Mwangi v Embakasi Ranching Company Ltd & another (Environment and Land Case 1486 of 2014) [2026] KEELC 492 (KLR) (5 February 2026) (Ruling)

Neutral citation: [2026] KEELC 492 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE 1486 OF 2014

OA ANGOTE, J

FEBRUARY 5, 2026

BETWEEN

SIMON GACHEHA MWANGI ..... PLAINTIFF

AND

EMBAKASI RANCHING COMPANY LTD ..... 1ST DEFENDANT

MRS. MWAURA NGUMBA ..... 2ND DEFENDANT

RULING

1. Before this court for determination is a Notice of Motion application dated 7th March 2025, brought pursuant to Sections 1A, 1B, and 3A of the *Civil Procedure Act*, Order 50 Rule 5, Order 9 Rule 9, Order 51 Rule 1 and Order 42 Rule 6 of the *Civil Procedure Rules*. Through the application, 2nd Defendant seeks the following orders:

    a. That this Honourable Court be pleased to issue stay of execution of the Judgement dated 23rd January 2025 in this matter pending the hearing and final determination of the appeal.

    b. That the costs of this application be provided for.

2. The application is premised on the grounds set out on its face and in the Supporting Affidavit sworn by the 2nd Defendant, Joyce Muthoni Mwaura. The deponent avers that judgment was delivered on 23rd January 2025, wherein the court issued a permanent injunction restraining the Defendants from trespassing upon, alienating, entering, disposing of, or otherwise dealing with the suit property.

3. The deponent averred that she has farmed and occupied the suit property for over thirty years, having settled thereon in good faith as the lawful owner. She contended that unless a stay of execution is granted, she and her family face imminent eviction, which would occasion grave and irreparable harm, depriving her of her livelihood.

4. It was further deponed that the judgment, which found the Plaintiff to be the lawful proprietor of the suit property and directed the issuance of a certificate of title in his favour, failed to properly consider critical legal principles governing ownership of land, particularly in the context of alleged double allocation.

5. The deponent urged that in view of the potential consequences to her family and the alleged misapprehension of the law relating to property ownership, it is in the interests of justice that execution of the judgment be stayed pending appeal.

6. She further averred that a stay is necessary to preserve the status quo and avert undue hardship while allowing a comprehensive interrogation of the legal issues on appeal. The deponent expressed apprehension that, absent a stay, she stands to lose her only source of livelihood at an advanced age, the suit property being the only home she has known.

7. The Plaintiff opposed this application through a Replying Affidavit sworn on 1st April 2025 by Simon Gatheca Mwangi. He deponed that the application is incompetent, as the firm of Anyenga Osiemo & Co. Advocates is not properly on record, having failed to seek leave or file a consent to come on record after judgment, contrary to Order 9 Rule 9 of the Civil Procedure Rules.

8. The Plaintiff further averred that judgment was delivered on 23rd January 2025 and a stay of execution for 45 days was granted, which has since lapsed. He contended that the present application has been overtaken by events as he is already in the process of obtaining certificates of title to parcels V4565 (Plot 1309/136/10254) and V4564 (Plot C1310/136/10253) pursuant to the judgement.

9. He denied the 2nd Defendant's claim of occupation, asserting that he has been in possession of the suit property since 2006, during which time he buried his late wife on the land and has continuously utilized it. He contended that issues of occupation and possession were conclusively determined during the trial and are now res judicata.

10. The Plaintiff further deponed that the 2nd Defendant is improperly raising issues that go to the merits of the judgment and which can only be ventilated on appeal. He asserted that the present application amounts to an attempt to appeal against the judgment before the same court.

11. He urged that the 2nd Defendant cannot seek perpetual stays of execution, having already been granted 45 days stay, and emphasized that he is entitled to enjoy the fruits of his judgment. It was deponed that the orders of this court remain valid and binding until set aside on appeal, and that execution has lawfully commenced, including steps towards issuance of titles.

12. The Plaintiff contended that the 2nd Defendant has failed to demonstrate substantial loss, noting that the burden of proof lies with her and that she has not adduced credible evidence of occupation or possession.

13. The 1st Defendant also opposed the application through a Replying Affidavit sworn on 20th October 2025 by Jack Kamau Wachira, a registered Surveyor in its employment. He described the application as frivolous, an abuse of court process, and intended to delay execution of a valid decree. He deposed that the 2nd Defendant has neither demonstrated substantial loss nor offered security for the due performance of the decree as required under Order 42 Rule 6 of the Civil Procedure Rules.

14. It was further deponed that judgment was rendered after a full hearing on the merits and that the intended appeal has not been shown to be arguable. The 1st Defendant maintained that it is the sole allocating authority and that evidence placed before the court conclusively demonstrated that the suit property was lawfully allocated to the Plaintiff.

15. He urged that it is in the interests of justice that successful litigants be allowed to enjoy the fruits of their judgments without undue delay. The parties filed submissions and cited authorities which I have considered.

Analysis and Determination

16. Upon consideration of the application, replying affidavits and rival submissions by Counsel, the issues for this court's determination are as follows:

    a. Whether the 2nd Defendant's Counsel is properly on record and

    b. Whether the 2nd Defendant has met the threshold for grant of stay of execution pending appeal.

17. By way of background, the Plaintiff instituted this suit by a Plaint dated 25th November 2014. He contended that the 2nd Defendant unlawfully trespassed onto the parcels of land known as V4564 and V4565, situate within Embakasi Ranching Limited. The Plaintiff consequently sought, inter alia, a permanent injunction restraining the Defendants from trespassing upon, alienating, or otherwise interfering with the said parcels, together with an order compelling the 1st Defendant to issue and/or process titles in their favour in respect of the suit properties.

18. Judgment in this matter was delivered on 23rd January 2025 in favour of the Plaintiff and the 2nd Defendant's counterclaim was dismissed. The 2nd Defendant, being dissatisfied with the judgment, filed a Notice of Appeal dated 10th March 2025 and thereafter moved this court to stay execution pending the hearing and determination of the intended appeal. The gravamen of the application is that the 2nd Defendant claims to be in possession of the suit property and fears eviction and loss of livelihood in the event execution proceeds.

19. The Plaintiff and the 1st Defendant oppose the application. Their principal objection is that the firm now appearing for the 2nd Defendant did not comply with Order 9 Rule 9 of the *Civil Procedure Rules.* They further dispute the 2nd Defendant's claim of possession and contend that the Applicant has not met the requirements under Order 42 Rule 6.

20. Order 9 Rule 9 of the *Civil Procedure Rules* requires that where there is a change of advocates after judgment, such change shall not take effect without an order of the court upon an application served on all parties, or upon a consent filed between the outgoing advocate and the proposed incoming advocate:

    > "When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
    >
    > (a) upon an application with notice to all the parties; or
    >
    > (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

21. In the present case, it is common ground that no formal application for leave was made under the said provision and no consent executed by both the outgoing and incoming advocates was filed in court.

22. Courts have taken different approaches where there has been non-compliance with Order 9 Rule 9. Some decisions have treated the provision as mandatory and struck out pleadings filed in contravention thereof. [see *Stephen Mwangi Kimote vs Murata Sacco Society Ltd* [2018] eKLR].

23. Others have held that, where the failure does not go to jurisdiction, does not affect the core of the dispute, and does not prejudice the opposing party, the court may invoke Article 159(2)(d) of the *Constitution* and the overriding objective to sustain the proceedings [see *Abdinoor Shurie vs Halima Bundid* [2020] KEELC 3354 (KLR) and *Regina Nang'unda Tundwe vs Margaret Nasimiyu Wasike* [2021] eKLR.]

24. The purpose of Order 9 Rule 9 is to protect advocates from being unfairly displaced after judgment, particularly where issues of fees and professional engagement may arise. This position was aptly articulated in *S.K. Tarwadi vs Veronica Muehlemann* [2019] eKLR, where the Court observed as follows:

> " ...In my view, the essence of Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a Judgment is delivered and then sack the advocate and either replace him...."

25. The court is in this respect guided by the Court of Appeal decision of *Tobias M. Wafubwa vs Ben Butali* [2017] eKLR in which it was held as follows:

> " We would go further to add that, provided that where the failure to comply with the rule 9 did not undermine the jurisdiction of the court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then, Article 159 of the *Constitution* and the overriding principles could be called upon to aid the court to dispense substantive justice through just, efficient and timely disposal of proceedings. A similar approach was invoked in the case of *Boniface Kiragu Waweru vs James K. Mulinge* [2015] eKLR where in addressing the issue of non-compliance with order 9 rule 9 this Court observed thus;
>
> > "All in all, we are not persuaded that non-compliance with Order III rule 9A of the Civil Procedure Rules was meant to make the following proceedings incompetent or a nullity, efficacious as the provision was meant to be. Indeed, all times, the set procedures ought to be followed or complied with. However, we find that non-compliance, in the present matter, did not go to the root of the proceedings. The non-compliance we may say, was procedural and not fundamental. It did not cause prejudice to the appellant at all..."

26. This court is satisfied that the failure to comply with Order 9 Rule 9 in the circumstances of this case neither undermines the jurisdiction of this court nor prejudices the Plaintiff or the 1st Defendant in a manner likely to occasion a miscarriage of justice. In the circumstances, Article 159(2)(d) of the *Constitution* and the overriding objective are applicable, and the application is deemed to be properly before the court for purposes of determination on the merits.

27. The principles governing stay of execution pending appeal are set out in Order 42 Rule 6(2), which provides that no order for stay shall issue unless the court is satisfied that the application has been made without unreasonable delay, that substantial loss may result to the applicant unless the order is made, and that such security as the court may order for the due performance of the decree has been given:

> " (1) No appeal or second appeal shall operate as a stay of execution or proceeding 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."

28. The question of how the court should exercise this discretion was extensively discussed by the Court of Appeal in *Butt vs Rent Restriction Tribunal* [1982] KLR 417 which stated thus:

1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

29. On the first limb of delay, judgment was delivered on 23rd January 2025 and the present application was filed on 7th March 2025, approximately one and a half months later. The 2nd Defendant attributes the lapse of time to the change of legal representation and the preparation of the application.

30. It is well settled that what constitutes unreasonable delay is dependent on the circumstances of each case. The court in *Utalii Transport Company Limited & 3 Others vs NIC Bank Limited & Anor* [2014] eKLR stated:

> "Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore,

inexcusable. On applying court's mind on the delay, caution is advised for courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality."

31. In the circumstances, and taking into account the explanation offered, this court is not persuaded that the delay is inordinate. This limb is therefore satisfied.

32. Substantial loss is the cornerstone of the jurisdiction under Order 42 Rule 6. It is not sufficient for an applicant to merely state that execution has commenced or is likely to be commenced. The applicant must demonstrate that unless stay is granted, the execution will create a state of affairs that will irreparably affect or negate the very essence of the appeal.

33. The court in *Century Oil Trading Company Ltd vs Kenya Shell Limited* as cited in *Muri Mwaniki & Wamiti Advocates vs Wings Engineering Services Limited* [2020] eKLR, defined substantial loss as follows:

> "The word 'substantial' cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words 'substantial loss' must mean something in addition to all different from that."

34. Courts have also held that substantive loss must be demonstrated. This position was articulated by the Court of Appeal in *Kenya Shell Limited vs Benjamin Karuga Kibiru & another* [1986] eKLR thus:

> "It is usually a good rule to see if Order 41 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 cornerstone of both jurisdictions for granting stay."

35. The Court in *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR similarly opined that the process of execution alone does not amount to substantial loss. It stated as follows:

> "No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail..."

36. The 2nd Defendant contends that she has occupied and utilized the suit property for several decades and that execution of the judgment will result in her eviction, and loss of her livelihood. She further contends that the issuance of certificates of title to the Plaintiff would irreversibly alter the status of the suit property, thereby rendering the intended appeal nugatory. The Plaintiff disputes this and maintains that he has been in occupation of the land since 2006 and that the question of possession was determined at trial.

37. This court notes that the 2nd Defendant's assertion that she has been in possession since 2006 materially contradicts aspects of her own pleadings in the counterclaim, including the admission that the Plaintiff

entered the land earlier and that he buried his wife on the suit property. Further, no fresh or cogent evidence has been placed before this court demonstrating her alleged occupation or a recent change in occupation.

38. That said, the decree sought to be stayed is not limited to a prohibitory injunction. The judgment also directed steps towards the issuance of certificates of title to the Plaintiff. Once titles issue pursuant to the judgment, the legal status of the suit property would be altered in a manner that may complicate restitution should the appeal succeed. In this case, that risk goes beyond the ordinary consequence of execution and is capable of constituting substantial loss in the context of a pending appeal.

39. Balancing the competing rights, this court is satisfied, in the circumstances of this case, that the 2nd Defendant has demonstrated the likelihood of substantial loss if execution proceeds before the appeal is heard.

40. On security, Order 42 Rule 6(2)(b) requires an applicant to furnish such security as the court may order for the due performance of the decree. The 2nd Defendant has expressed her willingness to provide reasonable security as may be directed by the court.

41. The purpose of providing security under Order 42 was discussed by the Court in *Arun C Sharma v Ashana Raikundalia t/a Rairundalia & Co Advocates & 2 Others* [2014] eKLR, where the court stated as follows:

> "The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor… Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."

42. While in *Focin Motorcycle C Ltd v Ann Wambui Wangui* [2018] eKLR it was stated that:

> "Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground of stay."

43. From the above persuasive decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same. Taking into account the age of the matter, the nature of the dispute, the steps towards title issuance contemplated by the judgment, and the need to balance both parties' interests, I find that an order for security is appropriate.

44. In the circumstances, I consider a deposit of Kshs. 500,000 as security to be reasonable.

45. In the result, the 2nd Defendant's Notice of Motion dated 7th March 2025 is allowed on the following terms:

    a. There shall be a stay of execution of the judgment delivered on 23rd January 2025 pending the hearing and determination of the intended appeal, on the following conditions:

i. The 2nd Defendant shall deposit Kshs. 500,000 as security for the due performance of the decree in a joint account in the names of the Plaintiff's and the 2nd Defendant's Advocates within 60 days from the date hereof.

ii. In default of compliance with the condition on security, the order of stay shall automatically lapse.

b. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 5TH DAY OF FEBRUARY, 2026.

O. A. ANGOTE

JUDGE

In the presence of:

Ms Njeri for the 1st Defendant

Ms Muigai for the Wambui for the Plaintiff

Court Assistant: Tracy