

KENYA / JUDGMENT

Mbuthu v Kiroe & another [2026] KEELC 5486 (KLR)

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COURT

Environment and Land Court

BEFORE

JA Mogeni

CASE / FILE NUMBER

Environment and Land Appeal E087 of 2025

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Mbuthu v Kiroe & another (Environment and Land Appeal E087 of 2025) [2026] KEELC 5486 (KLR)
(17 September 2026) (Ruling) Neutral citation:

[2026] KEELC 5486 (KLR) Republic of Kenya In the Environment and Land Court at Thika
Environment and Land Appeal E087 of 2025 JA Mogeni, J September 17, 2026 Between
Naomi Wanjiru Mbuthu Appellant and Peter Muiga Kiroe 1 st Respondent PEFA Church 2
nd Respondent (Being an Appeal against the Judgment by Hon. M. Sudi (PM) delivered on
15th July 2025 in Kiambu, MCCC Case Number 261 of 2020: Peter Muiga Kiroe v PEFA
Church and Another)

Ruling

1. This Ruling relates to the Notice of Motion dated 10/04/2026 brought under Order 40, Rule 1 (a) & (b), Rule 2, Order 51, Rule 1 of the Civil Procedure Rules 2010, Section 1A, 1B, 3A & 63 (e) of the Civil Procedure Act Cap 21 and all other enabling provisions of the Law seeking the following orders: 1. Spent. 2. That pending the hearing and determination of this Application, there be stay of execution of the orders of the Honourable Court issued in a Judgment dated 15/07/2025. 3. That pending the hearing and determination of this Appeal there be stay of execution of the orders of the Honourable Court issued in a Judgment dated 15/07/2025. 4. That cost of this Application be provided for. 2. The Application is based on the grounds on the face of it and the Supporting Affidavit of Naomi Wanjiru Mbuthu on 10/04/2026. She deposes that following the Judgment delivered by the Magistrate Court at Kiambu on 15/07/2025, she was dissatisfied with the decision and lodged an appeal, which she believes has overwhelming chances of success as it raises substantial triable issues of law and fact. On 23/07/2025, the 1 st Respondent served her with a draft decree and demanded settlement, prompting her to instruct her Advocates to file an application dated 29/07/2025 in Kiambu CMCC 261 OF 2020: Peter Muiga Kiroe V PEFA Church and Another seeking a stay of execution. 3. The trial Court subsequently granted a temporary stay of

execution for six months, which lapsed on 14/04/2026. The deponent fears that following this lapse, the 1 st Respondent will proceed to execute the decree, causing her irreparable harm and inconvenience. To demonstrate her commitment to the matter, she notes that she has already filed a complete Record of Appeal annexed to the Affidavit and marked as “NWM-1” with the appeal scheduled for directions on 7/05/2026. 4. Acting on advice from her Advocates on record, she states that unless the requested stay of execution is granted, the appeal will be rendered nugatory and an academic exercise. She affirms that the application was made without undue delay, that she is willing to abide by any Court orders necessary to preserve the status quo, and that granting the application is in the interest of justice. 5. The Application is opposed vide a Replying Affidavit sworn by Rose Murugi the 1 st Respondent on 29/06/2026. She deposes that the application is a gross abuse of the Court process that ought to be dismissed with costs. In support of her position, the deponent avers that vide a Ruling dated 14/10/2025, the trial Court granted the Applicant a conditional stay of execution subject to depositing Kshs. 200,000/= as security for costs within ninety days. 6. The deponent states that the Applicant wantonly failed to comply with the said condition, causing the conditional stay to automatically lapse. Despite several written demands sent by her Advocates on record to the Applicant's counsel to ascertain compliance, no response was ever elicited. Copies of the said lower Court Ruling and the Advocate correspondence are attached and marked as “RMK 1”. 7. The 1 st Respondent contends that the Applicant has mischievously mounted this fresh application for stay before this Honourable Court in a clear attempt to bypass the lower Court, knowing well that she is in deliberate breach of existing Court orders and would be unable to secure an extension of stay before the trial Court. Consequently, she prays that the Applicant's application be dismissed with costs. 8. No other Respondent filed any response. When the parties attended Court on 21/07/2026 the parties were directed to file written submissions. At the time of writing this Ruling none of the parties had filed any submissions. 9. The jurisdiction of this Court to grant a stay of execution pending appeal is anchored in Order 42, Rule 6(2) of the Civil Procedure Rules, 2010, which stipulates: “ 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.” 10. Having considered the Application and the responses filed the key issues falling for determination are: i. Whether the Applicant has satisfied the statutory conditions for the grant of a stay of execution pending appeal under Order 42, Rule 6(2) of the Civil Procedure Rules, 2010. ii. What is the legal effect of the Applicant failing to rebut or controvert the factual depositions in the 1st Respondent’s Replying Affidavit? iii. Whether the Applicant’s failure to comply with the conditional stay order issued by the lower Court, coupled with the non-disclosure of that default, disentitles her to equitable relief and constitutes an abuse of the Court process. 11. The Applicant asserts that she lodged a complete Record of Appeal (Annexure “NWM-1”), that her appeal raises triable issues with high prospects of success, and that she faces irreparable harm if execution proceeds. However, a stay of execution is not a matter of right;

it is a discretionary equitable remedy exercisable only upon strict compliance with the statutory prerequisites. 12. In *Machira t/a Machira & Co. Advocates v. Mapis Investments Ltd* [2002] eKLR, the High Court emphasized the cornerstone requirement of establishing substantial loss: "Substantial loss is the cornerstone of both jurisdictions. Equity will not assist a volunteer, and a party seeking stay must establish that if the stay is not granted and the appeal succeeds, the appeal will be rendered nugatory." 13. Similarly, in *Halai & Another v Thornton & Turpin (1963) Ltd* [1990] eKLR, the Court observed: "The Applicant must establish other factors than the regular conditions set out in Order 42 Rule 6. In addition, the Applicant must establish that substantial loss would result if stay is not granted. It is not enough to merely state that the appeal will be rendered nugatory." 14. The 1st Respondent filed a Replying Affidavit deponing that the lower Court had previously granted a conditional stay subject to depositing Kshs. 200,000/= security for costs within 90 days, which condition the Applicant wantonly breached. Crucially, the Applicant did not file a Rejoinder Affidavit or any further evidence to contradict these material facts. 15. Under our civil jurisprudence, facts deponed in an Affidavit that remain unchallenged or unrebutted are deemed admitted. In *Andrian Kithinji Mungania v. Japhet R. Nkonge Auctioneers & Another* [2013] eKLR, the Court stated: "Any statement of fact which is not controverted by the opponent is deemed to be admitted." 16. Likewise, in *Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited* [2010] eKLR, it was held: "Unrebutted Affidavit evidence must be taken as true." 17. Because the Applicant chose not to file a rejoinder Affidavit to controvert the 1st Respondent's depositions or explain her default, this Court takes the 1st Respondent's allegations specifically that the Applicant breached a subsisting conditional Court order as true and undisputed facts. 18. Equity mandates that a party seeking equitable relief must approach the Court with clean hands. In her Supporting Affidavit, the Applicant asserted that the lower Court's stay order lapsed merely due to the passage of six months. However, the 1st Respondent's unrebutted evidence which is shown in Annexure "RMK 1" reveals that the stay lapsed specifically because the Applicant refused or defaulted to deposit the Kshs. 200,000/= security for costs ordered on 14/10/2025. 19. Instead of seeking an extension of time or variation of terms before the trial Magistrate upon showing good cause, the Applicant suppressed these facts and mounted a fresh application before this Appellate Court. 20. In *Muroki Estates Limited v. Mengo Farm Limited* [2020] eKLR, the Court of Appeal condemned such conduct: "The Appellant did not go to Court with clean hands and had engaged in lies and falsehoods... that the application was found to be in blatant abuse of Court process... the Appellant had not disclosed those facts to Court but suppressed it." 21. Additionally, in Commonwealth administrative and legal jurisprudence, the doctrine against abuse of process prevents litigants from undermining previous Court orders by forum-shopping or seeking parallel remedies without purging their contempt or default. As Lord Diplock succinctly stated in the English House of Lords decision in *Hunter v. Chief Constable of the West Midlands Police* [1982] AC 529: "It concerns the inherent power which any Court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring

the administration of justice into disrepute." 22. By deliberately defaulting on the lower Court's condition to deposit security for costs, ignoring Advocate correspondence, and concealing the default from this Court to obtain a stay ex-parte or afresh, the Applicant has engaged in a deliberate abuse of the Court process. An Applicant who flouts Court orders cannot invoke the equitable discretion of this Court under Sections 1A, 1B, and 3A of the Civil Procedure Act . 23. Given the foregoing I move to make the following orders: i. The Notice of Motion dated 10/04/2026 is hereby dismissed. ii. The interim stay orders (if any) granted to the Applicant are hereby vacated. iii. Costs of this Application are awarded to the 1 st Respondent. iv. Matter shall be mentioned on 30/09/2026 for disposal of the Appeal. Meanwhile the Record of Appeal to be served upon all parties. (Mention date vacated). 24. Orders Accordingly. DATED, SIGNED AND DELIVERED IN THIKA THROUGH MICROSOFT TEAM ON THIS 17 TH DAY OF SEPTEMBER 2026. MOGENI J JUDGE In the presence of: Mr. Ombongi holding brief for Dr. Kamotho for Appellant/Applicant Mr. Gichuki for the 1 st Respondent No appearance for the 2 nd Respondent Mr. Melita - Court Assistant MOGENI J JUDGE

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Prepared on 27 October 2026 · Esheria