



# THE JUDICIARY



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**  
**ELCLA E046 OF 2025**

**GEORGE GAKOBO.....1<sup>ST</sup> APPELLANT**  
**MOSES MBATIA.....2<sup>ND</sup> APPELLANT**  
**KAMAU MBATIA.....3<sup>RD</sup> APPELLANT**  
**KANYONYO MBATIA.....4<sup>TH</sup> APPELLANT**  
**WAINAINA MBATIA.....5<sup>TH</sup> APPELLANT**  
**KAMAU GAKOBO.....6<sup>TH</sup> APPELLANT**

**-VERSUS-**

**JOSEPH WAMBURU KIHARA.....RESPONDENT**

*(Appeal from the Judgement and Decree of the Principal Magistrate's Court at Kandara (E W Wambugu)  
dated the 24<sup>th</sup> day of October, 2025 in MCELC No. E018 of 2024)*

## RULING

- 1) This ruling is on the notice of motion dated 20-11-2026. The motion which is brought under **Orders 10 rule 11 and 22 rule 22** of the **Civil Procedure Rules** seeks three residual orders as follows.
  2. Pending the hearing and determination of the intended appeal, there be a stay of execution of the decree and judgement dated 24-10-2025 restraining the Applicants (sic) herein from trespassing, picking tea leaves, cultivating and/or in any way making use of the land parcel No. Loc.3/Gituru/484 and or in any way interfering with the Plaintiffs' use of the same and costs of the suit and nominal damages.
  3. That the Appellants herein be allowed to continue harvesting and/or picking tea leaves, cultivating and/or making use of the 2 acre piece of land comprising the suit land.
  4. That the costs of this application be provided for.
- 2) The motion is based on eighteen (18) grounds and is supported by an affidavit sworn by George Gakobo the first Appellant dated 20-11-2025. The gist of the grounds and the affidavit is as follows. Firstly, on 24-10-2025 the trial court entered judgment against the

Appellants. The judgment shocked the mother of the 1<sup>st</sup> Appellant until she got a heart attack from which she died within 10 days of the judgment. Secondly, the trial court made many errors of fact and law as a result of which tea planted on suit land by the Appellants' father was awarded to the Respondent. The Court also awarded nominal damages of Kshs. 50,000/= to the Respondent. For the above state reasons the Appellants pray for the orders as above.

- 3) The motion is opposed by the Respondent who has sworn a replying affidavit dated 1-12-2025 in which he replies as follows. Firstly, he is the registered owner of the suit land. The judgment of 24-10-2025 declared the Appellants trespassers and restrained them from entering the suit land and harvesting tea thereon. Secondly, the Appellants have failed to demonstrate substantial loss if they do not enter the land. Thirdly, the Appellants have not offered any security for the due performance of the decree should their intended appeal be dismissed. Fourthly, if the Appellants are allowed to continue picking tea, it is the Respondent to suffer substantial loss because tea is perishable and a wasting asset and the Appellants have in the past harvested tea worth millions of shillings without accounting for it.

For the above and other reasons, the Respondent prays for the dismissal of the motion.

- 4) Counsel for the Applicants filed written submission's dated 26-3-2026. The Respondent's counsel did not file any submissions within the set timelines.
- 5) I have carefully considered the motion in its entirety including the grounds, the supporting affidavit and the replying affidavit. I find that the Appellants have in the written submissions cited the correct order being **Order 42** and not **Order 22** cited in the notice of motion together with **Order 10**. Be that as it may, that omission is curable under **Order 51 rule 10(2)** of the Civil Procedure Rules which provides as follows.

**“No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.**

Again **Order 2 rule 14** has a similar import. It states-

**“No technical objection may be raised to any pleadings on the ground of want of form.”**

- 6) As correctly stated by the Counsel for the Appellant **Order 42 rule 6(2)** gives three conditions precedent to the grant of an order of stay of execution pending appeal.

The conditions are-

- (1) the Applicant must satisfy the Court that he stands to suffer substantial loss, and**
- (2) that the application has been made without unreasonable delay and**
- (3) the Applicant has given security for the due performance of such decree or order as may be binding on him.**

7) Looking at the first condition, I find that the Appellants have not proved that they stand to suffer substantial loss if they do not pluck the tea on the suit land. There is nothing to show that the Appellants have homes on the suit land. All the eighteen grounds in the notice of motion are devoted to the errors alleged to have been committed by the learned trial magistrate. There is nothing to show what the Appellants have on the suit land. The supporting affidavit is a replica of the grounds in the motion and the grounds in the memorandum. Nothing distinguishes one from the other two.

I do not see how failure to pick tea on the suit land which has been found belong to the Respondent will occasion the Appellants substantial loss.

- 8) Regarding the second condition, I am prepared to hold that the appeal and the notice of motion were filed without unreasonable delay although on the borderline of the **30 days** spelt out in **Section 79G** of the Civil Procedure Act.
- 9) Finally on the final condition of security for the due performance of the decree that may finally be binding on the Appellants, they have not said that they should lose the appeal, they are ready refund to the Respondent all the proceeds that they will have got from the sale of the tea. In the lengthy affidavit, even the amount to be earned from the tea is not stated. The court could still impose a figure but without guidance from the Appellants, it would be speculative. Again if the Appellants really meant business, they would give a rough estimate of how much it would be per month or per season.
- 10) Since all the three conditions must exist together for an application for stay of execution to be allowed, I find that failure to prove substantial loss and the other two conditions being borderline, a case has not been made out for the grant of an order of stay of execution pending appeal.

11) In conclusion and for the reasons already given, I find **no merit** in the motion dated 20-11-2025 which I **dismiss**.

Costs in the cause.

**Dated, signed and Delivered virtually at Murang'a this 20<sup>th</sup> day of April, 2026.**

**M.N. GICHERU  
JUDGE.**

**Delivered online in the presence of :-**

**Court Assistant – Anthony**

**Appellants' Counsel – Mr Ashioya**

**Respondent's Counsel – Miss Njoroge**