

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ELCA NO E005 OF 2025
MICHAEL KARIUKI GACHENGA & 6 OTHERS.....APPELLANTS
VERSUS
NAOMI WANGUI KIMUHU & 7
OTHERS.....RESPONDENTS

RULING

The Application dated 24/11/2025 by the Respondents seeks for Orders that pending the hearing and determination of the intended Appeal to the Court of Appeal, this Court be pleased to grant a stay of execution of the Judgment delivered on 13/11/2025 together with all orders consequential thereof. The Judgment of 13/11/2025 was as follows:

“The upshot of the above is that this Appeal succeeds and the Judgment of the learned Trial Magistrate dated 2/9/2024 is hereby set aside in its entirety. In its place, I give Judgment in favour of the Appellants against the Respondents jointly and severally for: -

An Order of Permanent Injunction restraining the Respondents herein by themselves, their agents and/or servants from invading, trespassing, cultivating or in any way whatsoever interfering with

the Appellants' quiet possession and use of all those parcels of land known as NYANDARUA/NJABINI/ 9187,9130,9149,9131,9132,9165,9150,9151,9163.9 164,9137,91869167,9168,9134,9152,9166,9133,91 72,91829177 AND 9191 respectively.

I will not award any General Damages which were sought but not proved.

I will spare the parties any payment of costs in order to try and promote harmony in the family.

This is the Judgment I am being asked to stay”.

The Application is anchored on grounds that the Judgment herein was delivered in favour of the Respondents restraining the Respondents from invading, trespassing on, cultivating or in any other way whatsoever interfering with the Appellants' quiet possession and use of all these parcels of land known as NYANDARUA/NJABINI/ 9187, 9130, 9149,9131,9132,9165,9151,9150,9151,9163,9164,9137,9186,9167, 9168,9134,9152,9166,9133,9172, 9182,9177 and 9191 respectively.

The Respondents, being dissatisfied with the said Judgement, decided to exercise their right of Appeal to the Court of Appeal at Nakuru and they fear that should execution take place before the Appeal in the Court of Appeal is heard and determined they are likely to suffer irreparable and substantial loss and that the Application has been brought to Court without rescuable delay, in

good faith and in the interest of justice and in order to safeguard the rights and interest of the Applicants on the subject parcel of land pending the hearing of the intended Appeal. Both on the face of the Application and in the Affidavit in support of the Application by Naomi Wangui Kimuhu, the 1st Applicant herein sworn on 24/11/2025, the Applicants commit themselves to comply with any reasonable conditions that may be ordered by this Court.

A Notice of Appeal was timeously filed communicating their intention to lodge an Appeal and they requested for typed proceedings. They are of the view, though wrongly, that the Appellant herein would suffer no prejudice should the orders sought be granted as they have never been in occupation of the suit properties.

In the lower Court, the above Title Deeds were ordered to be cancelled upon the decision of H.O Barasa, Principal Magistrate Engineer in PMCC ELC No. E004of 2023. They finally urge that there is need to protect the substratum of the Appeal pending its hearing and determination so that should the Applicants be successful on Appeal, then they will be able to recover the parcels of land. on their part, the Respondents, through their Advocate , Luis Wahome, filed a Replying Affidavit sworn on 2/12/20225 denying to have ever been served with the Notice of Appeal nor the letter requesting for proceedings as required by Rule (1) 84 (2) of the Court of Appeals Rules and no reason has been advanced as to why the Respondents' Advocates were never served, and that since the Respondents have not commenced the process of execution by not

applying for or obtaining Decree as provided for under Orders 20 and 21 of the Civil Procedure Rules, the Application is pre-mature and should have been brought under the provisions of Order 43 of the Civil Procedure Rules and same is incurably defective and should be dismissed with costs.

The Respondents also filed grounds of opposition dated 22/12/2015 in which they echoed the same legal provisions that were not met and that the Application is meant to deny the Respondents of their cultivation right to enjoy the fruits of their Judgment and that the same raises no legal grounds to allow stay of execution and that there is no Appeal pending in the Court of Appeal.

I appreciate the Respondents' concern that they are yet to be served with the letter requesting for proceedings and a copy of the Judgment herein and Notice of Appeal. That argument is for another forum. What is of concern for me and which has been discharged is that the 2 documents have been filed and shown to me.

I now turn to the main argument in the Application, i.e. that should the Application fail to be granted, the Appeal, should it be successful, would be nugatory. Under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, Stay in case of appeal [Order 42, Rule 6]

(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 order set aside.

(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.

As I held in the Nyamira ELC Case No. 92 of 2021 Shadrack Nyaberi Mwakae VS David M. Omoganda Ong'era.

“.....it is important that the Court takes into consideration the likely effect of granting a stay of execution or of the failure to do so. In other words, the Court ought to weigh the likely consequences

of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is 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 and see where the scales of justice lie, considering the fact that it is the business of the court, so far as possible, to ensure that any transitional motions before the Court do not render nugatory the ultimate ends of justice. The interest of the Court in a stay of execution in the case of a non-monetary Decree such as this one is usually meant to serve the purpose of exclusively preserving the subject matter so that whoever succeeds in the Appellate Court will find the property still intact. The court therefore needs to be more cautious and interrogate the consequences of failure to preserve the subject matter. The orders issued in this case should therefore be in respect to the preservation of the subject matter itself until the outcome of the intended Appeal.....”

Should I then grant the orders as sought by the Applicants herein, what happens to the properties in issue? The Applicants will continue to use the land and it will be as if the Respondents never succeeded in this case in the first case. They will be deprived of the use of the land the subject matter of the Appeal. Should I also fail to grant the orders sought by the Applicants will this not, in the words of the Applicants, place the suit property beyond the reach of the Applicants as well? The Title Holders would be at liberty to dispose of the properties.

This Court therefore has an obligation to give orders that act as a prohibiting safeguard against any disposal of the suit lands. In this particular case, the Titles to the suit properties are still in the names of and in the hands of the Respondents. And the court declared that the Applicants acquired them lawfully and that the same belong to them. What would prevent the Respondents from transferring the suit lands to innocent third parties who have no information as to the pending Appeal. All that the Respondents herein will show the would-be purchasers is a copy of the Judgment in this Appeal and the property changes hands or as the case may be. It would turn the entire proceedings herein and in the appellate court into an academic exercise and later burden this court and/ or the appellate court with a flurry of Applications. It is of paramount importance to ensure realization of the ultimate winners' fruits of litigation and that nothing complicates the matter after the final Judgment.

In the premises and taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful Party, I order that the Title Deeds in respect of L.R. No. NYANDARUA/NJABINI/9187, 9130, 9149,

9131,9132,9165,9150,9151,9163.9164,9137,91869167,9168,9134, 9152,9166,9133,9172,91829177 AND 9191 should not change hands by way of transfer. However, in the interests of justice, the Respondents herein, i.e. **Michael Kariuki Gachenga, & 6 others** shall forthwith take possession of and use of the parcels of land known as NYANDARUA/NJABINI/9187,9130,9149,9131,9132,9165,9150,9151,9163.9164,9137,91869167,9168,9134,9152,9166,9133,9172,91829177 AND 9191 respectively until the determination of the intended Appeal in the Court of Appeal.

These are the conditions precedent to the actualization of this court's stay of execution aforegranted. That way the subject matter will be safe and protected which will allay the Applicants' fear and at the same time the Respondents will be able to start benefitting and enjoying the fruits of their Judgment albeit until further orders from the Court of Appeal. I cannot do better in terms of a balancing act.

Judgment dated, signed and delivered at Nyandarua this 11th Day of March, 2026.

MUGO KAMAU
JUDGE

In the Presence of: -

Court Assistant: - Samson.

For the Applicant.....Ms. Nancy Njoroge.

For the Respondent.....Mr. Wahome.