judgment indicates that it was delivered in the presence of Mr. Odera Were, Mr. Omar and Mr. Hussein for the

defendant. It is therefore not correct that no notice was served yet he was represented during the said delivery.

25. It is evident that having failed to satisfy one of the conjunctive elements for the grant of stay of execution pending appeal under the provisions of **Order 42 Rule 6**, the application thus fails.
26. The plaintiff/respondent argued and submitted that the defendant/applicant trespassed onto the suit property, occupied the same for three years and should not be allowed by this court to continue trespassing thereon. This court, through the decision whose execution is herein sought to be stayed, has declared the plaintiff/respondent the lawful proprietor of the suit property and the defendant/applicant a trespasser thereon. In my view, and upon careful considerations of the averments raised by the defendant/applicant, the defendant/applicant has failed to establish that he stands to suffer substantial loss in the event the reliefs sought are not granted.
27. It is also noteworthy that the question of security for the performance of the order whose execution is sought to be stayed by these proceedings was not specifically addressed by the defendant/applicant in his submissions. The defendant/applicant has therefore not met the threshold to enable this court grant stay of execution.

28. With regard to the notice of motion dated 12th September, 2025, the court has already pronounced itself with regard to the defendant/applicant's application dated 26th June, 2025 seeking to stay the execution of the Decree rendered on 24th March, 2025. In the premises, this court is minded to allow the same as the defendant/ applicant has not refuted that he has refused to vacate the suit property within the period prescribed in the judgment. It therefore follows that the application is allowed in terms of prayers 2, 3 and 5 of the same. In conclusion, and for clarity this court hereby issues the following orders: -

- i. Save for allowing the firm of Odera Were Advocates to come on record for the defendant/applicant post judgment, the notice of motion dated 26th June, 2025 lacks merit and it is dismissed with costs.***
- ii. The notice of motion dated 12th September, 2025 is hereby allowed.***
- iii. This court hereby issues an order directing Clear Real Auctioneers to execute the eviction orders as per the decree dated 24th March, 2025.***
- iv. The Officer Commanding Station (OCS) Kayole Police Station do provide adequate security during the eviction exercise.***
- v. The costs of both applications and the eviction exercise to be borne by the defendant/applicant.***

It is so ordered.

**DATED, SIGNED & DELIVERED VIRTUALLY
THIS 19TH DAY OF JANUARY, 2026.**

**HON. MBOGO C.G.
JUDGE
19/01/2026.**

In the presence of:

Ms. Vena Aron - Court assistant

Mr. Were for the Defendant/Applicant