

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELCLA NO. E002 OF 2026

GODWIN MURIITHI.....1ST

APPELLANT/APPLICANT

JOSEPHINE WANJIRU NJUE.....2ND

APPELLANT/APPLICANT

VERSUS

ELIAS K.

MBUI.....RESPONDENT

RULING

1. The Appellants/Applicants (hereinafter referred to as "*the Applicants*") filed a Notice of Motion Application under Certificate of Urgency dated 12th January 2026 seeking, inter alia, orders for stay of execution of the decree emanating from the Judgment delivered on 25th November 2025 in Embu Chief Magistrate's Court ELC Case No. E064 of 2021 ("*the trial court*"), pending the hearing and determination of this Appeal.
2. The Application is supported by the Supporting Affidavit of Godwin Muriithi, the 1st Applicant, sworn on 12th January 2026. The Respondent filed a Replying Affidavit dated 3rd February 2026 in opposition. The Applicants did not file written submissions within the timelines agreed upon by consent. The Respondent filed written submissions dated

12th March 2026. The matter thereafter came up for ruling on notice.

3. The Applicants were the Defendants in ELC Case No. E064 of 2021 before the Embu Chief Magistrate's Court. Judgment was delivered on 25th November 2025, following which the Respondent obtained a decree and commenced execution proceedings. The Applicants were aggrieved by the said judgment and lodged this Appeal. They simultaneously moved this Court for stay of execution of the decree pending the hearing and final determination of the Appeal.
4. The Applicants contend that the trial court ordered them to refund the Respondent the sum of Kshs. 11,250,000/=, which they assert they never received from him. They aver that the total consideration agreed upon between the parties was Kshs. 3,550,000/=, of which only Kshs. 2,900,000/= was acknowledged as received. They further contend that the impugned judgment is the result of a misapprehension of the provisions of Section 7 of the Land Control Act, Cap. 302, Laws of Kenya, and that it violates the equitable principle against unjust enrichment by directing them to refund approximately four times the amount they received.
5. The Respondent opposes the Application in its entirety. He contends that the intended Appeal is frivolous, raises no arguable issues, and is unlikely to succeed. He further avers that the Applicants have failed to demonstrate substantial loss warranting stay, and that they have not

offered any security for the due performance of the decree as required by the applicable rules. The Respondent deposes that he is a man of substantial means and is capable of repaying the decretal amount should the Appeal eventually succeed.

LEGAL ANALYSIS AND DETERMINATION

6. The jurisdiction of this Court to grant stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules, 2010 (CPR), which prescribes three conjunctive conditions that an applicant must satisfy, namely: (i) that substantial loss may result to the applicant if stay is not granted; (ii) that the application has been made without unreasonable delay; and (iii) that such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given. The applicable principles have been authoritatively restated in *James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR*, where the Court held that an applicant must satisfy all three conditions for stay to be granted, and that the discretion of the court must be exercised judicially.
7. The Applicants depose that they will suffer substantial loss if stay is not granted because the trial court directed them to refund the sum of Kshs. 11,250,000/= which they never received. They assert that this is a colossal sum and that the equitable principle against unjust enrichment has been disregarded.

8. The Respondent counters that execution of a liquidated decree does not, by itself, constitute substantial loss, and that the decretal sum is capable of repayment should the Appeal succeed. He further deposes that he possesses properties worth millions of shillings and is capable of making restitution.
9. The test for 'substantial loss' was considered in *Arun C. Sarma v Ashana Raikundalia T/A Raikundalia & Co. Advocates* where the Court held that substantial loss is the cornerstone of an application for stay of execution, and that the applicant must demonstrate that execution will render the appeal nugatory. Whereas it is generally true that execution of a money decree does not per se constitute substantial loss — as money is ordinarily capable of recovery — the Court is required to examine the specific circumstances of each case.
10. In the present case, the Applicants' core grievance is that the trial court awarded a sum of Kshs. 11,250,000/= by way of refund in circumstances where the total agreed consideration was only Kshs. 3,550,000/= and only Kshs. 2,900,000/= was received. If this assertion is accurate — a matter properly for the Appeal — then execution of a decree for nearly four times the consideration received could, depending on the Applicants' financial circumstances, render the Appeal nugatory. However, the Applicants have not placed before this Court any evidence whatsoever of their financial position, their assets, their liabilities, or any circumstances that would indicate an

inability to recover the decretal sum from the Respondent in the event the Appeal succeeds. The mere magnitude of the decree, without more, is insufficient to establish substantial loss under the established jurisprudence. This limb is not fully satisfied.

11. The Judgment of the trial court was delivered on 25th November 2025. The Application herein was filed on 12th January 2026, approximately seven (7) weeks after delivery of Judgment. The Applicants have explained that they applied for proceedings on 4th December 2025, and that the proceedings had not yet been supplied by the trial court registry. The Respondent has not specifically challenged this explanation. The Court finds that the Application was filed with reasonable promptitude and that no unreasonable delay has been demonstrated. This condition is satisfied.

12. The next is security which is the most critical condition in the present Application. Order 42 Rule 6(1) of the CPR is unambiguous: an order for stay of execution shall not be made unless the applicant furnishes such security for the due performance of the decree as the court may direct. The requirement for security is not discretionary — the Court's discretion operates in determining the *nature and quantum* of security, not in whether to require it at all. This position was affirmed in *Caneland Limited & 2 Others v Delphis Bank Limited* and in *Stephen Wanjohi v Central Glass Industries Limited*.

13. In the present Application, the Applicants have not offered, proposed, or even alluded to any form of security for the due performance of the decree. No explanation has been tendered for this omission. The Applicants have merely stated, at paragraph 12 of the Supporting Affidavit, that they "*will abide with any conditions of stay of execution that will be stipulated by the Honourable Court.*" This is not an offer of security — it is a passive willingness to comply with court directions, which falls far short of the legal requirement.
14. In *Machira T/A Machira & Co. Advocates v East African Standard (No. 2) [2002] KLR 63*, the Court emphasised that an applicant for stay of execution must demonstrate a genuine commitment to securing the due performance of the decree. An applicant who comes to court seeking to halt the enforcement of a lawful judgment but proffers nothing by way of security cannot be said to have satisfied the mandatory preconditions for the relief sought.
15. Notably, it is the Respondent — in opposing the Application — who has proposed that the entire principal sum of Kshs. 11,250,000/= be deposited into an interest-bearing joint account in the names of the respective Advocates on record. This proposal from the Respondent, made in the alternative, underscores the conspicuous gap in the Applicants' own case. The burden of satisfying the conditions for stay rests squarely upon the Applicants, and they have not discharged it.

16. The other condition is the arguability of the Appeal which is not a standalone condition under Order 42 Rule 6 CPR and that courts have in the exercise of their overall discretion, considered whether an appeal presents bona fide issues worthy of adjudication. On the face of the pleadings, the Applicants raise a substantive point touching on the application of Section 7 of the Land Control Act, Cap. 302, and the quantum of the award vis-à-vis the amounts actually received. These are matters that are properly arguable on appeal. However, the existence of arguable grounds of appeal cannot, by itself, overcome the failure to satisfy the mandatory preconditions under Order 42 Rule 6, particularly the requirement for security.

DISPOSITION

17. Having considered the Application, the Supporting and Replying Affidavits, and the written submissions filed by the Respondent, this Court finds as follows:

- a) The condition of no unreasonable delay is satisfied.
- b) The condition of substantial loss has not been adequately demonstrated.
- c) The mandatory condition of security has not been met. The Applicants have not offered any security for the due performance of the decree, and have provided no explanation for this omission.

18. The failure to satisfy two of the three conjunctive conditions — and in particular the mandatory requirement

of security — is fatal to this Application. Courts have consistently held that all three conditions must be cumulatively satisfied for stay of execution to be granted: see *Kinyunjuri Muguta v Watoku*. To grant stay in the present circumstances would be to reward a party who seeks to restrain the enforcement of a lawful decree while offering the judgment creditor nothing in return.

19. The Application for stay of execution dated 12th January 2026 is accordingly **dismissed**.

20. Costs of this Application are awarded to the Respondent.

IT IS SO ORDERED.

READ, DELIVERED AND SIGNED AT EMBU THIS 14TH DAY OF MAY, 2026

HON. E.C CHERONO
ELC JUDGE, EMBU

In the presence of;

1. Mr. Kiplimo H/B for Mr. Mugambi Njeru for the Respondent
2. 1st Applicant-present
3. M/S Ruth C/A