

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ELC APPEAL NO. E027 OF 2025

HUSSEIN KOCHORE LERIPENAPPELLANT/APPLICANT

VERSUS

ABDULRAHMAN KOCHORE1ST RESPONDENT

JUMA ABDULRAHMAN KOCHORE2ND RESPONDENT

RULING

1. What is before me is the Notice of Motion Application dated **30th September 2025**; brought pursuant to the provisions of **Sections 1A, 1B, 3A & 63 (e) of the Civil procedure Act; Order 42 Rule 6; Order 40 Rules 1 & 2 of the Civil Procedure Rules; and Article 40 of the Constitution 2010**; and where the Applicant has sought the following reliefs;

- (i)Spent
- (ii) *That Pending the hearing and determination of this appeal, there be a stay of execution of the judgment and decree delivered on 9th September 2025 by Hon. Ms. Christine Wekesa, senior principal magistrate in Marsabit E & L suit No. E003 of 2021.*
- (iii) *That pending the inter partes hearing and determination of this application, a temporary injunction do issue restraining the respondents, their servants, agents, or assigns from collecting, demanding or receiving rental proceeds form the property known as plot No. 90-Marsabit Town or otherwise dealing with the suit property.*

- (iv) *That pending the hearing and determination of this appeal, a temporary injunction do issue restraining the respondents, their servants, agents, or assigns from collecting, demanding, or otherwise receiving rental proceeds from plot No. 90 Marsabit Town, disposing of, leasing, subdividing, letting or otherwise interfering with the said property.*
- (v) *That pending the hearing and determination of this appeal, an order do issue reverting the control, possession and management of the suit property to the appellant considering that the trial court had already acknowledged his possession of the plot for over 30 years and in light of the fact that 1st respondent is a convicted criminal unfit to be left in possession and control of the suit property.*
- (vi) *That pending the hearing and determination of this appeal, all rental proceeds from plot NO. 90, whether already collected by the respondents or accruing during the pendency of this appeal, be deposited in a joint interest-earning account in the names of the parties' advocates on record or in such other manner as this honourable court may direct.*
- (vii) *That this honourable court be pleased to grant such further or other orders as it may deem just and expedient in the circumstances.*
- (viii) *That costs of this application be provided for.*
- (ix) *That the office commanding station [OCS]Marsabit police station be commanded to enforce and supervise the enforcement of the above orders.*

2. The subject application is premised on the numerous grounds which have been highlighted in the body thereof. Furthermore, the application is supported by the affidavit of Hussein Kochore sworn on 30th September 2025; and a supplementary affidavit sworn on 18th October 2025; and to which the deponent has annexed various documents/annexures.
3. The respondents filed a replying affidavit sworn by the 1st respondent on 15th October 2025. In addition, the respondents also filed grounds of opposition of even date and wherein the respondents have raised *inter alia* the ground that the appellant herein lacks the requisite locus standi to mount and to sustain the subject appeal and by extension the application.
4. The instant application came up for hearing on **23rd October 2025**; whereupon the advocates for the parties covenanted to canvass and dispose of the application by way of written submissions. To this end, the court proceeded to and gave directions pertaining to the hearing and disposal of the application. Additionally, the court also circumscribed the timelines for the filing and exchange of written submissions.
5. The appellant/applicant filed written submissions dated **28th October 2025**; and wherein same has highlighted five [5] issues for consideration and determination by the court. The issues raised by/on behalf of the applicant are *namely*; whether the court should stay the declaratory judgment of the trial court pending the hearing and determination of the appeal; whether it is just and legal for the court to refuse to exercise its jurisdiction by refusing to grant preservative orders on the basis of Section 45 of the Law of succession act, Chapter 160, Laws of Kenya; whether the applicant has satisfied the legal threshold for grant of a

temporary injunction pending appeal; whether it is in the interest of justice to allow the respondents who obtained possession fraudulently and was convicted for it and who do not have letters of administration to remain in control and deal with the suit property in light of the pending appeal; and whether the court should allow the application and grant the orders sought.

6. The respondents filed written submissions dated 27th October 2025; and wherein same has highlighted and canvassed four [4] key issues, *namely*; whether the appellant/applicant has the capacity to file the appeal and by extension the primary suit; whether this court can issue a stay; whether the court can issue orders of injunction among others; and whether the appeal has any chances of succeeding.

7. I have reviewed the notice of motion application dated 30th September 2025; the twin affidavits in support thereof; the grounds of opposition and the replying affidavit filed on behalf of the respondents; and upon consideration of the written submissions filed, I come to the conclusion that the determination of the subject application turns on three [3] key issues. The issues are *namely*; whether the Judgment and decree of the subordinate court is capable of being stayed either in the manner sought or otherwise; whether the Applicant herein has established a basis to warrant the grant of an order of temporary injunction or otherwise; and whether the Applicant is entitled to an order of mandatory injunction in the manner sought or otherwise.

8. Regarding the first issue, it is important to recall and reiterate that the appellant/applicant approached the subordinate court seeking various reliefs, *inter alia*; declaration that the Plaintiff [appellant] is the sole, lawful owner of plot number 90 situated in Marsabit town within the republic of Kenya; and that the suit property does not form part of the estate of the late Bahati Kochore [deceased].
9. Additionally, the appellant herein also sought for an order of mandatory injunction requiring the defendants [now the respondents] whether by themselves or their agents or otherwise howsoever, to demolish and remove any and all temporary or permanent structures and debris they have so far put up or caused to be in the suit property at their own costs, jointly and or severally.
10. The suit in the subordinate court was heard and disposed of *vide* judgment rendered on 9th September 2025; whereupon the learned trial magistrate [Hon. Christine Wekesa – SPM] found and held that the appellant/applicant had not proved his case. To this end, the learned trial magistrate dismissed the appellant's claim. On the contrary, the learned trial magistrate declared that the suit property forms part of the estate of Bahati Kochore [deceased].
11. My reading of the judgment of the learned trial magistrate drives me to the conclusion that the applicant's suit in the subordinate court was dismissed. To this end, the resultant decree was a negative decree and not otherwise. The question that does arise is whether a dismissal order, which births a negative decree, is capable of being stayed either in the manner sought or otherwise.

12. I beg to state and underscore that a negative decree or order is incapable of being stayed or at all. In this regard, I am afraid that the limb of the application seeking for an order of stay of the judgment and the resultant decree is not only misconceived, but based on misapprehension of the obtaining legal principles. For good measure, the judgment and the decree arising therefrom did not command the applicant to do or to abstain from doing any action; and hence no order of Stay can issue; or be granted.

13. The legal position that a negative decree or order cannot attract or accrue an order of stay of execution has been proclaimed in a plethora of decisions. In the case of **Charles Barongo Nyakeri vs The County Government of Kisii (2021) eKLR**, the Court of Appeal highlighted the position and stated thus;

*11. This Court has also consistently held that a negative order cannot be executed, and that where the trial court in its judgment has dismissed a suit, that is a negative order that is not amenable to grant of any stay. See **WESTERN COLLEGE OF ARTS & APPLIED SCIENCES v ORANGA & OTHERS [1976] KLR 63**.*

12. The applicant's claim was dismissed by the ELRC. What followed was a negative decree that cannot be executed. The order of stay of execution of the trial court's judgment pending hearing and determination of the intended appeal sought by the applicant cannot, therefore be granted.

14. Furthermore, in the case of **Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Millimo, Muthomi & Co. Advocates & 2 others (Civil Appeal (Application) E383 of 2021) [2022] KECA 491 (KLR) (18 February 2022) (Ruling)**, the Court of Appeal re-visited the foregoing legal principle.

15. For coherence the court stated as hereunder;

We reiterate the sentiments of the predecessor of this Court in its decision in Western College of Arts and Applied Sciences vs Oranga & Others (1976-80) 1 KLR, where the Court stated in respect of stay of execution as follows: "But what is there to be executed under the judgment, the subject of the intended appeal" The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In Wilson v Church, the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in and application for stay, it is so ordered." Further, in the more recent case of *Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others [2016] eKLR*, the Court of Appeal expounded on stay of execution stating: "

16. In Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows: "The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th

December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others__ [1976] KLR 63 at page 66 paragraph C).”

16.To the extent that the appellant’s suit in the subordinate court was dismissed, there is no order that is capable of being stayed. In this regard, I am afraid that the prayer for stay of execution of the judgment and decree of the subordinate court has been made/mounted in *vacuum*. Certainly, prayer 2 of the application under reference is misconceived and thus legally untenable.

17.Before concluding on this issue, there is yet one more aspect that merits mention and a short discussion. The aspect relates to and concerns whether an order of stay of execution can issue in respect of the limb of the judgment that declared the suit property to be part of the estate of Bahati Kochore [deceased]. It is instructive to state that where a property forms part of the estate of a deceased person, such a property can only be dealt with and or disposed of in accordance with the provisions of the Law of Succession Act, Chapter 160, Laws of Kenya. In particular, the provisions of sections 71 and 82 of the Law of Succession Act, are apt and succinct.

18. To my mind, the declaration that the suit property forms part of the estate of the deceased denotes that the parties; the heirs; and beneficiaries of the estate of the deceased shall be enjoined to invoke and deploy the jurisdiction of the probate and administration court. The respondents herein cannot deal and or dispose of the suit property other than in accordance with the law. In this regard, I discern no danger that can be suffered by the appellant/applicant herein to warrant an order of stay.

19. Finally, and on this issue, I apprehend that the substratum of the application seeking stay of the declaratory order is merely to defeat or obstruct the succession proceedings. However, I beg to underscore that if the applicant herein is convicted that the suit property does not form part of the estate of the deceased, then such a position can very well be addressed before the Succession court, which will equally be seized of the Jurisdiction to determine whether the Suit property was the Free Property of the Deceased or otherwise.

20. Simply put, the applicant herein has also not demonstrated a basis to warrant the grant of an order for stay of execution of [sic] the declaratory limb of the Judgment.

21. Instructively, an order of stay of execution pending appeal can only issue upon proof of the requisite conditions envisaged under Order 42 Rule 6 of the Civil Procedure Rules. The conditions to be proven include a demonstration that substantial Loss is likely to arise, if the Orders of Stay of Execution are not granted. [See also the holding in **Kenya Shell Ltd vs Benjamin Karuga Kibiru & another (1986) eKLR**.

22. Turning to the second issue, *namely*; whether the applicant has established a basis to warrant the grant of an order of temporary injunction pending the hearing and determination of the subject appeal or otherwise. To start with, it is common ground that whosoever wishes to partake of an order of temporary injunction pending the hearing and determination of an appeal, the Applicant not *excepted*, is enjoined to prove/establish the existence of *inter-alia* a prima facie case.

23. In this regard, there is no gainsaying that the applicant was obligated to place before the court evidence to warrant a finding that same has established a prima facie case. For good measure, what constitutes a prima facie case was highlighted by the Court of Appeal in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others (Civil Appeal 39 of 2002) [2003] KECA 175 (KLR) (7 March 2003) (Judgment)**, where the Court stated as hereunder;

A prima facie case in a civil application included but was not confined to a genuine and arguable case. It was a case which, on the material presented to the court, a tribunal properly directing itself would conclude that there existed a right which had apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

24. Back to the issue as to whether the applicant has established a prima facie case? It is the applicant herein who sought a declaration that the suit property lawfully belongs to him [applicant]. To this end, the applicant was seeking to be declared as the owner of the suit property. However, the subordinate court interrogated the evidence as presented by the applicant; and came to the conclusion that the suit property does not

belong to the applicant. On the contrary, the subordinate court found and held that the suit property forms part of the estate of the deceased.

25. It is the said decision of the subordinate court that has provoked the subject appeal. Nevertheless, there is no gainsaying that up to and including the filing of the subject application, the applicant herein has not accrued any positive order declaring same as the proprietor of the suit property.

The claim by the applicant must await the hearing and determination of the appeal.

26. In the premises, the question that does come to the fore is whether the applicant has demonstrated, albeit on a prima facie basis, any rights or interests in respect of the suit property to warrant the grant of an order of temporary injunction. Instructively, an order of temporary injunction can only issue to vindicate or protect prima facie legal or equitable rights, which are discernible in the eyes of the law and not otherwise.

27. In so far as the applicant has not accrued any such interests and or rights, and taking into account the obtaining position that the suit property forms part of the estate of the deceased, I am afraid that the applicant has not laid a basis to warrant the grant of an order of temporary injunction either in the manner sought or at all.

28. Furthermore, it is not lost on me that the applicant herein conceded and acknowledged that it is the respondents who have been in possession of the suit property since the year 2019. Even though the applicant contends

that the entry into and the taking of possession of the suit property by the respondents was illegal, the common position is to the effect that the respondents are the ones in possession. In this regard, the question that does arise is what shall be the import and tenor of the order of temporary injunction, sought.

29. I beg to highlight that an order of temporary injunction is intended to avert any threatened action. On the contrary, an order of temporary injunction cannot issue or be granted where the act complained of has occurred or accrued. [See the holding in the case of **Kenya Power and Lighting Company Limited versus Sherriff Molana Habib [2018] eKlr]**

30. Regarding this matter, I apprehend that the order of temporary injunction is being sought with the ultimate effect of achieving [sic] an eviction against the respondents *albeit* through the back door.

31. I am afraid that the circumstances beforehand do not warrant the issuance of such an order of temporary injunction. Notably, the situation beforehand replicates the situation that prevailed in the case of **The Headmaster, Kiembeni Primary school vs Baptist Church (2004) eKLR**, where the court [Hon. Justice D.K Maraga, Judge – as he then was] stated as hereunder;

I have also seen in other cases in which parties make applications for interlocutory injunctive order similar to the one made in this matter which if granted as prayed would have the effect of granting permanent or mandatory injunctions and sometimes even eviction orders. Such practice is to be highly discouraged. Courts on their part should be wary of such applications, bearing in mind the fact

that Order 39 does not provide for grant of permanent injunctions at interlocutory stage. See also Shah _v ? Shah (1981) KLR 374.

32. Finally, I beg to turn to the issue as to whether a mandatory injunction can issue in favour of the applicant herein either in the manner sought or otherwise.

33. For good measure, the Applicant herein has sought an order coached in the following terms;

“Pending the hearing and determination of this appeal an order do issue reverting the control, possession and management of the suit property to the appellant considering that the trial court had already acknowledged his possession of the plot for over 30 years and in light of the fact that the 1st respondent is a convicted criminal unfit to be left in possession and control of the suit property”

34. My understanding of the relief/prayer under reference is to the effect that the applicant is seeking an order of mandatory injunction. Notably, the applicant is seeking that the respondents, who are admittedly in possession of the suit property, be removed therefrom. On the contrary, the applicant is seeking to be restored or reinstated into the suit property during the pendency of the appeal.

35. It is instructive to underscore that an order of mandatory injunction does issue, albeit sparingly and with necessary circumspection. Moreover, such an order can only issue where the claimant demonstrates the existence of peculiar or exceptional circumstances warranting its issuance. Additionally, it is common ground that the threshold for

issuance of an order of mandatory injunction is slightly higher than the threshold for issuance of an order of temporary injunction.

36. In the case of *Nation Media Group & 2 others v John Harun Mwau [2014] KECA 308 (KLR)*, the Court of Appeal discussed the parameters to be satisfied/met before an order of mandatory injunction can issue.

37. For coherence, the court stated as hereunder;

It is trite law that for an interlocutory mandatory injunction to issue an applicant must demonstrate existence of and special circumstances. See KENYA BREWERIES LIMITED vs. WASHINGTON OKEYO, Civil Application No. 332 of 2000.

Likewise, in volume 24 Halsbury's Laws of England, 4th Edition paragraph 948, the learned authors state as follows:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff... a mandatory injunction will be granted on an interlocutory application.”

38. Has the applicant satisfied the higher threshold to warrant the grant of an order of mandatory injunction? I am afraid that the applicant herein has failed to do so. Firstly, there is no gainsaying that the applicant had sought to be declared as the lawful owner of the suit property. However,

the applicant did not accrue such a declaration. It then means that the applicant is still fighting in the corridors of the court to partake of such a declaratory order. Until the order does issue [if at all], the applicant has no legal rights or interests over the property to underpin the issuance of a mandatory injunction.

39. Secondly, it is not lost on me that the applicant herein acknowledges and confirms that the respondents have been in possession of the suit property since 2019. It then means that the grant of an order of mandatory injunction would itself work in justice and thus same must be declined.

40. Thirdly, and most importantly, the suit property has been declared to form part of the estate of the deceased. It then means that the administration of the suit property must be undertaken in accordance with the provisions of the Law of Succession Act, Chapter 160, Laws of Kenya.

41. Furthermore, it means that if this court were to grant an order directing the applicant to take possession of the suit property, this court will obviously be contravening the provisions of section 45 of the law of Succession Act cap 160 Laws of Kenya.

42. The provisions of section 45 of the Law of Succession Act [Supra] stipulate thus;

No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall

—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

43. Flowing from the foregoing, I hold the humble view that a court of law cannot be called upon to grant an order whose import and tenor is to contravene an express provision of the statute. Such an invitation, like the one beforehand, must not only be frowned upon but be deprecated.

44. In the circumstances, I find and hold that this court is not seized of the jurisdiction to decree a mandatory injunction whose net effect is to sanction the dealing with a property that is said to form part of the estate of the deceased. For good measure, until the appeal is heard and determined; and a contrary decision is arrived at, I must defer to the provisions of the Law of Succession Act, Chapter 160, Laws of Kenya.

FINAL DISPOSITION.

45. Having reviewed the application beforehand and upon consideration of the applicable law; I come to the conclusion that the Applicant herein has neither met nor satisfied the legal threshold to warrant the grant of the orders sought.

46. Suffice it to state that the application beforehand is devoid and bereft of merits and thus courts dismissal.

47. In the upshot, and for the reasons alluded to; the final orders that commend themselves to the Court are as hereunder;

(i) The Application dated 30th September 2025, be and is hereby dismissed.

(ii) Costs of the Application be and are hereby awarded to the respondents.

48. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ISIOLO THIS 6TH DAY OF
NOVEMBER 2025**

OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].

JUDGE

In the presence of:

Hussein - Court Assistance

Mr. Mamo for the Appellant/applicant

Mr. Leonard Ondari for the Respondents

