

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA

ELCA NO E030 OF 2025

JAMES KIMANI

GICHURU.....APPELLANT

VERSUS

JOSEPH KARIUKI MBUTHIA &

OTHERS.....RESPONDENTS

RULING:

The Application for consideration is dated 23/7/2025. It seeks for orders that pending the hearing and determination of the instant Appeal, the Court be pleased to grant stay of execution of the Judgment delivered on 25/4/2025 in Nyahururu M.C ELC Case No. E080 of 2022 together with all the consequential orders emanating therefrom.

The grounds upon which the Application is premised are that there was an Application for stay of execution in the lower Court following the delivery of the Judgment that is the subject of this Appeal. The

same was dismissed on 23/7/2025. An eviction Notice has been issued against the Applicant herein requiring him to vacate the suit premises by 26/7/2025 (now past) threatening to forcefully evict him and unless stay is granted, the Applicant will suffer irreparably and the Appeal rendered nugatory.

He further pleads that the Respondent will not suffer any prejudice if the Application is allowed and that it is in the wider interest of justice that this Application is granted. Besides the above grounds on the face of the Application, the Applicant filed a Supporting Affidavit sworn on even date where he pleads that should the orders not be granted, his family stands to suffer irreparably. But he doesn't indicate how. And that they are likely to suffer loss and prejudice without being given a chance to be heard in the Appeal and that they would be rendered destitute should execution

ensue. He also pleads that he is ready to abide by the conditions of stay as by law provided.

The 2nd Respondent, National Bank of Kenya Ltd. opposed the Application by filing grounds of Opposition dated 6/10/2025 on 16/10/2025 which is in opposition to the Application dated 6/5/2025 in the lower Court and I believe that the same was meant to be against the current Application but the inadvertent error is excused. In the said grounds, the said 2nd Respondent says that in the subordinate Court the suit had already abated by the time the Appellant was substituted and that the Application for stay is without merit and the same should be dismissed with costs. As if they were reading from the same script, the 1st, 4th, 5th and 6th Respondents followed the 2nd Respondent in the bush and also referred to the Application they are opposing as the one dated 6/5/2025 (of the lower Court). I believe all the Respondents are suffering from the syndrome of copy and paste but luckily they all got the actual trial Court right.

I will likewise forgive their inadvertence in their Affidavit sworn on 16/10/2025. In the said Affidavit in reply, sworn by the 1st Respondent, Joseph Kariuki Mbutia he depones that the Application in the lower Court was dismissed on 23/7/2025 and was found to be lacking in merit and that it is unprocedural to file a second but similar Application for he should have filed an Appeal against the dismissed Application. He further urges that the Applicant intends to deny the Respondents their right to enjoy the benefit of their Judgment despite having been in the Courts for 12 years yet the Respondents have been declared the rightful owners of the suit land and should not be denied the opportunity of enjoying Judgment and they should be allowed to proceed and execute it. On behalf of the 3rd, 4th, 5th and 6th Respondents, he prays that the Application be dismissed with costs to the Respondents.

After allowing the parties to file their written submissions and which they complied with, it is now my turn to render the Ruling of this Court.

First, I wish to put straight 2 issues that the Respondents have got wrong. Foremost, it is true that the suit in subordinate Court had abated by the time the Appellant was substituted. Although this point should be raised at the Appeal stage, I have read the Judgment of E.H.Keago, Chief Magistrate in Nyahururu C.M ELC Civil Suit No. 80 of 2022 which was initially High Court No. 16 of 2018.

At page 12, the Honourable Trial Magistrate made the following observations (and rightly so): -

“.....the 2nd issue for consideration is whether the claim is statute barred. This matter was first filed in the High Court on the 12/3/2021. The initial Plaintiff died on 11/4/2021 but was not substituted until 19/4/2021. By that time the suit had abated. The Application for substitution and revival of the suit was allowed by the Judge as unopposed and no Appeal was filed against that decision and hence the same is not available for consideration by this Court at this stage...”

I can't agree more.

The next point found on paragraphs 6 to 9 (inclusive). Under Order 42 Rule 6 (1) of the Civil Procedure Rules.

- (i) 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 Stay shall have been granted or refused by the Court appealed from, the Court to which such Appeal is preferred should 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.

Therefore, it was and still is open for the Applicant having not found favour with the lower Court, to move this Court for the same

relief. Not as an Appeal but as if such Application for stay of execution had not been made in the Court that the Appeal is from. It is perfectly and lawfully in order and no one can deny him that right.

Coming now to the merits of the Application, I must state that a Stay of Execution is not meant to overturn the Judgment. all that a Stay of Execution does is to preserve the subject of the suit/Appeal until the Appeal is determined. It should not be meant to perpetuate the unlawfulness that the lower Court had brought to an end or forestall the same. This would then defeat the purpose of the Judgment in the first place.

Secondly, it is not for the Appellate Court to consider whether the Appellant has high chances of success in the Appeal. It is simply to ensure that whoever succeeds on Appeal would go back and find the subject of the Appeal safe for his taking.

In this case, I am of the view of and I order that if the Appellant is still in the suit premises he should vacate immediately and give vacant possession to the Respondents to enable them enjoy the

fruits of their otherwise successful litigation. However, after the property has changed hands and is registered in the names of the purchasers at the public auction, the suit land should not change hands further until the current Appeal is heard and determined. Costs of this Application to await the outcome of this Appeal. This Court has spoken.

Ruling dated, and delivered at Nyandarua this 5th Day of March 2026.

MUGO KAMAU
JUDGE

In the presence of:

C/A Samson.

Ms. Kimure for the Applicant.

Mr. Muriuki. for 1st, 3rd, 4th and 6th Respondents.

Mr. Kiburi for the 2nd Respondent.

