



Nganga v Nyoike (Suing as the legal representative of the Estate of Nyoike Nganga – Deceased) (Civil Appeal E194 of 2021) [2026] KEHC 344 (KLR) (7 January 2026) (Ruling)

Neutral citation: [2026] KEHC 344 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E194 OF 2021
DO CHEPKWONY, J
JANUARY 7, 2026**

BETWEEN

GATURU NGANGA APPELLANT

AND

JOHN NGANGA NYOIKE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NYOIKE NGANGA – DECEASED) RESPONDENT

(Being an appeal against the Ruling issued by Hon. D. N. Musyoka, Senior Principal Magistrate on 5th October, 2021 vide Kikuyu Misc. Application No.15 of 1995)

RULING

1. This ruling determines the Appellant/Applicant's Notice of Motion application dated 11th October, 2024, brought pursuant to the provisions of Sections 3A and 66 of the *Civil Procedure Act*, and Order 42 Rule 6 of the Civil Procedure Rules, 2010. Through the said application, the Applicant seeks orders as follows:-
 - a. Spent.
 - b. Spent.
 - c. That this Honourable Court be and is hereby please to order stay of execution of the ruling delivered on 4th October, 2024 by this Honourable Court and subsequently the ruling delivered on 5th October, 2021 in the Senior Principal Magistrate's Court at Kikuyu Miscellaneous Application Case No.15 of 1998 before Hon. D. N. Musyoka and all other consequential orders made therein pending hearing and determination of the intended appeal in the Court of Appeal.
 - d. That cost of the application be in the cause.



2. The application is premised on the grounds set out on its face and is supported by the affidavit sworn by Gaturu Nganga, the Appellant/Applicant, on 11th October, 2024. In summary, the Applicant contends that by a ruling delivered on 4th October, 2024, this Court dismissed his application dated 7th September, 2023, which had sought the re-instatement of the appeal earlier dismissed for want of prosecution vide a ruling delivered on 5th July, 2023.
3. Being aggrieved by the said ruling of 4th October, 2024, the Applicant has since lodged a Notice of Appeal dated 8th October, 2024, thereby signifying a clear intention to pursue an appeal before the Court of Appeal.
4. The Applicant avers that the appeal herein was initially filed vide a Memorandum of Appeal dated 14th October, 2021 challenging the ruling of Hon. D. N. Musyoka (SPM), which was delivered in Kikuyu Miscellaneous Application N015 of 1998. He maintains that the appeal was lodged timeously and with unreasonable delay. But the pendency of the appeal, he changed advocates and instructed the Firm of J. O. Otieno & Co. Advocates to take over conduct of the matter. However, to his detriment, he has since learnt, that the said advocates neither entered appearance, filed any document, nor attended court on his behalf. Consequently, the appeal was dismissed for want of prosecution without his knowledge or participation. The Applicant contends that he genuinely believed that his advocates were diligently handling the matter and only became aware of the dismissal upon being served with the ruling delivered on 4th October, 2024.
5. The Applicant asserts that the failure to prosecute the appeal was not deliberate, contumacious or attributed to him personally, but was occasioned by the inadvertence, neglect or inaction of counsel. He urges this Court to find that the mistakes of an advocate should not be visited upon an innocent litigant, particularly where the litigant has demonstrated vigilance and an intention to pursue his case. The Applicant further depones that he is ninety (90) years of age and has resided on the suit property for over sixty (60) years so that unless a stay of execution is granted, he stands to suffer substantial and irreparable loss, including the risk of eviction and dispossession from property that has been his home for the better part of his life. He maintains that such loss would not be adequately compensable by damages.
6. It is also the Applicant's position that the Respondent has embarked on execution proceedings without personally serving him with court process or hearing notices, and that the Applicant only became aware of the adverse orders after they had been issued. The Applicant therefore urged this Court to exercise its discretion in his favour and grant an order of stay of execution pending the hearing and determination of the intended appeal, contending that the appeal would otherwise be rendered nugatory. He further asserts that no prejudice would be suffered by the Respondent if the orders sought are granted, whereas grave prejudice would be occasioned to him if they are denied.
7. The Respondent, John Nganga Nyoike, swore a Replying Affidavit dated 11th October, 2024, in opposition to the application. He depones that he is the legal representative, administrator and sole beneficiary of the Estate of Nyoike Nganga (Deceased) and characterizes the application dated 11th October, 2024 as malicious, incompetent, misconceived, bad in law and an abuse of the court process. He contends that the Appellant has persistently disobeyed and acted in contempt of court and tribunal decisions dating back to 1998 and 2009, which conclusively determined the ownership of 1.06 acres excised from LR. No.Muguga/Muguga/105 in favour of the Deceased. According to the Respondent, notwithstanding these decision, the Appellant unlawfully subdivided the land and procured registration of Muguga/Muguga/1648 in his own name, in blatant disregard to binding tribunal awards and court orders subsequently affirmed by the lower court in its ruling delivered on 5th October, 2021.



8. It is the Respondent's case that the present application is merely a repetition of earlier applications seeking reliefs, including applications dated 15th October, 2021 and 5th September, 2023, all of which were dismissed. He asserts that this application is therefore *res judicata* within the meaning of Section 7 of the *Civil Procedure Act*, the issues raised herein having been previously heard between the same parties, litigating under the same title and finally determined by courts of competent jurisdiction.
9. The Respondent further urges that the doctrine of *res judicata* applies not only to suits but also to interlocutory applications within the same proceedings. It is trite that the Court must bring litigation to an end by preventing the Appellant from repeatedly approaching the Court under the guise of differently framed applications seeking the same substantive relief. He emphasises that allowing such conduct would undermine the principle of finality in litigation and deny successful litigants the right to enjoy the fruits of their Judgments.
10. Additionally, the Respondent contends that this Court, having already rendered final determinations on the issues raised is *functus officio* and therefore lacks jurisdiction to entertain the present application. He maintains that any grievance the Appellant has should properly be pursued before the Court of Appeal, and not through successive applications before this Court.
11. On the question of stay of execution, the Respondent argues that the Appellant has failed to satisfy the mandatory conditions set out under Order 42 Rule 6(2) of the Civil Procedure Rules. In particular, he avers that the Appellant has not demonstrated the nature of the substantial loss he is likely to suffer and has a history of indolence, having previously failed to comply with court orders requiring the provision of security, leading to the lapse and vacation of earlier stay orders by consent.
12. The Respondent further accuses the Appellant of deliberately engaging in procedural manoeuvres aimed at frustrating execution and delaying the enjoyment of a lawful decree. He submits that litigation must come to an end and that continued indulgence of the Appellant would amount to an affront to the constitutional command under Article 159(2)(b) that justice shall not be delayed and Article 48 which guarantees individuals to access to justice, including successful litigants.
13. In conclusion, the Respondent maintains that the application is frivolous, vexatious, and an abuse of the court process and that since the Applicant has failed to meet the threshold for grant of stay of execution pending appeal, and that the same ought to be dismissed with costs.

Submissions

14. Pursuant to courts directions issued on 15th October, 2025, the application was canvassed by way of written submissions and both parties duly complied. The Appellant/Applicant filed written submissions dated 11th March, 2025, while the Respondent filed his written submissions dated 18th June, 2025 and the Court has carefully considered the rival submissions, the authorities cited, and the factual background of the dispute.

Appellant's/Applicant's Submissions

15. The Appellant/Applicant submits that the Notice of Motion dated 11th October, 2024 squarely falls within the ambit of Order 42 Rule 6 of the Civil Procedure Rules and that the Court is properly seized of jurisdiction to grant orders of stay of execution pending the hearing and determination of the intended appeal before the Court of Appeal. It is contended that the application was brought timeously, without any unreasonable delay, noting that the impugned ruling was delivered on 4th October, 2024 and a Notice of Appeal was promptly lodged on 8th October, 2024.



16. On the question of substantial loss, the Appellant argues that this is the cornerstone of an application for stay of execution and submits that unless stay is granted, he stands to suffer grave and irreparable loss. He emphasizes that the subject matter of the dispute is Land Reference Number Muguga/Muguga/1648, a parcel of land which he avers he has been the registered proprietor of and has occupied peacefully for over fifty years. The Appellant contends that execution of the lower court's orders would result in his eviction and ultimate loss of the land, thereby rendering the intended appeal nugatory. In support of this line of argument, reliance has been placed on several authorities, including *James Wangalwa & Another v Agnes Naliaka Cheseto and Nicholas Stephen Okaka & Another v Alfred Waga Wesonga*, for the proposition that substantial loss is not merely execution per se, but the creation of a state of affairs that would irreparably negate the essence of the appeal.
17. The Appellant further submits that there is a real and reasonable apprehension that the Respondent, once allowed to execute, may dispose of the suit property, making it practically impossible to reverse the situation even if the appeal succeeds. He argues that the Respondent is not a person of known means and that damages would not be an adequate remedy in the circumstances. The Appellant also raises concerns about the Respondent's locus, asserting that questions remain as to the Respondent's relationship with the deceased, which issues, in his view, deserve interrogation by the appellate court.
18. On whether the appeal would be rendered nugatory, the Appellant maintains that denial of stay would defeat his constitutional right of appeal and reduce the proceedings before the Court of Appeal to a purely academic exercise. He underscores that the intended appeal raises arguable issues deserving full consideration, stressing that an arguable appeal need not necessarily succeed, but must merely be one that merits judicial consideration, as stated in *Nairobi City Council v Tom Ojienda & Associates (Civil Appeal (Application) E080 of 2022) (2022) KECA 1326 (KLR) (2 December 2022) (Ruling)*.
19. In conclusion, the Appellant urges the Court to exercise its discretion judiciously and in the interests of justice by preserving the subject matter pending appeal. He submits that the balance of convenience tilts in his favour, and that granting stay would occasion no prejudice to the Respondent that cannot be compensated by costs, whereas refusal would occasion irreversible harm to him.

Respondent's Submissions

20. In opposition, the Respondent submits that the application dated 11th October, 2024 is incompetent, misconceived, vexatious, and an abuse of the court process. He contends that the issues raised therein have been conclusively determined by this Court in earlier rulings, particularly the ruling delivered on 4th October, 2024, and that the present application is therefore barred by the doctrine of *res judicata* as codified under Section 7 of the *Civil Procedure Act*.
21. The Respondent provides a detailed procedural history of the matter, tracing it back to the decisions of the Land Disputes Tribunal, the Appeals Tribunal, and subsequent rulings of the lower court and the High Court. He submits that the Appellant's appeal was dismissed for want of prosecution on 5th July, 2023, and that a subsequent application for reinstatement of the appeal was dismissed on 4th October, 2024. According to the Respondent, the Appellant cannot, through cosmetic rephrasing, reintroduce the same prayers that have already been heard and determined with finality.
22. The Respondent strongly argues that this Court having exhausted its jurisdiction on the matter is *functus officio* and that any grievance the Appellant has ought to be ventilated before the Court of Appeal and not through repetitive applications before the same court. He stresses that the principle of finality in litigation is fundamental to the administration of justice and that allowing endless applications would undermine confidence in the judicial process.



23. On the merits of stay under Order 42 Rule 6, the Respondent submits that the Appellant has failed to demonstrate substantial loss. He asserts that the land in question rightfully belongs to the estate of the deceased and that the Appellant's registration was the result of fraudulent subdivisions carried out in defiance of tribunal awards and court orders. He contends that the Appellant has been in persistent contempt of lawful decisions and is undeserving of the equitable relief of stay.
24. The Respondent further submits that the Appellant has a history of indolence and non-compliance with court orders, particularly failure to furnish security as previously directed, which led to the lapse and vacation of earlier stay orders. He argues that equity does not aid the indolent, and that the Appellant cannot seek the Court's discretion while openly disregarding its orders.
25. Additionally, the Respondent emphasizes his right to enjoy the fruits of a Judgment delivered in his favour, noting that justice delayed is justice denied. He relies on Article 159(2)(b) and Article 48 of the Constitution to argue that the continued obstruction of execution amounts to denial of access to justice. He maintains that litigation must come to an end and that the Respondent should not be condemned to "babysit a barren decree" indefinitely.
26. In conclusion, the Respondent urges the Court to dismiss the application with costs, vacate any interim orders of stay, and affirm the finality of its earlier rulings. He reiterates that the application does not meet the threshold for grant of stay of execution and is a blatant abuse of the court process.

Analysis and Determination

27. Having carefully considered the Notice of Motion dated 11th October, 2024, the supporting and replying affidavits, the rival written submissions, and the authorities cited by the parties, this Court is of the considered view that the following issues arise for determination:-
 - a. Whether the present application is barred by the doctrine of res judicata;-
 - b. Whether this Court is functus officio and therefore devoid of jurisdiction to entertain the application; and
 - c. Whether the Applicant has satisfied the threshold for grant of an order of stay of execution pending the intended appeal before the Court of Appeal.

Whether the Application is res judicata

28. On whether the Application is res judicata, the Respondent has argued that the present application is res judicata, contending that the Applicant has previously sought similar reliefs which were dismissed, and that the Court ought not to entertain what is portrayed as a disguised attempt to reopen issues already determined. The doctrine of res judicata is anchored in Section 7 of the Civil Procedure Act and is intended to bring finality to litigation by barring courts from entertaining matters whose issues have been directly and substantially in former proceedings between the same parties, litigating under the same title, and finally determined by a court of competent jurisdiction.
29. It is settled law that the doctrine of res judicata does not apply to suits only but to applications too, including interlocutory applications, where the ingredients of Section 7 are satisfied. This principle has been affirmed in decisions such as *Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others* and *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others*, where the courts underscored that parties should not be permitted to re-litigate the same issues through clever drafting or cosmetic variation of prayers.



30. However, res judicata is not to be applied mechanically or as a blunt instrument. The Court must carefully interrogate the substance of the issues previously determined vis-à-vis those presently before it. In the instant case, whereas it is true that the Applicant previously sought orders of stay pending the hearing and determination of the appeal before this Court, the present application seeks stay pending an intended appeal against the ruling delivered on 4th October, 2024 to the Court of Appeal.
31. In the Court's considered view, a prayer for stay pending determination of an appeal before the High Court is conceptually and legally distinct from a prayer for stay pending an appeal to the Court of Appeal. These are not identical reliefs, and neither do they arise in the same procedural context. An application for stay pending an appeal to the Court of Appeal is substantially different in scope, purpose, and legal footing from an application for stay pending an appeal before the High Court. The former is anchored on preserving the subject matter pending the High Court's determination on the merits, while the latter is intended to preserve the substratum pending the exercise of a constitutional and statutory right of second appeal.
32. Consequently, although the parties are the same and the dispute arises from the same litigation history, the issue of stay pending an intended appeal to the Court of Appeal has not been directly and substantially in issue, nor finally determined, in the previous applications. To that extent, the present application does not fall within the strict confines of Section 7 of the *Civil Procedure Act* hence the plea of res judicata therefore fails and is hereby rejected.
33. In regard to whether the court is functus officio, the Respondent further contends that having already rendered final determinations on the issues raised herein, this court is functus officio and therefore lacks jurisdiction to entertain the present application. The doctrine of functus officio is as well grounded in the principle of finality, and posits that once a court has performed its task by rendering a final decision, it lacks authority to revisit or alter that decision.
34. The Supreme Court of Kenya in the case of Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR explained that functus officio does not bar a court from dealing with ancillary or consequential matters that arise after Judgment, provided such matters do not entail a re-opening or alteration of the substantive determination on the merits. As such, even after delivering a final Judgment or ruling, a court retains residual jurisdiction to entertain applications that seek to perfect, protect, or give effect to its decision, including applications for stay, correction of errors, or clarification, so long as such applications do not invite the court to sit on appeal over its own decision.
35. In the present matter, the final determination by this Court was the dismissal of the appeal for want of prosecution, and subsequently the dismissal of the application seeking reinstatement of that appeal. The Applicant is not inviting this Court to revisit, vary, or set aside that substantive determination. Rather, the Applicant seeks an ancillary relief of stay, pending the exercise of his right of appeal to the Court of Appeal. In this court's view, such an application does not offend the doctrine of functus officio as it does not seek to change the substance of the final determination on merit, but merely calls upon the Court to consider whether, pending appellate intervention, the status quo ought to be preserved. This falls squarely within the limited residual jurisdiction that a court retains even after rendering a final decision.
36. Therefore, this Court finds and holds that it is not functus officio in relation to the present application, and that it is properly seized of jurisdiction to consider it.
37. The final and most critical issue is whether the Applicant has satisfied the threshold for grant of stay of execution under Order 42 Rule 6 of the Civil Procedure Rules. That provision is couched



in mandatory terms and requires an applicant to demonstrate, among other things, substantial loss, timeliness, and provision of security, where applicable. However, before delving into those parameters, the Court must first interrogate a more fundamental question which is whether there exists an executable or positive order capable of being stayed. It is trite law that a stay of execution can only issue against a positive order, that is, an order commanding a party to do something or to refrain from doing something. A negative order, which merely dismisses an application or suit without granting any affirmative relief, is incapable of being stayed.

38. The ruling sought to be stayed is the ruling delivered on 4th October, 2024, by which this Court dismissed the Applicant's application for reinstatement of the appeal. That ruling did not order any party to perform or abstain from any act. It did not decree eviction, payment, transfer, or any other executable command. It was, in essence, a negative order.
39. In the case of *Western College of Arts and Applied Sciences v Oranga & Others* [1976] KLR 63 as affirmed in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR and *Republic v Kenya Wildlife Service & Another Ex parte Abraham K. Sang* [2019] eKLR; the Courts consistently held that there can be no stay of execution of a negative order, as there is nothing to execute. The intended appeal before the Court of Appeal, as disclosed by the Notice of Appeal dated 8th October, 2024, challenges the ruling of this Court delivered on 4th October, 2024. Since that ruling contains no positive or enforceable order, this Court is unable, in law, to grant a stay thereof. The proper forum to seek redress in such circumstances is the appellate court, which may, upon being satisfied, issue appropriate conservatory orders.
40. In the same breadth, the Applicant has also sought stay of execution of the ruling delivered by the lower court on 5th October, 2021. However, the intended appeal before the Court of Appeal, as disclosed by the Notice of Appeal on record, is directed against the ruling of this Court dated 4th October, 2024, not against the ruling of the subordinate court delivered on 5th October, 2021.
41. In those circumstances, this Court would be acting outside its remit were it to purport to stay a decision of the subordinate court when the intended appeal before the Court of Appeal does not directly impugn that decision. Whether or not the subordinate court's ruling ought to be stayed, and whether such stay is necessary to preserve the substratum of the appeal, are questions that properly fall for interrogation before the Court of Appeal, which is seized of the intended appeal and has the jurisdiction to issue orders under Rule 5(2)(b) of the Court of Appeal Rules.
42. This Court is therefore constrained to find that the prayer for stay of execution, as framed, is legally untenable. The Applicant seeks to stay a negative order, which is incapable of being stayed, and further seeks to anchor that stay on an intended appeal that does not directly relate to the subordinate court's ruling sought to be stayed. To grant such orders would be stretching the law beyond its breaking point and to arrogate to this Court a jurisdiction it does not possess.

Conclusion

43. In the resultant, while this Court has found that the present application is neither *res judicata* nor barred by the doctrine of *functus officio*, it is equally persuaded that the prayer for stay of execution is devoid of legal foundation.
44. Consequently, the Notice of Motion dated 11th October, 2024 is devoid of merit and is hereby dismissed. However, the Court directs that each party bears its own costs of the application.

It is so ordered.



RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 7TH DAY OF JANUARY , 2026.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Onchangu counsel for the Respondent

No appearance for and by the Appellant/Applicant

Court Assistant - Sakina

