



THE JUDICIARY



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A
ELCLA E045 OF 2025

PAUL WAWERU GATUKAAPPELLANT
VERSUS
JOSEPHAT MWANGI NJOROGE.....RESPONDENT
AND
PETER MBURU KIMATHIAINTERESTED PARTY

(Being an appeal from the Ruling of the learned Senior Principal Magistrate Hon. Susan N. Mwangi in Murang'a C.M. ELC NO. E043 of 2025 delivered on 4.11.2025.)

RULING

- (1) This ruling is on the notice of motion dated 18-11-2025. The motion which is brought under **Order 42** of the **Civil Procedure Rules, Section 3A** of the **Civil Procedure Act** and all other enabling provisions of the law seeks the following residual orders.
 2. **The temporary injunction issued against the Appellant in Murang'a CMCC ELC Case No. E043 of 2025 restraining him from encroaching and/or constructing on L.R. No. Loc. 11/Maragi/1193/85 on 4-11-2025 be discharged forthwith and he be allowed to continue constructing on Loc.11/Maragi/1193/13.**
 3. **The costs of this application be borne by the Respondent.**
- (2) The motion is based on five(5) grounds and supported by an affidavit sworn by the Appellant also dated 18-11-2025. The gist of the grounds and the affidavit is as follows. One, the Appellant has not built on Plot No. Loc.11/Maragi/1193/85 which belongs to James Maina Mwangi. Two, the Respondent is not the owner of L.R. Loc.11/Maragi/1193/85 and therefore there is no suit in the lower court as the Respondent is a busy body. Three, the Respondent lacks *locus standi* to institute the suit

in the lower Court. Four, there is no prima facie case established in the lower court to warrant the granting of an injunction and the temporary orders issued against the Appellant on 4-11-2025 should be discharged forthwith.

- (3) The motion is opposed by the Respondent who has sworn a replying affidavit dated 27-1-2026 in which he deposes as follows. Firstly, the motion dated 18-11-2025 seeks identical orders to those sought in the appeal. The motion is therefore a blatant abuse of the court process, calculated to circumvent the appellate procedure with the sole intention of procuring a determination of the appeal without the benefit of a full hearing. If it were to be allowed, it would pre-empt and determine the appeal in limine, thus rendering the memorandum of appeal nugatory and occasioning grave prejudice to the Respondent. Secondly, the issues of ownership and encroachment were considered by the trial court in granting the impugned interim orders. The Appellant's remedy lies solely in prosecuting the appeal to conclusion. Finally, it is in the interests of justice that the status quo be preserved by maintaining the temporary injunction pending the hearing and determination of the appeal and the main suit.
- (4) Counsel for the parties were to file written submissions by 26-3-2026. The only submissions on record are by the Appellant's counsel dated a date that is not easy to discern.

I find that the following issues arise.

(a) Whether allowing the current application will determine the appeal.

(b) Whether the Appellant has satisfied the criteria for a stay of execution pending appeal.

- (5) I have carefully considered the motion in its entirety including the grounds, the supporting affidavit, the replying affidavit, the Appellant's written submissions and the available record. I make the following findings on the two issues above.
- (6) It is my finding that if I were to allow the current motion, there would be nothing left to decide in the appeal. It would also mean that the Appellant would continue to construct on disputed land. This would neither be fair nor just because the Respondent will not have been given a fair hearing by the Courts yet he has a dispute that should be resolved

by the Application of the law. That dispute is still pending before the lower Court in case No. Murang'a CM's case MCELC/E043/2025.

- (7) Regarding the second issue, I find that the Appellant has not satisfied the conditions for stay of execution pending appeal as per **Order 42 rule 6(2)** of the **Civil Procedure Rules**. The conditions include-
- (i) **substantial loss,**
 - (ii) **application being made without unreasonable delay and**
 - (iii) **the Applicant providing security for the due performance of the decree.**

The Appellant cannot be heard to say that he will suffer substantial loss for not being allowed to construct or disputed land. We do not know the outcome of the litigation pending in the lower court. Secondly, though the Application has been made without unreasonable delay, the Appellant has not said what would happen if he constructed on the suit land and it was eventually found that the land belongs to the Respondent. He has not mentioned how he would compensate the Respondent for this.

For the above stated reasons, I find **no merit** in the motion dated 18-11-2025. I **dismiss** it accordingly.

Costs in the cause.

Dated, Signed and Delivered virtually at Murang'a this 4th day of May, 2026.

**M.N. GICHERU
JUDGE.**

Delivered online in the presence of: -
Court Assistants – Jackline and Antony
Appellant's Counsel – Mr. T.M. Njoroge
Respondents' Counsel – Miss Kariuki holding brief