

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCLA NO. E037 OF 2026

GERALD

NDIRANGU

KARIUKI.....

.....APPELLANT/APPLICANT

=VERSUS=

PERIS NYAMBURA GIKANDU1ST

RESPONDENT

EMBAKASI RANCHING COMPANY LIMITED2ND

RESPONDENT

THE LAND REGISTRAR, NAIROBI3RD

RESPONDENT

THE ATTORNEY GENERAL4TH

RESPONDENT

RULING

1. Before the Court is the Applicant's Notice of Motion **dated 10th March 2026**, premised on **Sections 1A, 1B and 3A of the Civil Procedure Act, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010.**

The Applicant seeks:

- (i) an order of injunction restraining the Respondents, their agents, servants or any person acting under their instructions from encroaching upon, occupying, trespassing on, developing, evicting from, alienating, processing title to, registering or otherwise dealing with Nairobi Block 105/7899 (“the suit property”) in any manner inconsistent with the Applicant’s claimed rights pending the hearing and determination of this Application and the Appeal;**
- (ii) an order staying execution of the Judgment and Decree of the trial court dated 20th February 2026 pending the hearing and determination of the Application and the Appeal.**

2. The Application is supported by the Supporting Affidavit and Further Affidavit of **Esther Wangari Ndirangu sworn 10th March 2026 and 1st April 2026 respectively**, the Applicant’s submissions dated April 2026, annexed photographs (EWN-1), completion

documents and a letter from the 2nd Respondent to the National Land Commission.

3. Pursuant to the directions issued by this Court, the Application was canvassed by way of written submissions.
4. The dispute concerns ownership of Nairobi Block 105/7899. In the trial court MCELC E186 of 2021, the Applicant sought declaratory and injunctive relief asserting allocation and possession since 1988, supported by allotment letters, share certificate, site visit, beacon, survey and completion documents allegedly issued by the 2nd Respondent in 2015.
5. The 1st Respondent filed a counter-claim asserting lawful allocation by the 2nd Respondent. After a full hearing on merit, the trial court delivered judgment on 20th February 2026, dismissed the Applicant's suit with costs, upheld the 1st Respondent's counter-claim, declared her the lawful owner, and directed the 2nd and 3rd Respondents to process and register title in her favour.
6. The Applicant filed this Appeal and the instant Application before this court.

7. The Applicant contends that he has been in actual possession and occupation of the suit property since its allocation in 1988. He states that he erected a stone perimeter wall to secure the land and was awaiting title processing before commencing development. He relies on documentary evidence comprising the allotment letter, share certificate, payment receipts and completion documents issued by the 2nd Respondent in 2015.
8. In his submissions, the Applicant argues that he has satisfied the threshold for stay of execution under **Order 42 Rule 6(2) CPR**. He claims the Application was filed without unreasonable delay within 18 days and before expiry of the trial court's 30-day stay, that substantial loss will result because execution will disrupt his possession, investments and planned development which cannot be adequately compensated by damages, and that he is ready and willing to provide any security ordered by the Court. He cites the cases of **Butt v Rent Restriction Tribunal [1982] KLR 417** and **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** on substantial loss and preservation of the status quo.

9. On the injunction, the Applicant invokes **Giella v Cassman Brown & Co Ltd [1973] EA 358**, asserting a prima facie case with probability of success arguable issues on whether the trial court considered his evidence, the 2nd Respondent's authority to testify, and predecessor proceedings, irreparable harm from loss of possession, and that the balance of convenience favours preservation of the status quo. He maintains the Appeal raises serious triable issues and will be rendered nugatory without the orders sought.
10. The 1st Respondent opposes the Application through her Replying Affidavit sworn **18th March 2026** annexing the trial Judgment "PNG-1" and photographs "PNG-2" taken on 18th March 2026 and her written submissions dated **29th March 2026**.
11. She asserts she is the lawful owner pursuant to the trial court's reasoned judgment after full hearing. She deposes that the suit property is vacant, unfenced and undeveloped as shown in her recent photographs and that the Applicant does not occupy it.

12. In her submissions, the 1st Respondent contends that the Applicant has failed the conjunctive test under **Order 42 Rule 6(2) CPR**: (a) no substantial loss because the land is open and any alleged loss is purely pecuniary and compensable by damages; (b) the Application is an abuse of process aimed at delaying the fruits of judgment; and (c) no security has been offered. She cites the case of **Ogle v Sheikh & 7 others [2024] KEELC 3866 (KLR)** and the principle that a successful litigant is entitled to enjoy the fruits of judgment.

13. On the injunction, she submits that the Applicant has not established a prima facie case the trial court correctly evaluated evidence, no irreparable harm exists on vacant land, and the balance of convenience favours her as decree holder. She describes the Application as a “dog-in-the-manger” strategy and an abuse of court process. She prays for dismissal with costs.

14. The 2nd Respondent opposes through the Replying Affidavit of its surveyor **Jack Kamau Wachira** sworn **24th March 2026** (annexing Board Resolution “JKW-1”) and its written submissions. It confirms that, per its records and a

survey conducted, the suit property was lawfully allocated to the 1st Respondent and that two distinct plots exist. The 2nd Respondent states the Applicant has no proprietary interest and that a previous suit MCELC E78 of 2011 was abandoned upon discovery of the true ownership position.

15. In submissions, the 2nd Respondent argues that the Applicant fails both the stay and injunction thresholds: no prima facie case as judgment already declared ownership, no irreparable harm vacant land, loss compensable by damages, and balance of convenience favours the decree holder.

16. It further contends the Application offends the doctrine of lis pendens as outlined in section 52 of the Transfer of Property Act because the Applicant procured transfer documents during pendency of litigation, and that it constitutes an abuse of process by re-opening concluded issues. It prays for dismissal with costs.

17. Having considered the application, rival affidavits and written submissions filed, this Court has distilled two main issues for determination:

(i) Whether the Applicant has satisfied the threshold for stay of execution under Order 42 Rule 6(2) of the Civil Procedure Rules;

(ii) Whether the Applicant has met the principles for an injunction pending appeal

18. Under **Order 42 Rule 6(2) of the Civil Procedure rules**, the said provision is conjunctive: no stay shall be granted unless the Court is satisfied that (a) substantial loss may result, (b) the Application was made without unreasonable delay, and (c) security as ordered has been given. This position has been consistently reaffirmed in recent decisions as was in the case of **Mutua v Leina & 2 others (ELC Appeal) [2026] KEELC and Kedoki & another v Nchoe [2025] KEELC 5012**

19. The Application was filed on 10th March 2026 being 18 days after judgment and before expiry of the trial court's 30-day stay. Certified copies of proceedings have been obtained. This limb is satisfied.

20. On substantial loss, the Applicant claims possession and a stone wall. However, the 1st Respondent's dated photographs of 18th March 2026 and the 2nd

Respondent's surveyor's evidence show the property is vacant, unfenced and undeveloped. The Applicant's undated photographs do not rebut this recent on-site evidence.

21. Any loss remains pecuniary and compensable by damages. Recent case law confirm that substantial loss means irreparable harm that would render the appeal nugatory and is not established by mere execution of a lawful decree or speculative claims of possession on vacant land as held in **Kedoki & another v Nchoe [2025] KEELC 5012, Motorhub Limited v Trillium Properties (K) Limited [2026] KEELC 765 (KLR) and Musyoka v Kungu [2025] KEELC 5670.** This limb is not satisfied.

22. On the aspect of current occupation or possession of the suit property, this Court has carefully evaluated the conflicting evidence presented by the parties. The Applicant claims actual possession since 1988 and the erection of a stone perimeter wall. However, the 1st Respondent has produced clear, dated photographs taken on 18th March 2026 depicting the property as open,

unfenced and completely vacant with no visible developments or structures.

23. This evidence is corroborated by the 2nd Respondent's surveyor who confirms that the suit property remains vacant and undeveloped per the company's records and survey findings. In contrast, the Applicant's photographs annexed to the Further Affidavit are undated and do not sufficiently rebut the recent on-site evidence adduced by the Respondents.

24. Consequently, it is noteworthy that the suit property is currently vacant and unoccupied, and the Applicant has not established actual possession or occupation as claimed.

25. While the Applicant raises arguable appeal points, the trial court delivered a reasoned judgment after full hearing. The 1st and 2nd Respondents produced evidence of lawful allocation and survey confirmation of distinct plots.

26. Recent case law shows that courts continue to apply the Giella test strictly in land appeals, requiring not merely arguable issues but a probability of success at the

interlocutory stage as demonstrated in **Munana v Bale & 3 others [2024] KEELC 916, Sinko & 8 others v Olotulet [2025] KEELC 610 and Jawa & 2 others v Affected Party [2025] KEELC.**

27. A successful litigant is entitled to enjoy the fruits of judgment. Granting the injunction would nullify the trial decree. The lis pendens and prior litigation concerns raised by the 2nd Respondent further tilt equity against the Applicant. The Court of Appeal has recently reaffirmed that dealings with land during pending litigation are voidable and offend lis pendens, binding even third parties in **Frank Logistics Limited v Golden Lion Real Estate Company & 6 others [2025] KECA 1471 (KLR) and Cove Investments Limited v Rono & 2 others [2025] KECA 1089.** The balance favours the Respondents.

28. This Court has exercised its discretion judiciously in accordance with the clear and mandatory provisions of **Order 42 Rule 6(2) of the Civil Procedure Rules, 2010**, which requires all three conjunctive conditions to be satisfied before a stay of execution pending appeal may be granted.

29. The Applicant has failed on the critical limb of substantial loss rendering the application for stay fatally defective. This position is fortified by the principles articulated in **Butt v Rent Restriction Tribunal [1982] KLR 417** and the recent authorities in **Mutua v Leina & 2 others (ELC Appeal) [2026] KEELC, Kedoki & another v Nchoe [2025] KEELC 5012, Motorhub Limited v Trillium Properties (K) Limited [2026] KEELC 765 (KLR) and Musyoka v Kungu [2025] KEELC 5670**, all of which emphasise that substantial loss must be real, irreparable and such as would render the appeal nugatory and not merely speculative or pecuniary in nature.

30. Equally, the prayer for an injunction pending appeal fails to meet the tripartite test established in the locus classicus of **Giella v Cassman Brown & Co Ltd [1973] EA 358**. The Applicant has not demonstrated a prima facie case with probability of success, nor has he shown irreparable harm that cannot be compensated by damages. The balance of convenience overwhelmingly favours the 1st Respondent as the successful decree holder who is prima facie entitled to enjoy the fruits of the

judgment of the trial court. This principle has been consistently upheld by the Environment and Land Court in **Munana v Bale & 3 others [2024] KEELC 916, Sinko & 8 others v Olotulet [2025] KEELC 610 and Jawa & 2 others v Affected Party [2025] KEELC.**

31. Furthermore, the evidence before this Court demonstrates that the Applicant has violated the doctrine of lis pendens codified under Section 52 of the Transfer of Property Act (applicable in Kenya). The 2nd Respondent has specifically deposed that the Applicant had earlier filed suit MCELC E78 of 2011 against the 1st and 2nd Respondents.

32. During the pendency of that suit, a survey was conducted in or around 2015 which established the existence of two distinct plots and confirmed that the suit property (Nairobi Block 105/7899) lawfully belonged to the 1st Respondent. Despite full knowledge of the survey results and the pending litigation affecting the property, the Applicant nevertheless procured transfer documents and completion documents in respect of the suit property. He later abandoned the earlier suit and instituted the

present proceedings. Such conduct squarely offends the doctrine of lis pendens, which renders any transfer or dealing with the property during the pendency of a suit relating to it void as against the party who ultimately succeeds in the litigation. This position has been authoritatively applied by the Court of Appeal in **Cove Investments Limited v Rono & 2 others [2025] KECA 1089** and by the Environment and Land Court in **Tonui v Wekesa & 5 others [2025] KEELC 1326**.

33. Equity further demands that a party who approaches the Court must come with clean hands a principle the Applicant has manifestly failed to satisfy.

34. For the foregoing reasons, it is the finding of this court that the Application dated 10th March 2026 lacks merit and the same is dismissed with costs to the 1st and 2nd Respondents.

Dated, Signed and Delivered Virtually this 21st day of April, 2026.

**E. K. WABWOTO
JUDGE**

In the presence of: -

Mr.Omondi for the Appellant/Applicant.

Mr. Macharia Gaitho for the 1st Respondent.

Ms. Nyamai the 2nd Respondent.

N/A for the other parties.

Court Assistants: Mary Ngoira and David Ngoosa.

ORIGINAL