

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA686/2025  
[2026] NZCA 83

BETWEEN

TERENCE EASTHOPE  
Appellant

AND

MARION FUSIPALA ALE AS EXECUTOR  
OF THE ESTATE OF MALU ALE  
Respondent

Court: Courtney, van Bohemen and Andrew JJ

Counsel: Appellant in person  
G A Ireland for Respondent

Judgment: 17 February 2026 at 3.30 pm  
(On the papers)

Reasons: 24 March 2026

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JUDGMENT OF THE COURT

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- A** The application for stay of execution of the order in [2025] NZHC 3037 at [57] is declined.
- B** The appellant must pay the respondent costs for a standard application on a band A basis together with usual disbursements.
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REASONS OF THE COURT

(Given by Andrew J)

**Introduction**

[1] Marion Fusipala Ale is the executor of the estate of her father, Malu Ale. The principal asset of the estate is the property at 18 Brixton Road, Mt Eden, Auckland

(the property). Marion’s brother, Terence Easthope, has lived at the property for many years. In October 2025, Associate Judge Gellert made an order for possession requiring Terence to vacate and deliver up the property to Marion and to remove all items of personal property from the property.<sup>1</sup>

[2] Terence has appealed the judgment. He applied to the High Court for a stay of enforcement pending determination of the appeal, which Venning J declined on 9 February 2026.<sup>2</sup> He then applied to this Court for a stay.<sup>3</sup> That application was declined on 17 February 2026, with reasons to be given later.<sup>4</sup> This judgment contains the reasons.

[3] The principles relevant to an application for stay are well settled and were summarised in *Wootton v Wootton*, where this Court said:<sup>5</sup>

[9] In determining whether or not to grant a stay under r 12(3), the Court must weigh the factors “in the balance” between the successful litigant’s rights to the fruits of a judgment and “the need to preserve the position in case the appeal is successful”. Factors to be taken into account in this balancing exercise include:

- (a) whether the appeal may be rendered nugatory by the lack of a stay;
- (b) the bona fides of the applicant as to the prosecution of the appeal;
- (c) whether the successful party will be injuriously affected by the stay;
- (d) the effect on third parties;
- (e) the novelty and importance of questions involved;
- (f) the public interest in the proceeding; and
- (g) the overall balance of convenience.

While that list does not include the apparent strength of the appeal, that is treated as an additional factor.

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<sup>1</sup> *Ale v Easthope* [2025] NZHC 3037 [High Court decision] at [57].

<sup>2</sup> *Ale v Easthope* [2026] NZHC 148 [High Court stay decision].

<sup>3</sup> Pursuant to Court of Appeal (Civil) Rules 2005, r 12(3).

<sup>4</sup> *Easthope v Ale* [2026] NZCA 26.

<sup>5</sup> *Wootton v Wootton* [2020] NZCA 478 (footnotes omitted). See also *Golden Touch Investment and Trade Co Ltd v Zhu* [2025] NZCA 454 at [6]; and *Wu v Stalix Property Ltd* [2022] NZCA 467 at [8].

## Background

[4] We adopt the factual background as set out in the judgment of Venning J:<sup>6</sup>

[3] Marion is the executor of the estate of her father, Malu Ale, who died in November 2000. At the time, Malu was married to but separated from Vailima Easthope. Malu and Vailima had four children: Marion, Terence, Joyce Easthope (Joyce), and Leonard. While Malu and Vailima were separated the separation was amicable and they had never arranged for a formal division of their relationship property or a dissolution of the marriage.

[4] By his will (of which Probate was granted in January 2001) Malu left his estate to be shared equally between Vailima and Joyce. The principal asset in Malu's estate was the property at Brixton Road.

[5] Vailima made a successful claim under the Family Protection Act 1955 (FPA) and on 11 June 2003 the Family Court granted her a life interest in Malu's estate's half-interest in the Brixton Road property. As a result Vailima was able to remain in the property until her death in August 2021.

[6] By her will made 10 February 2004, after leaving two minor bequests to two other individuals, Vailima left her estate to be divided equally between Marion, Leonard and Terence (Joyce having been provided for by Malu's half-share in the property).

[7] As the principal asset in both Malu and Vailima's estates is their respective interests in the Brixton Road property, the result is that the children share in that property as to Joyce (one-half) and as to Marion, Leonard and Terence (one-sixth each).

[8] Following Vailima's death, Marion as executor of Malu's estate and Leonard as executor of Vailima's estate, entered a Deed of Family Arrangement to sell the Brixton Road property to enable the net proceeds of sale (and after payment of debts) to be distributed with one-half paid to Vailima's estate to be distributed in accordance with her will and one-half to be paid to Joyce as the sole beneficiary of Malu's estate.

[9] In April 2024, Marion arranged for Terence to be served with a notice to vacate the property so it could be sold with vacant possession as Terence had refused to vacate the property. Terence has lived in the Brixton Road property with Vailima from about 2001 or 2002 until her death in 2021 and continues to occupy the property. Terence responded with an application under the FPA in respect of Vailima's estate. He also claims that there was an agreement that she would transfer the property to him at nominal value. As Terence maintained his refusal to leave the property Marion pursued the application for summary judgment for vacant possession. In that she was supported by Leonard as executor of Malu's estate.

[10] Terence opposed the application for summary judgment and made a number of interlocutory applications himself.

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<sup>6</sup> High Court stay decision, above n 2.

[11] In her comprehensive judgment of 14 October 2025, Judge Gellert considered the defences raised by Terence but rejected them and made the order for possession.

### **Application for stay**

[5] Terence represents himself. He made similar submissions and arguments in this Court as were advanced before Venning J. In particular, he says that if the application for stay is not granted his appeal right will be rendered nugatory. He also says that Venning J's conclusion that there is no "realistic prospect" that he could remain in the Property, even if his appeal is successful, risks pre-empting the appeal's practical utility and remedies.<sup>7</sup> It does not preserve the status quo pending appellate determination.

[6] Terence says that, if evicted, he will suffer immediate and irreparable prejudice. He submits that any prejudice the Court identifies to the respondent as a result of the Court granting a stay can be overcome by the Court imposing protective conditions, including requiring the maintenance of insurance, reasonable access on notice and undertakings not to encumber or dispose.

[7] This is not an appeal from the decision of Venning J. However, for the reasons we set out next, we agree with Venning J's conclusions.

[8] The strongest argument for Terence is that unless a stay is granted, his appeal right will be rendered nugatory. If the order for vacant possession is enforced, then the property will be sold. However, Terence has no claim to full ownership of the property and there is no suggestion he is either willing or able to buy out the interests of the other beneficiaries. Realistically, there is no outcome in which the property would not be sold.

[9] As Venning J observed, Terence's principal claim is not against the property itself but against his mother's estate.<sup>8</sup> The estate's interest in the property is limited to a one-half share in the value of the property. Terence's potential claim has been recognised by the trustees of both estates who have proposed that on sale of the

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<sup>7</sup> At [18].

<sup>8</sup> At [19].

property, 50 per cent of the net proceeds will be maintained on trust pending resolution of Terence's claim. Terence's interest in the property can be addressed in that way.

[10] Terence has suggested that he may pursue a claim against his father's estate under the FPA. However, as Venning J observed, such a claim would face a number of difficulties: it would be substantially out of time and Terence had said previously that he had no intention of making a claim against his father's estate.<sup>9</sup> That indication is recorded in the judgment of Judge Gellert.<sup>10</sup>

[11] The effect on third parties is a significant factor because Terence's actions are affecting all beneficiaries in the estates. The estates are incurring costs, with a reduction in the net benefit to the other beneficiaries. Terence's now unlawful occupation of the property continues to affect Marion and the other residual beneficiaries in Malu's and Vailima's estates.

[12] There is no novelty or public interest in the appeal.

[13] We are satisfied that the overall balance of convenience is against Terence. Given the number of beneficiaries in the estates and the terms of the current wills, there is no realistic prospect of Terence achieving a better outcome than the executors' current undertaking to hold one-half of the net proceeds of the sale of the property on trust pending resolution of his claim against the estate.

[14] As to the apparent strength of the appeal, we agree with Venning J that the comprehensive judgment of Judge Gellert responded to all the points that Terence could raise on appeal.<sup>11</sup> The prospects of success on appeal are low. In particular, there is no realistic outcome whereby Terence is likely to increase his share of the property to more than 50 per cent. As noted, that is the amount that the executors of both estates have agreed and undertaken to hold on trust pending resolution of Terence's claim.

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<sup>9</sup> At [20].

<sup>10</sup> High Court decision, above n 1, at [41]–[44].

<sup>11</sup> High Court stay decision, above n 2, at [28].

## **Result**

[15] The application for stay of execution of the order in [2025] NZHC 3037 at [57] is declined.

[16] The appellant must pay the respondent costs for a standard application on a band A basis together with usual disbursements.

Solicitors:

McVeagh Fleming, Auckland for Respondent