

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ELCA NO. E026 OF 2024

SAMUEL KAGOIYO NJERU

APPELLANT

VERSUS

BERNARD NYAMU MBURIA

(Sued through his guardian Lucy Wambui Gituku)

RESPONDENT

RULING

[Notices of Motion dated 12th & 20th November 2025]

1. The two applications arose after the delivery of the judgment in this appeal on 12th November 2025. In that judgment, the Court dismissed the appeal; affirmed the decision of the trial court delivered on 24th April 2024 in **Kerugoya CM ELC No. 129 of 2019**, wherein the learned magistrate held that the contract between the parties for the transfer of **Land Parcel No. Mutira/Kiaga/49** was void for want of full payment of the consideration; that the Plaintiff refund the sum of **Kshs. 480,000/=** to the Defendant; that the Defendant's name be cancelled from the register in respect of the said parcel of land, and that the Plaintiff be registered as the proprietor thereof.

Being dissatisfied with that decision, the Defendant lodged the appeal before this court, that was determined vide the judgment rendered on 12th November 2025, in which it found no fault in the findings of the learned magistrate and dismissed the appeal with costs to the Respondent.

The application dated 12th November 2025:

2. The first application dated 12th November 2025 was filed by the Respondent through his next friend, Lucy Wambui Gituku. In the application, the Respondent seeks orders inter alia that this Court be pleased to discharge the injunctive orders issued in **Embu High Court Civil Case No. 130 of 2005** in respect of **Land Parcel No. Mutira/Kiaga/49**, and further that the Court directs the Land Registrar to lift the restriction placed against the said parcel of land pursuant to a letter dated 30th June 2005 issued by the District Commissioner following a complaint lodged by Humphrey Gituku Mburia (deceased).

The application is supported by the grounds on its face and by the supporting affidavit sworn by Lucy Wambui Gituku, the Respondent's next friend. She deposes that the Respondent, Bernard Nyamu Mburia, also known as Kiara Mburia, is a person of unsound mind and that she was duly appointed as his guardian by a court order issued on 26th April 2023. She states that the Respondent was born in 1928, is currently almost one hundred years old, and is presently sickly and bedridden.

3. According to the deponent, **Land Parcel No. Mutira/Kiaga/49** was originally registered in the name of the Respondent. However, the land was subsequently transferred to the Appellant under circumstances later found by both the trial court and this Court to be improper, the courts having determined that the contract relied upon by the Appellant was void for want of full payment of the agreed purchase price. She explains that a suit seeking recovery of the said land was initially filed in **Embu High Court Civil Case No. 130 of 2005** by Humphrey Gituku Mburia, who was the Respondent's brother and guardian at the time but is now deceased. She further deposes that during the pendency of that suit, the High Court, on 5th February 2006, issued orders placing a restriction on the suit property to preserve it pending the hearing and determination of the matter.

The deponent further states that the matter was subsequently transferred to the **Environment and Land Court at Kerugoya**, where it was registered as **ELC Case No. 52 of 2014**, and later transferred to the **Chief Magistrate's Court at Kerugoya**, where it proceeded as **Kerugoya CM ELC No. 129 of 2019**.

4. She avers that the Respondent ultimately succeeded in the litigation before the trial court and that the Respondent's appeal was dismissed by this Court. It is

therefore her position that the injunction and restriction that had earlier been placed on the suit land have now outlived their purpose and ought to be lifted so as to facilitate the implementation of the decree issued by the trial court.

She further deposes that the decree directing cancellation of the Appellant's name from the register cannot be implemented while the injunction and restriction remain in place. She states that the Respondent, having litigated over the matter for a period spanning approximately twenty years, is desirous of enjoying the fruits of the judgments rendered in his favour.

5. The application was opposed by the Appellant through grounds of objection dated 20th November 2025. In those grounds, the Appellant contends that this Court, sitting as an appellate court, lacks the requisite jurisdiction to issue orders that were not the subject of the appeal. He further argues that the injunctive orders issued in **Embu High Court Civil Case No. 130 of 2005** can only be lifted or discharged by that court and not by this appellate court. It is therefore his position that the application lacks merit and ought to be dismissed with costs.

The application dated 20th November 2025:

6. The second application before the Court, dated 20th November 2025, was filed by the Appellant. In the

application, the Appellant seeks inter alia for orders of stay of execution of the judgment and decree delivered on 12th November 2025, pending the hearing and determination of the application and the intended appeal to the **Court of Appeal**.

The application is supported by the grounds on its face and by the supporting affidavit sworn by the Appellant, Samuel Kagoiyo Njeru. The Appellant deposes that judgment in this appeal was delivered on 12th November 2025 in favour of the Respondent and that there is an imminent risk that the Respondent may proceed to execute the decree. He maintains that he lawfully purchased the suit property from the Respondent and that a valid sale agreement was entered into between them.

He further avers that he has filed a Notice of Appeal signifying his intention to challenge the judgment before the **Court of Appeal**. According to him, unless orders of stay are granted, the Respondent may execute the decree and proceed to deal with the suit property in a manner that would render the intended appeal nugatory.

7. The application was opposed through a replying affidavit sworn by Lucy Wambui Gituku on 11th December 2025, inter alia deposing that the final order made by this Court in the judgment delivered on 12th November 2025 merely dismissed the appeal with costs to the Respondent. She

contends that such an order constitutes a negative order that is incapable of being stayed.

She further states that the Respondent is the successful litigant in the matter and should therefore be allowed to enjoy the fruits of the judgment. According to her, the Appellant has failed to demonstrate the grounds necessary to warrant the grant of an order of stay under **Order 42 Rule 6 of the Civil Procedure Rules.**

8. She also deposed that the Appellant has never taken possession of the suit property nor utilized it at any time. She states that the Appellant had entered into a sale agreement dated 25th April 2001 with the Respondent for the purchase of the suit land at an agreed consideration, but only paid **Kshs. 480,000/=** and failed to either pay the balance or transfer **Land Parcel No. Mwerua/Kabiriri/1557** as agreed. She observes that more than twenty-five years have since elapsed without the Appellant fulfilling his obligations under the agreement.

The deponent further reiterates that the dispute has been in court since 2005, and that the Respondent, who is elderly, sickly and of unsound mind, may not live long enough to enjoy the fruits of the judgment if the orders sought are granted. She therefore urges the Court to dismiss the application.

9. The issues for determinations in the two applications are as follows:

- a. Whether this Court has jurisdiction to discharge the injunctive orders issued in Embu High Court Civil Case No. 130 of 2005.*
- b. Whether the Applicant has satisfied the conditions for the grant of stay of execution pending appeal.*
- c. Who pays the costs?*

10. I have considered the grounds on the two applications, the affidavits in support and opposition thereto, submissions filed by the learned counsel, superior court decisions cited and come to the following determinations:

- a. The Respondent, through the application dated 12th November 2025, seeks for orders discharging the injunctive orders issued in **Embu High Court Civil Case No. 130 of 2005** and further seeks that the Land Registrar be directed to lift the restriction placed on **Land Parcel No. Mutira/Kiaga/49**. The Appellant has opposed the application on the ground that this Court lacks jurisdiction to discharge orders that were issued by another court, namely the **High Court at Embu**. The issue, therefore, calls for an examination of the legal nature of interlocutory injunctions, the effect of final determination of the

dispute, and the statutory power of the court in relation to restrictions on land.

b. Interlocutory injunctions are governed by **Order 40 of the Civil Procedure Rules**, which empowers the court to grant temporary injunctions where property in dispute is in danger of being wasted, damaged, alienated or otherwise interfered with pending the determination of the suit. The jurisprudential purpose of such orders is well settled. They are preservatory in nature and are issued solely for the purpose of maintaining the status quo pending the final determination of the rights of the parties.

c. In his classical exposition on the subject, **Charles Henry Wells, Cornell University Law School, 1890**, *“The Interlocutory Injunction, with Special Reference to its Important Uses,”* he explained the nature of interlocutory injunctions in the following terms:

“Interlocutory or preliminary injunctions are such as are granted at any time before final hearing... The only purpose of an interlocutory injunction is to preserve the subject in controversy in its condition at the time of granting the writ... The court

interposes only such restraint as will preserve matters in status quo during the litigation.”

That exposition reflects a principle that has long been accepted in modern courts: that interlocutory injunctions are provisional remedies issued to prevent irreparable harm pending the determination of the dispute, and they do not determine the substantive rights of the parties.

- d. The same understanding underpins modern Kenyan jurisprudence. In the case of ***Giella versus Cassman Brown & Co Ltd***, the **Court of Appeal** emphasised that the function of an interlocutory injunction is to preserve the subject matter pending the hearing and determination of the suit. Because such orders are purely provisional, they are inherently temporary and dependent on the existence of the suit. Once the dispute is heard and determined, the basis upon which the injunction was granted ceases to exist.

That principle is also reflected in **Order 40 Rule 6 of the Civil Procedure Rules**, which recognizes that interlocutory injunctions are not intended to subsist indefinitely by providing that such injunctions may

lapse where suits are not determined within a specified period unless the court orders otherwise.

- e. It follows that the very nature of interlocutory injunctions is that their existence is inseparably linked to the pendency of the suit in which they are granted. They are provisional safeguards, and once the dispute is finally determined, the foundation upon which they were granted ceases to exist.

In the present case, the material placed before the Court shows that the interlocutory orders sought to be discharged were issued by the High Court on 5th December 2006 in **Embu High Court Civil Case No. 130 of 2005**. Those orders were granted in favour of Humphrey Gituku Mburia, now deceased, who had instituted the proceedings seeking recovery of **Land Parcel No. Mutira/Kiaga/49** on behalf of his brother, the present Respondent. The purpose of the injunction was clearly preservatory: to prevent dealings with the suit land pending the hearing and determination of the dispute regarding its ownership.

- f. The record further shows that the dispute over the suit land was subsequently heard and determined by the **Chief Magistrate's Court at Kerugoya in CM ELC No. 129 of 2019**, which delivered judgment on 24th April 2024 declaring the sale agreement between

the parties void for want of full consideration and directing that the Appellant's name be cancelled from the register and that the Respondent be registered as the proprietor of the suit land.

The Appellant challenged that decision before this **Court in ELC Appeal No. E026 of 2024**, but the appeal was dismissed on 12th November 2025, thereby affirming the judgment of the trial court. The consequence of those developments is that the dispute that gave rise to the interlocutory injunction issued in 2006 has now been fully and finally determined. The preservative purpose for which the injunction was granted has therefore been exhausted.

g. The objection raised by the Appellant, however, is that only the High Court at Embu can discharge the orders it issued. That argument must be examined within the broader constitutional framework governing land disputes in Kenya. At the time the orders in **Embu High Court Civil Case No. 130 of 2005** were issued, disputes relating to the ownership and use of land fell within the jurisdiction of the High Court. However, the promulgation of the **Constitution of Kenya 2010** fundamentally restructured the judicial architecture by establishing

specialised courts to deal with specific subject matter.

- h. **Article 162(2)(b) of the Constitution** established the Environment and Land Court, a court of the same status as the High Court with jurisdiction to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. That jurisdiction was subsequently operationalised through the **Environment and Land Court Act 2011**, which vested the Court with exclusive authority to adjudicate such disputes.

Consequently, when this Court is called upon to deal with questions relating to land, it exercises the jurisdiction that would previously have been exercised by the High Court prior to the establishment of the specialised Environment and Land Court.

- i. More importantly, the present application does not invite the Court to sit on appeal over the ruling of the High Court delivered in 2006. Rather, it invites the Court to recognise that the final determination of the dispute has overtaken the interlocutory orders issued in those proceedings and that their continued existence now operates as an impediment to the

enforcement of the decree issued by the trial court and affirmed on appeal.

- j. The second limb of the application concerns the restriction placed on the suit land. Restrictions on dealings with land are governed by the **Land Registration Act 2012**. Under **Section 76**, of the said **Act**, the Land Registrar may restrict land in order to prevent fraud, improper dealings, or to preserve property pending the resolution of a dispute. Importantly, **Section 78(2)** of the **Act** expressly grants the court jurisdiction, upon application by a proprietor affected by a restriction, to order that such restriction be removed or varied. The material before the Court indicates that the restriction placed on **Land Parcel No. Mutira/Kiaga/49** was also intended to preserve the land pending the resolution of the ownership dispute. That dispute has now been conclusively determined by the trial court and the decision upheld by this Court on appeal. In those circumstances, the restriction has served the purpose for which it was imposed, and its continued existence now serves only to hinder the implementation of the decree directing the rectification of the land register.

Accordingly, this Court is satisfied that the interlocutory injunction issued in **Embu High Court**

Civil Case No. 130 of 2005 has been overtaken by the final determination of the dispute and that the restriction placed on **Land Parcel No. Mutira/Kiaga/49** should be lifted so as to facilitate the implementation of the decree issued by the trial court.

- k. The Appellant seeks through the application dated 20th November 2025 for orders of stay of execution of the judgment delivered on 12th November 2025 pending the hearing and determination of the intended appeal before the Court of Appeal.

The application is premised on the grounds set out on its face and supported by the Applicant's affidavit, in which he deposes that judgment in the appeal was delivered in favour of the Respondent and that there is an imminent risk of execution. He avers that he lawfully purchased the suit land and that a valid sale agreement was entered into between the parties.

He further expresses apprehension that, unless a stay is granted, the Respondent may proceed to execute the decree and dispose of the suit land to third parties, thereby rendering the intended appeal nugatory. The Applicant states that he has filed a notice of appeal and intends to lodge a substantive appeal before the Court of Appeal.

- I. The Respondent opposed the application by way of a replying affidavit dated 11th December 2025. She contends that the judgment delivered on 12th November 2025 merely dismissed the appeal with costs and therefore constitutes a negative order incapable of being stayed. She further avers that the Respondent is the successful litigant and should be allowed to enjoy the fruits of the judgment after litigating over the dispute for over two decades.

It is also deposed that the Applicant has never taken possession of the suit land nor utilized it at any time, and that the purported sale agreement entered into between the parties in April 2001 was never completed, the Applicant having paid only **Kshs. 480,000/=** out of the agreed purchase price of **Kshs. 780,000/=** and failing to either pay the balance or transfer the alternative parcel of land agreed upon. The Respondent further states that the proprietor of the land is a person of advanced age and unsound mind who is currently bedridden, and expresses apprehension that continued delay may deny him the opportunity to enjoy the fruits of the judgment rendered in his favour.

m. Applications for stay of execution pending appeal are governed by **Order 42 Rule 6(1) of the Civil Procedure Rules**, which provides that:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

The rule makes it clear that the mere filing of an appeal does not operate as a stay of execution of the decree or order appealed from. A party seeking such relief must therefore demonstrate sufficient cause to justify the court’s intervention.

n. The requirements for the grant of stay are further set out under **Order 42 Rule 6(2) of the Civil Procedure Rules** which provides:

“(2) No order for stay of execution shall be made under subrule (1) unless -

(a) The court is satisfied that a substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

The effect of the above provisions is that an applicant must satisfy three conditions before the court can exercise its discretion in their favour: the application must be brought without unreasonable delay; the applicant must demonstrate that they stand to suffer substantial loss if stay is not granted; and the applicant must be willing to provide security for the due performance of the decree.

o. However, the jurisdiction to grant a stay under the above provision presupposes the existence of a decree or positive order capable of execution. Where a judgment merely dismisses a suit or an appeal without directing any act to be done by the unsuccessful party, such a judgment is regarded in law as a negative order, and there is nothing arising from it that can be stayed. This principle was authoritatively stated in the case of **Kimondo & another versus Progressive Credit Ltd (Civil Appeal 49 of 2023) [2025] KEHC 7297 (KLR) (21 May 2025) (Ruling)**. Where the **Court of Appeal** stated that:

“...In the case of Sonalux Limited & another versus Barclays Bank of Kenya Limited & 2 others [2008] eKLR, the Court of Appeal addressed its mind on whether an order for stay of execution can be granted against a negative order and held as follows- “As regards the matter before us all we can say is that the ruling of the superior Court (Kasango, J.) in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. It therefore follows that no order of stay can properly issue

relating to that ruling.” In view of the foregoing, this Court finds that it cannot grant such orders for stay of execution and proceedings since the order issued by Judge P.J. Otieno on 27th November, 2020 was a negative order incapable of being executed. This Court’s finding is that the applications dated 11th January, 2021 and 9th February, 2021 are devoid of merit and the same are hereby dismissed with costs to the respondents.”

p. In the present matter, the judgment delivered by this Court on 12th November 2025 stated inter alia that:

“On the whole and upon evaluation of the evidence, I cannot fault the learned magistrate on the decision she reached in analysing and evaluating the evidence before her. I find no merit in the appeal, and I dismiss the same with costs to the respondent.”

The decree extracted from that judgment equally provides that the appeal lacks merit and is dismissed with costs to the Respondent. The judgment therefore did not issue any positive or executable order against the Applicant other than the order as to costs.

- q. In those circumstances, there is no decree arising from the judgment of this Court capable of execution so as to warrant an order of stay. What the Applicant seeks in effect is to stay the consequences of the judgment of the trial court, which this Court affirmed on appeal. However, the judgment sought to be stayed in the present application is the appellate judgment, which merely dismissed the appeal. The Court therefore agrees with the Respondent that the judgment in question constitutes a negative order incapable of being stayed.
- r. Even if the Court were to consider the application within the framework of **Order 42 Rule 6 of the Civil Procedure Rules**, the Applicant has not demonstrated the essential element of substantial loss nor offered security for the due performance of the decree. The Applicant's apprehension that the Respondent may dispose of the suit land to third parties remains speculative and unsupported by evidence.

On the other hand, the material placed before the Court shows that the Respondent has litigated over the suit property for close to two decades and seeks to implement the decree that restored the land to him. In the circumstances, the Court is not satisfied

that the Applicant has established any basis upon which the discretionary power to grant a stay of execution pending appeal may be exercised in his favour. Accordingly, the application for stay of execution pending appeal is without merit and is for dismissal.

s. Under **Section 27 of Civil Procedure Act, Chapter 21 of Laws of Kenya**, costs follow the events unless where otherwise ordered by the court for good reasons. I find no reasonable cause to deviate from that dictate in the two applications.

11. Arising from the foregoing determinations on the two applications, the court finds and orders as follows:

a. That the appellant's notice of motion dated the 20th November 2025 is without merit and is dismissed with costs.

b. The respondent's application dated 12th November 2025 has merit and is granted in terms of prayers 2 and 3 thereof with costs.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS
23RD DAY OF APRIL 2026.**

S. M.

Kibunja

ELC

JUDGE

In the presence of:

Appellant – Mr. Gitau Kahiga

Respondent – Mr. Mwangi Kinyua

Kinyua - Court Assistant

S. M.

Kibunja

ELC

JUDGE

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