



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC APPEAL NO. E050 OF 2022**

**ELIZABETH WANJIKU**

**GITHU.....APPELLANT/APPLICANT**

**VERSUS**

**KENYA COM RABBIT CONSORTIUM LTD.....**

**.....RESPONDENT**

**RULING**

1) Before this Court are two interconnected Applications that seek to determine the trajectory of this Appeal and the safety of the suit property, **LR No. Tinganga/Cianada Block 1/1383.**

i. The First Application is the Notice of Motion dated **23/07/2025** seeking a review and setting aside of this Court's Ruling delivered on 7th July 2025, which dismissed the Applicant's application for stay of execution.

ii. The Second Application is the Notice of Motion dated **06/11/2025** seeking an injunction and stay of execution pending the determination of the Review Application, and a declaration of contempt against the Respondent.

2) The Notice of Motion dated 23/07/2025 was filed by the Appellant/Applicant under Order 45 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking the following:

1. **Spent**

2. **THAT** this Honourable Court be pleased to review and set aside its Ruling delivered on 7th July, 2025 dismissing the Applicant's application for stay of execution.

3. **THAT** the Honourable Court be pleased to reinstate the Applicant's application for stay of execution dated 22nd January, 2025, and hear the same on its merits.

4. **THAT** costs of this application be in the cause.

3) The grounds upon which the application is premised is as follows:

1. **THAT** the Applicant filed an application dated 22<sup>nd</sup> January, 2025 seeking stay of execution of Judgment pending appeal.

2. **THAT** the said application was dismissed by this Honourable Court on the ground that it had already been dispensed with.

3. **THAT** the earlier dismissal of the application was not on its merits, but rather on a technical ground that the Advocate who presented it was not properly on record.

4. **THAT** the issue of stay has never been heard or determined on its merits, and the Applicant continues

to face imminent execution despite having a valid appeal.

5. **THAT** there exists sufficient reason and an error apparent on the face of the record, in that the Court did not consider or determine the substance of the application.
  6. **THAT** it is in the interests of justice and fairness that this Honourable Court reviews its Ruling and allows the application to be heard on its merits.
  7. **THAT** the Applicant is ready and willing to abide by any terms the Court may impose for the grant of stay.
- 4) The grounds are supported by the Supporting Affidavit of **Elizabeth Wanjiku Githu**. Where the Applicant deponed that the initial application she filed is dated 23/06/2022 which was seeking stay of execution regarding **MCELC Case No. 32 of 2019**, but it was never heard on its merits; it was dismissed purely on a technicality because the filing Advocate was not properly on record as evidenced by annexure **'EWG-1'**.
- 5) Subsequently she filed an application dated 22/01/2024 but this was also dismissed on **7<sup>th</sup> July 2025** on the grounds that the matter had already been dispensed with as evidenced by annexure marked as **'EWG-2'**.
- 6) The deponent asserts that the Court erred in its July 2025 Ruling because the substantive issue the merits of the stay of execution has never actually been determined by any Court.

- 7) She maintains that she has an arguable Appeal and that if execution proceeds, the Appeal will be rendered pointless.
- 8) The application is filed promptly and in good faith to ensure the Applicant is granted her constitutional right to a fair hearing on the merits of the stay.
- 9) She urges the Court to review and set aside the Ruling of 7<sup>th</sup> July 2025 to allow the stay application to be heard and determined substantively.
- 10) In response the Respondent filed Grounds of Opposition in which the Respondent characterizes the application as mischievous, frivolous and a vexatious attempt to stall the legal process.
- 11) The Respondent points to Order No. 2 issued on 16<sup>th</sup> September 2025, which explicitly states that there is no order of stay of execution and that the Court would not intervene in or supervise the execution process.
- 12) The Respondent argues that the Applicant's interpretation of Order No. 3 as a stay of execution is illogical, as it would directly contradict the clear and unambiguous language of Order No. 2.
- 13) The Respondent contends that Order No. 3 was merely an administrative directive regarding the Court file. They further argue that it was issued without a formal prayer request from the Applicant and without the Respondent being heard.
- 14) The Respondent highlights that the decretal amount, the money owed from **CMELC Case No. 32 of 2019** has

remained outstanding for over three years, and the current application is seen as an attempt to further prejudice the Respondent's right to enjoy the fruits of their Judgment.

15) The Appellant/ Applicant again filed another Notice of Motion dated 6/11/2025 seeking the following orders:

1. **Spent.**

2. **THAT** pending the hearing and determination of this Application, there be a temporary order of injunction restraining the Respondent, its agents, servants, or auctioneers from advertising for sale, selling, transferring, disposing of, wasting, alienating, visiting, or otherwise interfering with **LR No. Tinganga/Cianada Block 1/1383.**

3. **THAT** pending the hearing and determination of the Review Application dated 23rd July 2025, this Honourable Court be pleased to stay all execution proceedings and any intended sale and interference of the said property in **Kiambu MCELC No. 32 of 2019** or any related enforcement proceedings.

4. **THAT** the Honourable Court be pleased to declare the Respondent in contempt of the Court's orders issued on 16/09/2025 and 2nd October 2025, and issue appropriate sanctions.

5. **THAT** the Officer Commanding Station (OCS) of the relevant jurisdiction be directed to ensure compliance and maintenance of peace pending hearing and

determination of the Review Application dated 23rd July 2025.

6. **THAT** costs of this Application be provided for.

16) The Application is based on the following grounds and the Affidavit sworn by Elizabeth Wanjiku Githu sworn on even date. The following are the principal grounds:

- i. **THAT** on 16th September 2025, this Court issued orders (specifically Order No. 3) directing that since the lower Court file was returned to the Kiambu Chief Magistrate's Court under an erroneous impression, it be returned to this Court to enable the hearing and determination of the appeal.
- ii. **THAT** on 19th September 2025, the Respondent's application to set aside the said Order No. 3 was dismissed, thereby confirming the validity and subsistence of the order.
- iii. **THAT** notwithstanding these orders, the Respondent has issued a 45-day statutory notice of intention to sell the Applicant's land, in total defiance of the authority of this Honourable Court.
- iv. **THAT** the Applicant has a pending Review Application dated 23rd July 2025, currently fixed for Ruling on **17th March 2026**.
- v. **THAT** unless restrained, the Respondent's contemptuous execution will render the review nugatory, cause irreparable loss, and constitute a gross abuse of the Court process.

- vi. **THAT** this Court holds inherent jurisdiction under Sections 1A, 1B, and 3A of the Civil Procedure Act to protect the integrity of its proceedings.
- 17) The application is opposed vide a Replying Affidavit sworn by **Kariuki Runyenje Robinson**, the General Manager of the Respondent. In the Replying Affidavit, the Respondent is asking the Court to grant the injunction only on the condition that the Applicant pays the uncontested portion of the debt.
- 18) The Respondent states they do not wish to fully oppose the Application on its merits because according to the Respondent, a full-blown legal battle over this Motion would delay the Ruling already scheduled for 17/03/2026. They want to avoid clogging the Court process.
- 19) The Respondent argues that while the Appellant/Applicant is appealing the Judgment, the Memorandum of Appeal only challenges Ksh 1,500,000 and therefore the remaining balance of Ksh 2,470,000 is not part of the Appeal. Therefore, they argue the Court has no power to stop them from collecting this specific amount.
- 20) Therefore, the Respondent contend that an injunction cannot legally cover money that is not even being disputed in the Appeal.
- 21) According to the Respondent, they highlight that the Judgment was issued on 26/05/2022 nearly three years ago implying that the Respondent has been denied the fruits of their Judgment for too long.

- 22) They assert that when they issued the 45-day statutory notice to sell the Appellant's property, there was no active Court order stopping them.
- 23) They point out that you stopped an auction in July 2024 but failed to pay the auctioneer's charges of Ksh 243,929.06 as shown by Exhibit '**KRR 3**'.
- 24) Thus, the Respondent urges the Court to grant the injunction/stay of execution **only if** the Appellant is ordered to pay:
- a) The uncontested Ksh 2,470,000.**
  - b) Accrued interest on that amount.**
- 25) Failure to pay this should allow the Respondent to proceed with the sale of the property immediately.
- 26) When the matter was mentioned on 26/01/2026, the Respondent orally canvassed and allowed prayers 2 and 3 but prayer 4 on contempt was to be canvassed together with Notice of Motion Application dated 23/07/2025.
- 27) On 02/10/2025 when the parties attended Court they were directed to file and exchange their written submissions.

**Applicant's Written submissions on the Application of 23/07/2025**

- 28) The Applicant's written submissions in support of the Notice of Motion dated 23/07/2025 center on the pursuit of a substantive hearing for a stay of execution, arguing that procedural technicalities should not bypass the ends of justice.

- 29) Primarily brought under Order 45 Rule 1 of the Civil Procedure Rules, Section 80 of the Civil Procedure Act, and the Court's inherent powers under Section 3A, the Applicant contends that the Ruling delivered on 7<sup>th</sup> July 2025 contains an error apparent on the face of the record. This Ruling dismissed a stay application on the basis of *res judicata*, yet the Applicant asserts that the previous application was struck out solely on the technicality of Counsel's status under Order 9 Rule 9 of the Civil Procedure Rules and was never heard and finally decided on its merits as required by Section 7 of the Civil Procedure Act.
- 30) The Applicant relies on the legal principle established in **Mutuia & 2 Others (Ex parte Applicants) [2025] KEHC 7446 (KLR)**, emphasizing that an error justifying review must be self-evident and patent without requiring a convoluted legal argument. Furthermore, the Applicant cites **Re Estate of Riungu Nkuuri (Deceased) [2021] eKLR** to fortify the position that a dismissal on a procedural technicality does not constitute a final adjudication of substantive issues. By misapplying the doctrine of *res judicata* to a matter that was never substantively determined, the Applicant submits that the Court fell into a manifest error that warrants the setting aside of the July Ruling.
- 31) Finally, the Applicant underscores the necessity of the Court's intervention to prevent irreparable harm and protect the integrity of the Appeal. Invoking the landmark decision in

**Butt v Rent Restriction Tribunal [1979] eKLR**, where the learned Judge stated:

***“I have of course anxiously considered whether by refusing the application, I, a newly appointed judge might appear to arrogate to myself a notion of infallibility ... I must act on what I see to be the guiding and overriding principle namely that what is the least tortuous path to an end of this litigation and I have come to the conclusion that the appellate path from Section 8(2) and 35(2) of Cap 296 is the shortest way to finality and, more important from the Applicant’s point of view, that his position will not be irretrievably changed thereby so that if my decision was wrong, his appeal will not be nugatory.”***

- 32) The Applicant argues that a stay of execution is vital to ensure the Appeal is not rendered nugatory, especially as the execution targets a family home. The submissions conclude that in the interest of justice and the right to a fair hearing under Article 48 of the Constitution, the application dated 22/01/2024 should be reinstated and the lower Court file be produced to facilitate a determination of the stay on its actual merits.

### **Respondent’s Submissions**

- 33) In response the Respondent filed the written submissions dated 20/09/2025 in opposition to the Notice of Motion dated 23/07/2025 arguing that the Applicant’s

request for review is founded on a fundamental misapprehension of the Court's previous findings and a fatal disregard for procedural law. The Respondent contends that the Applicant has failed to satisfy the stringent criteria for review under Order 45 Rule 1 of the Civil Procedure Rules, asserting that there is no error apparent on the face of the record.

34) Specifically, the Respondent clarifies that when the Court dismissed the stay application on 7/7/2025 on the grounds of *res judicata*, it was not referring to the struck-out application of December 2022, but rather to a substantive application dated 30/05/2023 filed in the **Kiambu MCELC Case No. 32 of 2019**. The Respondent submits that since the lower Court had already determined the issue of stay, the Applicant's attempt to relitigate the same in this Court constitutes an outright abuse of the Court process.

35) Furthermore, the Respondent challenges the very competence of the Appeal, arguing that the Memorandum of Appeal dated 9th June 2022 is null and void. This is based on the fact that the firm of **Rachier & Amollo, Advocates**, filed the Appeal post-Judgment without obtaining an order of the Court to change Advocates, thereby violating the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules. Relying on the precedent in **John Langat v Kipkemoi Terer & 2 Others [2013] eKLR**, the Respondent posits that where a change of Advocates is effected after Judgment without a Court order, any subsequent filings by the new

Advocates including the Memorandum of Appeal and the present application are incompetent and a legal nullity.

36) In conclusion, the Respondent maintains that because the underlying Appeal was filed by a stranger to the record, there is no valid substratum upon which the application for review can rest. The Respondent further argues that the current Advocates, **Anyega Osiemo & Co.**, are similarly improperly on record as no order has ever been granted to regularize the representation. Consequently, the Respondent urges the Court to strike out the Memorandum of Appeal and dismiss the application for review with costs, as the Applicant has failed to establish any discovery of new evidence or an error of law that would justify the Court's interference with its earlier Ruling.

### **Analysis and Determination**

37) Having considered the pleadings, responses and submissions, the Court identifies the following key issues for determination:

***a) Whether the Applicant has met the threshold for Review of the Court's orders under Order 45 of the Civil Procedure Rules.***

***b) Whether the Memorandum of Appeal is competent, given the challenge to the change of Advocates under Order 9 Rule 9.***

***c) Whether a Stay of Execution is warranted and if so, under what conditions.***

***d) Whether the Respondent is in Contempt of Court.***

- 38) The Respondent contends that the Appeal is a nullity because the firm of **Rachier & Amollo** filed the Appeal post-Judgment without a Court order for change of Advocates. The ***Black's Law Dictionary*** defines a nullity as something that has no legal force or effect. Under Order 9 Rule 9 of the Civil Procedure Rules, a change of Advocates after Judgment requires the leave of the Court. However, the Supreme Court of Kenya and the Court of Appeal have shifted toward substantive justice over procedural technicalities per Article 159(2)(d) of the Constitution. In **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR**, the Court emphasized that procedural hurdles should not be used to drive a litigant from the seat of justice if the mistake is curable.
- 39) Thus, while there was a procedural lapse, striking out an entire Appeal based on a filing entry is a draconian measure. The Court finds this is a curable irregularity.
- 40) In the Ruling dated 7/07/2025, the Applicant argues there is an error apparent on the face of the record because the Court dismissed the stay application as *res judicata*, whereas the previous application was struck out on technicalities, not merits.
- 41) Section 80 of the Civil Procedure Act and Order 45 Rule 1 allow for review where there is an error apparent. In **Mutuia & 2 Others [2025] KEHC 7446 (KLR)**, the Court held that an error is apparent if it is self-evident and does not require a long-drawn argument to establish.

- 42) The doctrine of ***Res Judicata*** Section 7 of the Civil Procedure Act requires a matter to have been heard and finally decided. If as stated by the Applicant the previous application was struck out for Counsel not being properly on record, then the merits of the stay were never reached. Striking out is not the same as a dismissal on merits. Therefore, a manifest error occurred in applying *res judicata*. The Application for Review in my opinion is therefore merited.
- 43) The Respondent argues that an injunction should not cover the uncontested portion of the debt which is Ksh 2,470,000. In **Butt v Rent Restriction Tribunal [supra]**, the Court established that the discretion to grant a stay is exercised to ensure the Appeal is not rendered nugatory. However, the fruits of Judgment principle dictates that a successful litigant should not be deprived of their money without good cause.
- 44) The Applicant's Appeal challenges only a portion of the Judgment. It is a settled principle of equity that he who seeks equity must do equity. Staying the execution of a family home is necessary to prevent irreparable loss, but the Respondent is entitled to security for the decretal sum.
- 45) The Applicant alleges contempt regarding the 45-day notice issued despite Order No. 3 of 16/09/2025. Now, contempt is serious and quasi-criminal in nature and if one is found to be in contempt, they risk losing their freedom. The standard of proof is higher than a balance of

probabilities. Given the administrative confusion regarding the lower Court file and the ambiguity of Order No. 3 which the Respondent viewed as administrative, the Court finds the willful element of disobedience has not been proven to the required standard.

### **Final Orders**

46) This Court finds that the interests of justice are best served by allowing the Appeal to be heard on its merits while protecting the Respondent's right to the fruits of their Judgment.

47) Accordingly, I make the following orders:

- i) The application for review dated 23/07/2025 is hereby allowed.***
- ii) The Ruling of this Court dated 7/7/2025 is set aside.***
- iii) The application for stay of execution dated 22/01/2024 is hereby reinstated and deemed as heard.***
- iv) A temporary injunction and stay of execution is hereby granted restraining the Respondent from selling or interfering with LR No. Tinganga/Cianada Block 1/1383 pending the hearing and determination of the Appeal, on condition that:***
  - a) The Appellant/Applicant shall deposit the sum of Ksh 2,470,000 the uncontested amount into a joint interest earning account in the names***

***of both Counsel within thirty (30) days from the date of this Ruling.***

***b) In the alternative, the Applicant may provide a Bank Guarantee for the said amount from a reputable bank within the same period.***

***c) In default of compliance with Order No. (a) or (b) above, the stay of execution shall stand vacated, and the Respondent shall be at liberty to proceed with execution.***

***d) The prayer for contempt is hereby dismissed.***

***e) Costs shall be in the cause.***

It is so ordered.

**DATED, WRITTEN AND SIGNED FOR DELIVERY AT THIKA VIA MICROSOFT TEAMS ON THIS 17<sup>TH</sup> DAY OF MARCH 2026.**

.....  
**MOGENI J**  
**JUDGE**

**In the presence of:-**

..... for the Appellant/Applicant

..... for the Respondent

Melita.....for Court Assistant

.....  
**MOGENI J**  
**JUDGE**