

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ELC MISCELLANEOUS CASE NO. E023 OF 2025

SIMON GITONGA MUCHIRI.....
APPLICANT

VERSUS

BERNARD MAINA KURIA.....
.....RESPONDENT

RULING

1. Coming up for determination is a Notice of Motion Application dated 3rd December, 2025 brought under the provisions of Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the Civil Procedure Act, Section 6 & 7 of the Environment and Land Court and Article 159 of the Constitution of Kenya 2010 wherein the Applicants have sought for the following orders:
 - i. That the Honourable Court be pleased to grant a stay of execution of the decree issued in C.M.ELC No 52 of 2019 Naivasha until the instant application is fully heard and determined.
 - ii. That the Applicant be granted leave to file an Appeal out of time.
 - iii. That costs of the application be in cause.
2. The Application is premised on the ground that, on its face, the Supporting Affidavit of equal date, sworn by Simon Gitonga Muchiri, the Applicant herein, deposes that he was the Defendant in C.M.ELC No 52 of 2019, Naivasha, and that the Respondent was the Plaintiff. That judgement in the above case had been entered in favour of the Plaintiff on 27th August, 2025. Subsequently, he instructed his advocates to file an appeal against the said judgement.

3. He had made the payment for the judgment and proceedings on 8th September 2025, as evidenced by the attached court receipt. Subsequently, the court documents were provided, and he attached a copy of the judgment. However, being an elderly man who had been ill for some time, he was unable to follow up on the matter.
4. On or around November 29th 2025, he was informed by his Advocates that the Respondent's Advocates had sent a letter threatening to execute the decree, noting that the deadline for filing the appeal had passed. He requested leave to file the appeal late and for a stay of execution until the appeal was filed.
5. In response to and opposing the Applicant's Application, the Respondent submitted his Replying Affidavit dated 11th December, 2025, stating that the Application was irregular, misconceived, incompetent, and baseless, and therefore should not be considered by the Court. He noted that the Applicant was aware that the judgment in CM.ELC No 52 of 2019 was delivered on 27th August, 2025, in favor of the Applicant, with a thirty-day stay of execution granted to the Respondent, which expired on 26th September, 2025.
6. However, it had been over two months since the 30-day stay of execution was granted, yet the Applicant had not filed an appeal, if indeed they intended to do so. Interestingly, the Applicant only proceeded to file this application after receiving a letter demanding that they vacate the suit property, known as L.R. Number 1144/803, Naivasha, and pay costs as per the decree issued on 25th November, 2025.
7. He thus stated that the Application was an afterthought, likely created to frustrate or deter him from enjoying the benefits of the judgment, especially since no proof was provided that the Applicant had been ill for the past three months.
8. That from the Intended Memorandum of Appeal, they had not challenged the costs awarded to him by the Magistrate or the amount specified in the Certificate of Costs. Moreover, for a stay of execution pending appeal, the

Applicant must meet certain conditions, including providing security to the Court to ensure payment of the judgment debt if the appeal fails. If the Court is willing to grant a Stay of Execution of the decree in CM.ELC No 52 of 2019, it would be fair to require the Applicant to deposit Ksh. 366,350/= as security.

9. It was reasonable that the Respondent had been in court since 2013, having filed Nakuru High Court ELC No. 609 of 2013. Despite this, he was denied the right to use his property and has spent money over the last 12 years on legal fees to have the Applicant evicted from his property.
10. The instant Application was disposed of by way of written submissions.

Applicant's Submissions.

11. In his Submissions dated 27th January, 2026, the Applicant submitted that he had provided sufficient reasons for the delay in complying with the timelines, and hence he was not guilty of inordinate delay. As regards the issue of security, he urged the Court to find that the subject matter of the application was land, and that requiring the Applicant to pay the deposit would hinder him from exercising his constitutional rights. He thus urged the Court to exercise its discretion in his favour.
12. He placed reliance on the Court of Appeal decisions in **Nyeri Civil Application Number 50 of 2010; Paul Wanjohi Mathenge vs Duncan Gichane Mathenge, Nairobi Civil Application Number 238 of 2005; National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Another** and **Nairobi Civil Application Number 31 of 2013; Stanley Kangethe Kinyanjui vs Tony Keter & 5 Others** to submit that the Honourable Court had unlimited power to exercise its discretion to grant the prayers sought in their application. He thus prayed that the instant application be allowed,

Respondent's Submission

13. The Respondent on the other hand, vide its submissions dated 4th February, 2026, framed his issues for determination as follows:

- i. Whether the Honourable court should grant a stay of execution of the decree issued on CMELC No. 52 of 2019, Naivasha.
 - ii. Whether the Applicant should be granted leave to file an appeal out of time.
 - iii. Who should bear the costs?
14. On the initial issue of whether the court should grant a stay of execution for the decree issued on CMELC No. 52 of 2019 Naivasha, he based his arguments on the case of **Butt vs Rent Restriction Tribunal (1982) KLR 417** and rulings in **RWWW vs EKW (2019) eKLR** and **RWW v EKW [2019] eKLR**, to argue that the authority to grant or deny a stay of execution was at the court's discretion. He also referred to Order 42 Rule 6 of the Civil Procedure Rules, which outlines the principles for granting a stay.
15. On the issue of substantial loss, he relied on the Court of Appeal's decision in the case of **Mukuma vs Abuoga (1988) KLR**, where it was held that substantive loss was what had to be prevented by preserving the status quo, as such loss would render the Appeal nugatory. He submitted that the title deed for the suit property had been registered in the Respondent's name in 2009, and that the Application had not sought orders to cancel the same. He further submitted that, in any event, the Applicant does not reside on the suit property, nor has he put up any structures thereon. He thus submitted that the Applicant had not shown or proved that he would suffer substantial loss if the stay of execution was not granted.
16. On undue delay, he submitted that the evidence showed that the judgement in CMELC No. 52 of 2019 Naivasha had been delivered on 25th August, 2025, while the instant Application was filed on 3rd December, 2025, after the Applicant had been served with the Decree and Certificate of costs. He further submitted that, having been filed approximately three

months (3) after the delivery of the judgement, the instant Application was an afterthought intended to forestall the execution of the decree.

17. On security for due performance, he relied on the decided case of **Mwaura Karuga t/a Limit Enterprises vs Kenya Bus Services Ltd & 4 others [2015] eKLR** to submit that the court had discretion to determine the kind of security the Applicant should give. He further submitted that the Applicant had not offered security for the due performance of the decree and that the title deed had been issued in the name of the Respondent in the year 2009. That, although the Respondent had filed the instant suit seeking orders for the Applicant to vacate the suit property, pay the costs of the suit and interest, the Applicant did not challenge the title deed or seek to have it cancelled.
18. He argued that the Applicant did not present a sufficient case to justify a stay of execution, but merely claimed it as a legal right to pursue the Appeal. However, if the Court determines that the Applicant met the criteria for granting a stay, he should be ordered to deposit Kshs. 366,350/-, covering the total costs plus interest specified in the decree.
19. On the second issue, namely whether the Applicant should be granted leave to file an appeal out of time, he relied on the provisions of Section 79G of the Civil Procedure Act and on the decided case of **Diplack Kenya Limited vs William Muthama Kitonyi [2018] eKLR**, where it was held that an Applicant seeking enlargement of time to file an appeal, or admission of an already filed appeal, must show that he had good cause for doing so.
20. That the principles applicable to an Application for leave to appeal out of time were set down by the Supreme Court in its decision in **Nicholas Kiptoo Korir Arap Salat vs IEBC and 7 Others [2014] eKLR** and the Court of Appeal's decision in **Paul Musili Wambua vs Attorney General & 2 Others [2015] eKLR**.
21. Regarding the duration of the delay, he argued that the judgment in question was delivered on 25th August 2025, while the current Application

was filed on 3rd December 2025, amounting to approximately three months. The Applicant cited "sickness" caused by his advanced age as the main reason for the delay. However, as it is well-established law that the burden of proof lies with the claimant, the Applicant failed to submit any medical evidence or details about when and for how long he was ill, leaving the court unable to verify those claims. He contended that the delay in filing the appeal was not adequately justified by the Applicant.

22. On the likelihood of the Appeal succeeding if the instant Application was allowed, he submitted that the Applicant had annexed an intended Memorandum of Appeal, in which he generally faulted the trial court for finding that the Respondent had proved his case on a balance of probabilities, while the Intended Appellant had not. He further submitted that the Respondent had confirmed that a title deed for the suit property had already been procured in his name, hence he had instituted the suit because the Applicant was illegally occupying the same and had refused to vacate. He further submitted that the prayers he had sought were eviction, costs and interest. That, nonetheless, the Applicant in his Statement of Defence had only sought for the dismissal of the Plaintiff's suit, but had not challenged the title deed and/or sought to have it cancelled either because of fraud or illegal procurement.
23. That the Applicant was not appealing the issue of costs and interest awarded, but rather the court's finding that the Respondent had proved his case and was entitled to the orders sought. That if, at all, the Applicant did not seek to have the title deed in the Respondent's name cancelled, why would he refuse to vacate the suit property?
24. That subsequently, the question that arises is what the court would be considering on appeal, or what the contrary decision in the trial court would have been. He submitted that the intended appeal is frivolous and vexatious, aimed at frustrating the Respondent from enjoying the fruits of the judgement.

25. Regarding the degree of prejudice to the Respondent if the Application was allowed, he submitted that the Respondent had been in court since 2013, when the matter was filed at the Nakuru Law Courts. That he holds a title deed in his name, which has never been challenged, although he has never been in occupation or use of the property since purchasing it. That he had been forced to incur legal fees to have a party in illegal occupation evicted. He thus submitted that if litigation were reopened, the Respondent would be more prejudiced. That whereas equity favours the vigilant, the Applicant had not demonstrated sufficient reasons to warrant the court allowing him leave to file the appeal out of time.
26. On the costs of the Application, he submitted that costs follow the event, hence the Applicant should pay costs as he had failed to meet the requirements of the prayers sought in his application.
27. In conclusion, he submitted that litigation must come to an end; thus, the Application dated 3rd December, 2025, should be dismissed with costs.

Determination.

28. Having considered the application before the court herein, the opposition thereto, the submissions by both parties, the authorities cited, and the applicable law, the Applicant brings his application seeking an order from the court to stay the execution of a judgment delivered by the trial court in Naivasha CM.ELC No 52 of 2019 rendered on 27th August, 2025. The Applicant further seeks leave to file his intended Appeal, having been aggrieved by the said judgment.
29. Consequently, the pending issues for determination are whether this court should grant the Applicant the orders sought for being;
- i. Enlargement of time to enable him file his appeal after the expiry of the statutory period.
 - ii. Stay of execution of the judgment of Naivasha Chief Magistrate court rendered on 27th August 2025 in Naivasha CM.ELC No 52 of 2019.

30. On the first issue concerning the order of Leave to appeal out of time, Section 79G of the Civil Procedure Act, which gives an appellate court discretion to extend time for filing an appeal from the subordinate Court to the High Court. (Read Environment and Land Court) stipulates as follows;

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. “

31. In the case of **Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**, the Supreme Court of Kenya held that:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the Applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the Applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

- i. *extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving*

- party, at the discretion of the Court;*
- ii. *a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;*
 - iii. *whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;*
 - iv. *where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;*
 - v. *whether there will be any prejudice suffered by the Respondent, if extension is granted;*
 - vi. *whether the application has been brought without undue delay; and*
 - vii. *whether in certain cases, like election petitions, public interest should be a consideration for extending time”*

32. Has the Applicant fulfilled the above requirements so as to be granted leave to file his appeal out of time? The Applicant asserts that he intended to appeal the judgment delivered on 27th August, 2025, having paid for the proceedings and judgment as early as 8th September, 2025. The failure to file the appeal within the statutory timelines was due to his age as an elderly man who has been suffering from illness, which hindered his ability to follow up with his advocates. The application was triggered on 29th November, 2025, when the Respondent threatened to execute the decree. He invoked the provisions of Article 159 of the Constitution and the Oxygen principles of the Civil Procedure Act, seeking the court's discretion to hear the appeal on its merits despite the delay.

33. The Respondent's argument in opposing the application was that it was misconceived, incompetent, and an afterthought. That the Applicant was well aware of the judgment date and the 30-day stay of execution granted by the trial court, which expired on 26th September, 2025. The Applicant remained silent for over two months, only moving to court after

receiving a demand to vacate the suit property L.R. No. 1144/803. The Applicant provided no medical evidence or proof to substantiate the claims of illness that allegedly prevented the filing of the appeal.

34. That litigation had been ongoing since 2013 (originally Nakuru High Court ELC No. 609 of 2013), wherein, after 12 years of legal costs and being denied the use of his property, he should not be further frustrated by an afterthought application. He contended that, should the court be inclined to grant a stay, the Applicant must satisfy the conditions of Order 42 Rule 6, specifically by depositing Ksh. 366,350/= as security for costs to protect his (Respondent's) interests should the appeal fail.

35. I have considered the Applicant's intended memorandum of appeal, in which his dissatisfaction with the trial Magistrate's decision was that the court had erred in law by finding that the Respondent had proved his case on a balance of probabilities, that the Applicant had not disproved the Respondent's case and lastly that the trial Magistrate had misdirected himself by deciding the case without considering all facts.

36. The parameters for the exercise of such discretion were clearly set out in the case of **Thuita Mwangi vs Kenya Airways Ltd, [2003] eKLR**, where the court of appeal held as follows

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.....”

37. In this case, the judgment was delivered on 27th August 2025. The Applicant applied for leave on 3rd December 2025, a delay of approximately three months. While the Applicant cites old age and illness, no medical evidence was provided to the Court. However, the Court notes

that the Applicant showed an early intent to appeal by paying for the proceedings on 8th September 2025. It has also been confirmed by the parties that the Respondent does not reside on the suit land. I find that no prejudice will be suffered if an extension of time is granted to the Applicant to file his appeal out of time.

38. As to the Second issue, as to whether there should be stay of execution, Order 42 Rule 6 of the Civil Procedure Rules, stipulates as follows:

'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 subrule (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.'

39. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to wit:
- i. The Court is satisfied that substantial loss may result to the Applicant unless a stay of execution is ordered;
 - ii. The application is brought without undue delay and
 - iii. 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.
40. For the Applicant to succeed in the present application, the onus was on him to satisfy the conditions as set down under Order 42 Rule 6 of the Civil Procedure Rules. Indeed, the purpose of a stay of execution is to preserve the substratum of the case. In the case of **Consolidated Marine. vs. Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)**, the Court held that: -

“The purpose of the application for stay of execution pending Appeal is to preserve the subject matter in dispute so that the right of the Appellant who is exercising his undoubted right of Appeal are safeguarded and the Appeal if successful is not rendered nugatory”.

41. On the first condition of proving that substantial loss may result unless a stay order is made, it was incumbent upon the Applicant to demonstrate what kind of substantial loss he would suffer were the stay order not made in his favour.
42. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma vs. Abuoga (1988) KLR 645** where the Lordships stated that;
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”*
43. The Applicant herein contends that he would suffer irreparable loss if a

stay were not granted, as he risked being evicted from the suit land pursuant to the 27th November 2025 notification by the Respondent's Advocates, thus occasioning him substantial loss.

44. Platt, Ag.JA (as he then was) in **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, at page 416 expressed himself as follows:

"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an Appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money".

On the part of **Gachuhi, Ag.JA** (as he then was) at 417 held:

"It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the Applicant would suffer loss if the money is paid. What sort of loss would this be" In an application of this nature, the Applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of Appeal succeeding" On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."

45. This being the case, and while keeping in mind that the Applicant was and is still in possession of the suit premises, and further in exercising the court's discretion, to always opt for the lower rather than the higher risk of injustice, I find that the Applicant has discharged the first condition of proving that substantial loss may result unless a stay order is made

46. On the second condition, there is no dispute that the impugned

judgment was entered on 27th August 2025, wherein the Applicant made the payment for the judgment and proceedings on 8th September 2025, and a Memorandum of Appeal was subsequently filed on 3rd December 2025. I find that the said application is brought without undue delay.

47. On the last condition as to provision of security, the Applicant in the present application has not offered to furnish security for the due performance of such decree as is mandatory as per the wording of Order 42 Rule 6 (2) (b) of the Civil Procedure Rules.
48. However, the Courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions, according to Section 1A (2) and 1B of the Civil Procedure Act.
49. It therefore follows that all the pre-overriding objective decisions must now be looked at in the light of the said provisions. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms, which are aimed at placing the parties before the Court on equal footing. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.
50. The Respondent argued that this matter has been in court since 2013 and that he has been denied the use of his land L.R. No. 1144/803 for 12 years. The Court must balance the Applicant's right to appeal with the Respondent's right to enjoy the fruits of his judgment.
51. I find that the intended grounds of appeal challenge the trial court's evaluation of evidence on a balance of probabilities. To lock out the Applicant at this stage would be a harsh exercise of discretion, especially where property rights are involved. Substantial justice under Article 159 of the Constitution requires that the court protects the interests of both parties. Thus, it is directed as follows:

- i. Leave is hereby granted to the Applicant to file and serve the Memorandum of Appeal and the Record of Appeal within forty-five (45) days from the date of this Ruling.
- ii. A Stay of Execution of the decree in C.M.ELC No. 52 of 2019 is granted pending the hearing and determination of the Appeal on condition that the Applicant deposits Kshs. 366,350/= (being the security for costs and judgment debt) into a joint interest-earning account in the names of both counsel within thirty (30) days.
- iii. In default of compliance with any of the above conditions, the stay of execution shall stand vacated, and the Respondent shall be at liberty to proceed with execution.
- iv. There shall be no costs awarded.

Dated and delivered at Naivasha via Teams Microsoft this 14th day of May 2026.

**M.C. OUNDO
ENVIRONMENT & LAND COURT- JUDGE.**