

hearing and determination of the Application for stay under Rule 5(2) (b) of the Court of Appeal Rules.

iii. THAT in the interim, and pending the hearing and determination of the intended Appeal, the Respondent be restrained either by himself, servants, workers, agents and/or employees from evicting the Applicant from the suit property known as Dagoretti/Uthiru/ T36.

iv. THAT an interlocutory injunction be granted restraining the Respondent either by himself, servants, workers, agents and/or employees from evicting the Applicant from the suit property known as Dagoretti/Uthiru/ T.36.

v. THAT the 2nd Respondent either by himself, servants, workers, agents and/or employees be restrained by way of an injunction from cancelling the registration of the Title of L.R Dagoretti/Uthiru/ T36 registered in the name of Applicant and registering it in the name of the 1st Respondent.

vi. THAT the costs of this Application be provided for.

2. The Motion is founded on the grounds set out on the face of the Motion and is supported by the affidavit of Simon Karanja Thimba, the 1st Defendant/Applicant, sworn on even date. He

deponed that on 30th July 2014, the Plaintiff/Respondent instituted this suit against him and other parties, seeking, *inter alia*, orders for the cancellation of the title to L.R. Dagoretti/Uthiru/T.36 registered in his name.

3. The matter proceeded to full hearing, and in its judgment delivered on 23rd May 2024, the court found in favour of the Plaintiff. Consequently, it was deposed, the court directed the Chief Land Registrar to cancel his title and to register the same in the name of the Respondent, Jackson Gitau Mwaura, on behalf of the Estate of Peninah Wanjiru Mwaura (Deceased).
4. The 1st Defendant/Applicant explained that aggrieved by the said judgment, he filed a notice of appeal dated 4th June 2024, signifying his intention to challenge the decision before the Court of Appeal, in that in furtherance thereof, he instructed his advocates to apply for certified copies of the typed proceedings and judgment herein.
5. The Applicant avers that he has reason to believe that the Plaintiff/1st Respondent is poised to execute the judgment by moving the lands registrar to effect cancellation of the title to the suit property. He expresses apprehension that such execution will occasion him substantial loss, as he has heavily invested in the suit land by constructing residential houses thereon, and stands to suffer demolition of the developments and possible eviction.

6. He further depones that he intends to file an application for stay of execution before the Court of Appeal under **Rule 5(2)(b)** of the **Court of Appeal Rules**. On the advice of Counsel, he contends that the purpose of such an application is to preserve the substratum of the dispute so as to safeguard the right of appeal and ensure that, if successful, the appeal is not rendered nugatory.
7. In that regard, the Applicant urges this court to grant an interim stay of implementation of the judgment delivered on 23rd May 2024, pending the hearing and determination of the intended application under **Rule 5(2)(b)**, in deference to the hierarchical structure of the courts.
8. He maintains that no prejudice will be occasioned to the 1st Respondent if the orders sought are granted. Conversely, he contends that he stands to suffer irreparable harm should execution proceed, as the intended appeal would thereby be rendered nugatory. It is his position that the interests of justice militate in favour of granting the stay orders sought.
9. No response was filed to this Motion. No submissions had been filed as at 23rd March, 2026.
10. Having considered the Motion, Affidavits and submissions, the sole issue that arises for determination is whether the 1st Defendant/Applicant is entitled to the reliefs sought.
11. Vide the present Motion, the Applicant principally seeks two reliefs, an order of stay of execution pending the hearing and

determination of an intended application before the Court of Appeal under **Rule 5(2)(b)**, and injunctive relief pending appeal.

- 12.** This court's jurisdiction as regards stay of execution pending appeal is settled, and is codified under **Order 42 Rule 6(1)** and **(2)** of the **Civil Procedure Rules, 2010**, which provides as follows:

“(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.

(2) No order for stay of execution shall be made under sub rule (1) unless—

***(a) the court is satisfied that 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.”***

13. Sub-rule (6) thereof is also instructive and provides:

“Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with...”

14. The court is accordingly guided by the foregoing provisions.

15. By way of background, the Respondent, as Plaintiff, instituted this suit seeking, *inter alia*, a declaration that the registration of one David Mwaura Karanja as the registered proprietor of L.R. Dagoretti/Uthiru/T.36 was illegal, null and void, and an order for cancellation of that title issued to the Applicant herein and restoration of the same in the name of the Plaintiff.

- 16.** The Respondent's case was that the suit property originally belonged to his mother, who had purchased it in or about 1958 but passed away before effecting transfer in his favour. It was his contention that in or about 1995, the said David Karanja fraudulently procured registration in his own name and subsequently transferred the property to the Applicant.
- 17.** Upon a full hearing, the court found that the Respondent had proved his case on a balance of probabilities and consequently ordered that the Applicant's title be cancelled and the property restored to the Respondent. Aggrieved by that decision, the Applicant expressed an intention to appeal and duly lodged a notice of appeal dated 4th June 2024.
- 18.** Notably, however, the Applicant has not sought before this court a substantive stay of execution pending appeal under **Order 42 Rule 6** of the **Civil Procedure Rules**. Instead, the Applicant seeks what is framed as a stay of execution "*pending the hearing and determination of the Application for stay under Rule 5(2)(b) of the Court of Appeal Rules.*"
- 19.** In essence, therefore, the Applicant invites this court to grant interim or holding orders of stay of execution to await the hearing and determination of an intended application before the Court of Appeal.
- 20.** It is trite that this court and the Court of Appeal exercise distinct and independent jurisdictions in applications for stay of execution pending appeal. As aforesaid, this court's

jurisdiction is anchored on **Order 42 Rule 6** of the **Civil Procedure Rules**, while that of the Court of Appeal's jurisdiction is derived from **Rule 5(2)(b)** of the **Court of Appeal Rules**.

- 21.** Once a party elects to move the Court of Appeal for stay, that court becomes properly seized of the matter and is fully empowered to grant appropriate relief, including interim or ex parte orders of stay pending the hearing and determination of the application. Indeed, it was brought to the attention of this court that as at 16th July 2025, the Applicant's Motion for stay under **Rule 5 (2) (b)** of the **Court of Appeal Rules** was already pending before the Court of Appeal.
- 22.** It therefore follows that this court cannot purport to grant provisional or holding orders merely to await the hearing and determination of the stay Motion before the Court of Appeal.
- 23.** Even if the Motion for stay had not been filed before the Court of Appeal, this court would still not be justified in granting holding orders of stay. Its jurisdiction as regards stay cannot be invoked in the abstract, or as framed by the 1st Defendant/Applicant.
- 24.** Turning to the prayer for injunctive relief pending appeal, the court's power is anchored in **Order 42 Rule 6(6)** of the **Civil Procedure Rules**. A plain reading of that provision

shows that such power is only exercisable where the court is sitting in its appellate capacity, and not as a trial court.

- 25.** In the present case, the court is seized of the matter as a court of first instance and not on appeal. The jurisdiction contemplated under **Order 42 Rule 6(6)** is therefore not available to the Applicant. This position was persuasively affirmed in *Hunkar Trading Company Limited & another v Family Bank Limited (Commercial Case E841 of 2021) [2024] KEHC 2951 (KLR) (Commercial and Tax) (21 March 2024) (Ruling)*, where the court held that:

“...it is evident that this court’s jurisdiction to grant an order for temporary injunction pending appeal can only be invoked in instances where the Court is exercising its appellate jurisdiction, which is not the case herein.”

- 26.** Ultimately, the court finds that the Notice of Motion dated 4th June 2024 is devoid of merit. Consequently, the application is dismissed with costs.

Dated, signed and delivered virtually in Nairobi this 30th day of April, 2026.

O. A. Angote
Judge

In the presence of;

Mr. Malenga for 1st Defendant

Mr. Ambani for Plaintiff

Court Assistant: Tracy

ORIGINAL