



**REPUBLIC OF KENYA**

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

**ELC LAND APPEAL CASE NO. E077 OF 2025**

**GEORGE KIMUNGE.....**  
**.....APPELLANT**

**VERSUS**

**PRICILLA MUKAMI GACHAU.....**  
**.....RESPONDENT**

***(Being an Appeal from the Ruling and Application of Hon. Noelle Kyanya (DR) delivered on 18th June 2025 in the Principal Magistrates Court at Ruiru in CMC ELC E127 OF 2024)***

**RULING**

1. The Application before the Court is brought under Sections 1A, 1B, 3A, 63(e), and 95 of the Civil Procedure Act; Order 42 Rule 6, Order 22 Rule 22, and Order 51 Rule 1 of the Civil Procedure Rules 2010 (As Amended in 2020) and all enabling provisions of the law.
2. It seeks the Court's intervention to grant a stay of execution of the Ruling and all consequential orders delivered on 18/06/2025 by Hon. Noelle Kyanya (DR) in **Ruiru CMC ELC E127 of 2024**, and a further stay of proceedings in the

lower Court pending the hearing and determination of the intended Appeal.

3. The Application is supported by the Affidavit of George Kimunge, the Applicant herein. The Applicant's grievance arises from a Ruling where the trial Court allegedly granted injunctive and eviction orders over **Parcel No. RUIRU/KIU/BLOCK 2/13898**. The Applicant contends that this property is his matrimonial home and is distinct and unrelated to the suit property, **RUIRU/KIU/BLOCK 2/2935**. He argues that the execution of the said orders is imminent and that unless a stay is granted, his Appeal which raises triable issues regarding the identity of the suit property will be rendered nugatory.
4. In the Supplementary Affidavit sworn on 29/06/2025, the Applicant admits that, due to an inadvertent clerical error, the said Affidavit was erroneously stamped with a law firm stamp instead of the official Commissioner for Oaths stamp. He clarifies that the document was indeed sworn before Ms. Gacheri RM, who is a duly appointed and practicing Commissioner for Oaths in the Republic of Kenya, and maintains that this mistake was a purely administrative oversight by the office which should not be visited upon the litigant.
5. The Applicant further asserts that this omission is a mere technicality that does not go to the root of the application or

affect the substance and validity of the testimony contained therein. He is advised by his Counsel that such a procedural defect is curable under the spirit of Article 159(2)(d) of the Constitution of Kenya, which mandates that justice shall be administered without undue regard to procedural technicalities. He reiterates that the Respondent will suffer no prejudice if the error is excused, whereas the Applicant stands to suffer irreparable loss and damage if the Court fails to intervene. Consequently, the Applicant urges the Court to accept this clarification and find that the Affidavit remains a valid piece of evidence in support of the pending Motion.

6. In response, the Respondent, Priscilla Mukami Gachau, opposes the Application for stay of execution and stay of proceedings by first raising a fundamental technical objection regarding the validity of the Applicant's Supporting Affidavit. She contends that the Affidavit is incurably defective and should be struck out because it was purportedly sworn before a firm of Advocates rather than an individual Advocate, which is a direct violation of the mandatory provisions of the Oaths and Statutory Declarations Act. On this procedural ground alone, the Respondent maintains that the entire application is incompetent and lacks a proper legal foundation to move the Court.

7. Beyond the technicalities, the Respondent asserts that the Applicant has failed to satisfy the legal threshold required for the grant of stay orders under Order 42 Rule 6 of the Civil Procedure Rules. She argues that there has been no demonstration of substantial loss or sufficient cause to warrant the Court's intervention. According to the Respondent, the learned Magistrate in the trial Court acted within judicial discretion by issuing injunctive orders and directing the Land Registrar to note the pendency of the suit. She emphasizes that these orders were purely preservative in nature, intended to protect the subject matter from being wasted or alienated until the final determination of the dispute.
8. The Respondent further clarifies the merits of the underlying dispute by stating that she adduced clear evidence of a payment of Kshs. 300,000/= made to the Applicant as the purchase price for the property. She maintains that she successfully established a legal nexus between the Applicant's interest in **RUIRU/KIU/BLOCK 2/2935** and the current suit property, **RUIRU/KIU/BLOCK 2/13898**. In her view, the Applicant has failed to identify any specific legal principle that the trial Magistrate flouted in granting the injunction, rendering the intended Appeal frivolous and lacking a prima facie chance of success.

9. In conclusion, the Respondent depones that the issues before the trial Court regarding ownership and the issues before the Appellate Court regarding the preservation of the property are distinct and can be determined simultaneously without prejudice. She argues that staying the proceedings would be a travesty of justice as it would unnecessarily delay the final determination of the suit and impede her right to a fair and speedy trial. Consequently, she urges the Court to find the application meritless and dismiss it with costs to the Respondent.

10. Parties on 22/07/2025 agreed to canvass the application by way of written submissions. The Applicant/Appellant filed their submissions dated 27/07/2025 and the Respondent filed theirs dated 7/7/2025.

### **Applicant's Submissions**

11. The Applicant's submissions in support of the Notice of Motion dated 2/07/2025 are grounded on the urgent necessity to preserve the subject matter of the Appeal and prevent the suit from being rendered nugatory. The Appellant seeks a stay of execution of the Ruling delivered on 18/06/2025 by the trial Court in **Ruiru MC ELC E127 of 2024**, alongside a stay of the lower Court proceedings. It is the Applicant's primary contention that the trial Court erroneously issued injunctive orders over **Parcel No. RUIRU/KIU/BLOCK 2/13898**, which effectively serve as

final eviction orders at an interlocutory stage. This is particularly prejudicial as the property in question is the Applicant's matrimonial home of over ten years, while the Respondent's underlying claim and physical acts of trespass related to an entirely different property, **RUIRU/KIU/BLOCK 2/13901**.

12. The legal threshold for a stay of execution is strictly governed by **Order 42 Rule 6(2)** of the **Civil Procedure Rules**, which requires a demonstration of substantial loss and an application filed without unreasonable delay. The Applicant submits that the loss of a matrimonial home and the threat of demolition constitute substantial and irreparable loss. This position is supported by the holding in **Osaga & 4 Others v Marwanga [2025] KEELC 5605 (KLR)**, where the Court observed that pending eviction of a resident from suit land satisfies the requirement of substantial loss and justifies judicial intervention to prevent the Appeal from becoming an academic exercise.
13. Furthermore, the Applicant invites the Court to exercise its discretionary power as guided by the Court of Appeal in **Butt v Rent Restrictions Tribunal [1982] KLR 417**, which established that a stay should be granted to ensure that an Appeal is not rendered nugatory. In this instance, the "special circumstances" include the fact that the trial Court granted a major relief claimed in the suit-possession and

eviction-at a preliminary stage. As held in **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, the right of Appeal is a constitutional safeguard that must not be impinged upon by allowing execution to proceed while a non-frivolous Appeal is pending.

14. On the prayer for a stay of proceedings, the Applicant submits that allowing the lower Court to continue while the Appellate Court determines the validity of the interlocutory orders would lead to a multiplicity of suits and a waste of judicial resources. The trial Court overstepped its jurisdiction by granting orders that amount to a final determination of ownership rights before a full hearing on the merits. This practice was condemned in **Olive Mwhaki Mugenda & Another v Okiya Omtata Okoiti & 4 Others [2016] eKLR**, which cited the persuasive principle that Courts should not grant interim relief that amounts to the final relief sought. Following the precedents of **Vivo Energy Kenya Limited v Maloba Petrol Station Limited and 3 Others [2015] eKLR** and **Stephen Kipkebut t/a Riverside Lodge and Rooms v Naftali Ogola [2019] eKLR**, the Applicant maintains that the trial Court flouted judicial precepts. Having demonstrated diligence by filing this application within fourteen days of the Ruling, and having shown that the Appeal raises cogent points of law regarding property identity and evidence, the Applicant humbly prays that this

Honourable Court finds merit in the application and allows it in its entirety to safeguard the integrity of the judicial process.

### **Respondent's Submissions**

15. The Respondent, Priscilla Mukami Gachau, in her submissions has reiterated what she had averred in her Replying Affidavit. She vehemently opposes the Applicant's Notice of Motion dated 2nd July 2025, primarily on the ground that the application is premised upon an incurably defective Supporting Affidavit. On the face of the record, the Affidavit was commissioned by **Gacheri R M & Co. Advocates**, which is a firm of Advocates rather than an individual Practitioner. The Respondent submits that under Section 4(1) of the Oaths and Statutory Declarations Act, Cap 15, the power to administer oaths is vested exclusively in an individual Advocate by virtue of their specific commission. This position is fortified by the decision in **Mohamed v Judicial Service Commission [2023] KEELRC 2983**, where the Court held that an appointment as a Commissioner for Oaths can only be granted to a practicing Advocate and not a law firm. Consequently, such an omission is fatal and cannot be salvaged by the oxygen rules or Article 159 of the Constitution, as Courts must not provide rescue to parties who exhibit scant respect for statutory rules, a principle underscored by the Court of

Appeal in **Nicholas Kiptoo Arap Salat v IEBC & 6 Others [2013] eKLR.**

16. Regarding the prayer for a stay of proceedings, the Respondent submits that the Applicant has failed to demonstrate any special or exceptional circumstances to justify halting the lower Court matter, **Ruiru MELC E127 of 2024**. Relying on the test in **David Morton Silverstein v Atsango Chesoni [2002] eKLR**, the Respondent contends that for a stay to issue, the Applicant must show that the Appeal raises substantial questions and would be rendered nugatory otherwise. In this case, the issues are distinct: while this Court examines the propriety of conservatory orders, the trial Court is tasked with the substantive determination of ownership of **RUIRU/KIU/BLOCK 2/13898**. The Respondent maintains that these processes can proceed concurrently without prejudice. Furthermore, a stay of proceedings is a grave interruption of a party's right to litigate, and as stated in **Halsbury's Laws of England (4th Edition)**, cited in **Njuguna v Wanyoike [2024] KEELRC 4372**, such an order should only be imposed where the proceedings beyond all reasonable doubt ought not to continue.

17. Finally, the Respondent asserts that the Applicant has not satisfied the three-tier test for a stay of execution under Order 42 Rule 6 of the Civil Procedure Rules. Specifically, the

Applicant has failed to demonstrate substantial loss. The Respondent clarifies that the trial Court's injunction merely preserved the property and did not effect an eviction; rather, it protected the Respondent's established interest following her payment of Kshs 300,000/=. The Applicant has further failed to furnish security for the due performance of the Decree. The Respondent argues that granting a stay would effectively allow the Applicant to alienate the property, thereby defeating the Respondent's prima facie legal interest. In the interest of justice and the protection of the subject matter, the Respondent humbly urges this Honourable Court to find the application meritless and dismiss the same with costs.

### **Analysis and Determination**

18. Having considered the pleadings, the rival Affidavits and submissions I have come to the position that the key issues for determination in this matter are:

- i. Whether the Supporting Affidavit is incurably defective for being commissioned in the name of a law firm rather than an individual Advocate;*
- ii. Whether the Applicant has demonstrated substantial loss and satisfied the criteria for a stay of execution under Order 42 Rule 6 of the Civil Procedure Rules;*  
and

*iii. Whether there exist exceptional circumstances to warrant a stay of proceedings in the lower Court pending the determination of the intended Appeal.*

19. Regarding the technical challenge to the Affidavit, the Respondent's objection is anchored on the strict interpretation of the Oaths and Statutory Declarations Act, Cap 15. Section 4(1) of the Act mandates that the power to administer oaths is a personal commission granted to an individual. In **Mohamed v Judicial Service Commission [2023] KEELRC 2983**, the Court expressed the following verbatim view:

***"Such appointment could only be of an Advocate in practice and not a firm of Advocates."***

20. This Court, however, must balance this statutory requirement against the constitutional dictate of Article 159(2)(d), which requires that justice be administered without undue regard to procedural technicalities. While the Court of Appeal in **Nicholas Kiptoo Arap Salat v IEBC & 6 Others [2013] eKLR** cautioned that Article 159 is not a panacea for all procedural professional legal maladies, the Applicant's Supplementary Affidavit explains that the use of the firm stamp was an inadvertent clerical error by a duly commissioned individual, **Ms. Gacheri RM**. In the interests of substantive justice, this Court finds that where the identity of the individual commissioner is disclosed and their

qualification is not in doubt, the error of a misapplied stamp is a curable irregularity that does not render the entire application incompetent.

21. On the issue of stay of execution, the Applicant must satisfy the three-tier test set out in Order 42 Rule 6(2) of the Civil Procedure Rules. **Black's Law Dictionary** defines substantial loss as a serious loss of substance, rather than a minor or trivial one. The Applicant asserts that the suit property is his matrimonial home and that the trial Court's orders, though termed injunctive, effectively amount to eviction. In **Osaga & 4 Others v Marwanga [2025] KEELC 5605 (KLR)**, the Court held:

***"Consequently, the Applicants will suffer substantial loss if the eviction is allowed and the Appeal shall also be rendered nugatory."***

22. This Court agrees that the threat of losing one's primary residence before the Appellate Court can weigh the merits of the case constitutes substantial loss. Furthermore, the Court of Appeal in **Butt v Rent Restrictions Tribunal [1982] KLR 417** held that:-

***"The general principle in granting or refusing a stay is ... if there is no other overwhelming hindrance, a stay must be granted so that an Appeal may not be rendered nugatory."***

23. Failure to grant a stay in this instance would allow for the potential alienation or alteration of a matrimonial home, which would make any subsequent success on Appeal a hollow victory.

24. Regarding the stay of proceedings, the Court remains cognizant that such orders are issued sparingly. As cited in **Njuguna v Wanyoike [2024] KEELRC 4372**, the authoritative view from **Halsbury's Laws of England** is that:-

***"Stay of proceedings is a serious, grave, and fundamental interruption in the right a party has to conduct his litigation."***

25. The Applicant argues that the trial Court granted final relief at an interlocutory stage a practice discouraged in **Olive Mwhaki Mugenda & Another v Okiya Omtata Okoiti & 4 Others [2016] eKLR**, where the Court verbatim stated:

***".... the Court should not grant interim relief which amounts to final relief."***

26. If the trial Court's Ruling indeed determined ownership of a property (**Block 2/13898**) that was not properly the subject of the pleadings, proceeding with the main suit while this jurisdictional and factual question is on Appeal would create a multiplicity of conflicting outcomes and a waste of judicial resources.

27. In view of the foregoing, this Court finds that the Applicant has demonstrated that the intended Appeal is arguable and that the balance of convenience tilts in favor of preserving the status quo. The application dated 2/07/2025 is hereby determined as follows:

- i) A stay of execution of the Ruling and Orders delivered on 18/06/2025 is hereby granted pending the hearing and determination of the Appeal.***
- ii) Further, the proceedings in Ruiru CMC ELC E127 of 2024 are stayed pending the said Appeal to prevent the risk of contradictory findings on the identity of the suit property.***
- iii) The Applicant is directed to file and serve the Record of Appeal within forty-five days, in default of which the stay orders shall stand vacated.***
- iv) Mention of the matter for directions on canvassing of the Appeal will be on 20/07/2026.***
- v) Costs shall abide the outcome of the Appeal.***

It is so ordered.

**DATED SIGNED AND DELIVERED VIRTUALLY AT THIKA VIA  
VIDEOLINK THIS 22<sup>ND</sup> DAY OF APRIL, 2026.**

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**MOGENI J**  
**JUDGE**

**In the presence of:**

Miss Swaka holding brief for Mrs. Keremi for the  
Appellant/Applicant

Mr. Omwanya for the Respondent

Mr. Melita - Court Assistant

.....

**MOGENI J**  
**JUDGE**

ORIGINAL