



THE JUDICIARY



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A
ELCEPMISS E002 OF 2025

HUMPREY KIMARI GICHIRIRO.....1ST APPLICANT
JAMES GITHIGA KIMANI T/A
GITHIGA KIMANI & CO. ADVOCATES.....2ND APPLICANT
VERSUS
NYORO CONSTRUCTION COMPANY LTD.....1ST RESPONDENT
PETER W. MWANGI T/A THAMES TRADERS AUCTIONEERS.....2ND RESPONDENT

RULING

1) This ruling is on the amended notice of motion dated 4-12-2025. The motion which is by the Applicants is brought under **Sections 1A, 1B and 3A of the Civil Procedure Act, Order 42 rule 6** of the **Civil Procedure Rules** and all other enabling provisions of the law. The motion seeks three residual orders.

(c) The execution and/or enforcement of the warrants of arrest issued pursuant to the Court's ruling dated 5/3/2025 and duly confirmed by the further court ruling delivered on 24-9-2025 against the Applicants be stayed pending the hearing and determination of this application inter partes or until further court orders.

d) That the court be pleased to give leave to the Applicants to file an appeal against the lower court's ruling delivered on 5-3-2025 out of time.

e) That the costs of this application be provided for.

2) The motion is based on twelve (12) grounds and is supported by an affidavit of J.N.Kirubi dated 8-10-2025. The gist of the grounds and the affidavit is as follows. Firstly, the 1st Applicant was the Plaintiff in Murang'a CMELC E046 of 2022 in which he sought the Defendant and anybody claiming through him restrained from interfering with L.R. No. Loc. 11/Gikandu/1532, special damages of Kshs. 25,000/=, Kshs. 967,400/= for restoration and rehabilitation of the suit land and aggravated damages for unlawful trespass on the Plaintiff's parcel of land. The first Applicant obtained a favourable judgment against the 1st Respondent vide a decree dated 7-6-2023. The

Applicant applied for execution through his advocates on record. Secondly, the 1st Respondent through its advocates on record opposed the execution. Thirdly, the trial court delivered its ruling on 5-3-2025 and issued substantive orders against the Applicants and the second Respondent in the following terms.

- (a) A finding in favour of 1st Respondent/judgment debtor.**
- (b) The Applicant, his advocate and the 2nd Respondent to avail motor vehicle registration No. KBQ 154 U in Court on 12-3-2025 in the same condition it was attached.**
- (c) Failure to do so, the Applicant, his advocate and the 2nd Respondent shall not only be held in contempt of the court but shall be ordered to pay the 1st Respondent the amount of the said vehicle in cash within 14 days without any further reference to this or any other court.**

Fourthly, the above strict substantive orders against the Applicants were issued by the Court without a proper or substantive motion by the 1st Respondent and the reliefs granted to it were made by the court *suo moto*. Fifthly, the second Respondent filed an application dated 19-5-2025 seeking to set aside the orders of 5-3-25 but the said application was dismissed and the trial court proceeded to make orders for the immediate arrest of the Applicants for failure to avail the motor vehicle or the stated amount. In addition, warrants of arrest were to be executed by the OCS Murang'a Police Station and the DCIO and the documents examiner to avail their report on 4-12-2024. Finally, the Applicants are now apprehensive that warrants of arrest against them can be executed if the Court does not allow the motion.

- 3) The motion is opposed by the director of the 1st Respondent in a replying affidavit dated 22-10-2025 for the following reasons. Firstly, by the decree of 7-6-2023, the 1st Applicant was awarded a sum of Kshs. 1,373,197/=. Secondly, in execution of the said decree, the 1st Applicant instructed the firm of Thames Traders Auctioneers, the 2nd Respondent who proceeded to attach motor vehicle No. KBQ 154 U valued at Kshs. 2,064,000/= belonging to the 1st Respondent. The 1st Respondent paid a sum of Kshs. 1,100,516 upon which he sought the release of its motor vehicle after having complied with the payment directive. The 1st Respondent wrote and indicated its willingness to release the balance of the decretal sum provided the motor vehicle was released. Thirdly, on 5-3-2025, the trial court issued an order directing the Applicants together with the 1st Respondent to either avail the motor vehicle in good condition or the sum of Kshs. 1,500,000/=. The order was

not complied with. As a result of non-compliance, the court issued warrants of arrest against the Applicants and the 2nd Respondent. The court even gave them additional time to comply with the orders but they remained in contempt of the said orders having failed to comply with the court orders. Fourthly, the Applicants and the 2nd Respondent did not appeal against the orders of 5-3-2025 or seek review of the same. Their continued failure to comply with the court orders prompted the trial court to issue a ruling on 24-9-2025 committing them to civil jail for contempt, after their persistent disregard of the orders for release of the motor vehicle. Finally, the Applicants have no audience before this court for failure to purge their contempt of court and this application is fatally defective because it is not supported by any substantive suit and it contravenes **Order 3 rule 1** of the **Civil Procedure Rules** which requires that every suit be instituted by way of a plaint, petition or originating summons.

- 4) Counsel for the parties were to file and serve written submissions by 25-3-2026 but none of them was able to file by then. This ruling is therefore written without the benefit of the written submissions by either party.
- 5) I have carefully considered the motion in its entirety including the grounds, the supporting affidavit and the replying affidavit. I find that the following issues arise.
 - (a) **Whether the Applicants have been given a fair hearing in the trial court.**
 - (b) **Whether the Applicants have taken up the given opportunity given to show cause.**
 - (c) **Whether the motion is properly before this court.**
 - (d) **Whether a case has been made for leave to file an appeal out of time against the ruling delivered on 5-3-2025.**
- 6) On the first issue, I find that the Applicants were given time to account for the proceeds of the execution process. The ruling of 5-3-2025 which was made in the presence of their counsel gave them time until 12-3-2025 to account for the proceeds of the execution process. I do not have the benefit of the record of appeal to see the full picture but it is clear from the ruling of 24-9-2025, that the auctioneer filed an application dated 19-5-2025 seeking the setting aside of the orders made on 5-3-2025. For two months therefore, the 2nd Respondent could still have accounted for the proceeds of the execution but instead chose to file the motion dated 19-5-2025.

- 7) As for the second issue, I find that the Applicants have not taken up the opportunity given to them to show cause and account for the proceeds of execution. The warrants of attachment and sale give timelines within which the auctioneer must return the said warrants to court, whether executed or not and with an explanation as to why they have not been executed. Had the auctioneer complied with what the warrants require of him, the notice to show cause would not have been necessary in the first place. The trial magistrate was within her powers in trying to establish how the warrants were executed and to issue any orders necessary to ensure accountability in the execution process.
- 8) Looking at the third issue, I find that this motion is not properly before the court. It is not anchored on any appeal. There is no record of appeal. The suit itself, if I may call it so, is classified as **ELCEP MISC NO.E002 of 2025**. It is not therefore an appeal. **Order 42 rule 6** of the Civil Procedure Rules under which this motion is brought deals with *“stay in case of appeal”*. So where is the appeal?.
- 9) On the final issue, I find that the Applicants have not made out a good case for filing an appeal out of time. The only reason given by the Applicants for not filing the appeal on time is **“..they had reason to believe that the trial court would allow the 2nd Respondent’s application dated 19-5-2025 seeking to set aside the orders made on 5-3-2025.”** This is not a good reason. It neither plausible nor satisfactory. The Applicants are not talking about illness, incapacity, delay in obtaining proceedings or ruling or mistake of counsel. Even the application said to have been the reason for the delay was itself filed almost one and a half months after the time allowed for the filing of an appeal.
- 10) For the above stated reasons, I find **no merit** in the motion dated 4-12-2025 and I **dismiss** it with costs to the 1st Respondent.

Dated, Signed and Delivered virtually at Murang’a this 20th day of April, 2026.

**M.N. GICHERU
JUDGE.**

Delivered online in the presence of :-

Court Assistant – Anthony

Applicant’s Counsel – Mr Kirubi

1st Respondent’s Counsel – Miss Kaiballah