

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ELC MISC NO. E017 OF 2024**

**PETROL OIL KENYA LIMITED .....**  
**APPLICANT**

**VERSUS**

**MWADZAYA WACHANDA CLAN WELFARE REGISTERED**  
**TRUSTEES AND OTHERS .....**  
**RESPONDENTS**

**RULING**

**THE APPLICATION**

1. A ruling was delivered by this court on 14/11/2024 allowing the applicant's application dated 22/3/2024. The present application is dated 20<sup>th</sup> December 2024 has been filed by the respondents above Mwadzaya Wachanda Clan Welfare Registered Trustees and Others. They seek the following orders:

1. .... **Spent.**
2. **That pending the hearing and determination of this application *inter partes*, this honourable court be pleased to grant an order of stay of the ruling delivered on 14<sup>th</sup> November 2024 and any other consequential orders arising therefrom.**
3. **That this honourable court be pleased to grant an order of stay of the ruling delivered on 14<sup>th</sup> November 2024 and any other consequential orders therein pending hearing and determination of the intended appeal at the court of appeal.**
4. **That the costs of this application be in the cause.**

5. That application is premised on the grounds set out at its foot and is supported by the affidavit of **Mohamed Menza Yama**, the 2<sup>nd</sup> respondent. The grounds are that the applicants are aggrieved by the ruling mentioned herein above and intend to appeal against it on various grounds. The deponent avers that the applicants have been threatened

with eviction by the respondent, and that if no order is granted their appeal would be rendered nugatory.

## **THE RESPONSE**

6. The respondent filed a replying affidavit of one **Benjamin Kingori**, its Chief Executive Officer. The deponent states that the ownership dispute regarding the suit lands is long since concluded through multiple litigation and that the properties have been adjudicated to belong to the respondent and that the applicants have no right to be on the premises. The application is thus asking the court to sanction an illegality. They state that this is a case where it is not efficacious to grant a stay of execution as that would amount to giving with one hand and taking away with the other hand. It is stated that the applicants are habituated to filing numerous applications and appeals, which have all been dismissed, and their sole aim is to continue with their illegal stay on the suit land.

## **ANALYSIS AND DETERMINATION.**

7. I have considered the application dated 20<sup>th</sup> December 2024 and the response thereto and the submission of the parties.
8. One of the grounds upon which the respondent opposes the said motion though not raised in the replying affidavit is whether the ruling that has been delivered can be stayed. In raising this point, the respondent points out that the application as drafted seeks an order of *“stay of the ruling delivered on 14<sup>th</sup> of November 2024 and the consequential orders”*.
9. When such a ground of attack on the application has been raised by the other side to the effect that the application does not seek a stay of execution of the ruling but only a stay of the ruling -the latter which cannot happen since the ruling has been delivered- it is a weighty thing and I must deal with this issue on a preliminary basis; this court ought to be careful in its determination lest it grant what has not been sought.

10. It is one thing fail to cite the proper provisions of the law under which a party brings an application and it is another thing to ask for orders that are not provided for in the law that a party cited. In the first case the law comes to the aid of the defaulting applicant by providing as follows in

**Order 51 Rule 10 (1):**

“10. Provision under which application is made to be stated [Order 51, rule 10]

(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”

11. Therefore, where the wrong provisions of law have been cited, or no provisions have been cited at all, the court may in its discretion proceed and determine an application on its merits on the prayers that have been expressed therein.

12. It is the view of this court that prayers made pursuant to a certain rule must abide strictly in accordance with the terminology used in that position of the law if the court is to be seen as not engaging in guesswork as to what the prayers seek, otherwise multiple disputes such as the present, will arise and clog the justice system. Where the prayers have been crafted differently from what has been advised by the rules, the court lacks any jurisdiction to amend the prayers on behalf of an applicant as that would mean that the court would have waded into the arena of conflict. In that case, the applicant’s application would hang by the lanky thread of whether or not the court can decipher what is being sought by the application in view of the language employed therein *vis a vis* the language of the statute or subsidiary legislation provisions.

13. In the present case though **Order 42 rule 6** of the Civil Procedure Rules has been cited for the application dated 20<sup>th</sup> December 2024, the

prayers therein seek “*stay of the ruling delivered on 14<sup>th</sup> November 2024*” and not a “*stay of execution of the ruling delivered on 14<sup>th</sup> November 2024*” and all the consequential orders.

14. “*Stay of execution*” is thus the focus of **Order 42 rule 6 (1)** and **Order 42 rule 6(2)**.
15. Used in any other context, a loose term that does not abide by the language of statute would be innocuous but not in prayers of serious consequences such as those under **Order 42 rules 6(1)** and **(2)** relating to execution. I am not convinced that it is just and proper for this court to sit and amend the motion *suo moto* but it will seek in the context of the language in the entire application to establish whether it is a stay that is indeed being sought. In doing this, this court is not condoning any perilous sloppiness or ambiguity of draftsmanship on that part of counsel in respect of an application brought in respect of such a matter of potentially dangerous consequence.
16. On its own and without reference to the provisions of the Civil Procedure Rules, the prayer makes no sense at all. However, Black's Law Dictionary 10<sup>th</sup> Edition defines “*stay*” in the following manner: “*the postponement or halting of a proceeding judgment or the right*”, or “*an order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding- also termed stay of execution, suspension of judgment.*”
17. On the basis of the foregoing, this court is constrained to believe that there is an application for stay of execution before it.
18. This court now needs examine whether the application has attained the threshold required of a stay of execution application.
19. The principles for granting an order of stay of execution under **Order 42 Rules (1)** and **(2)** are now well established. **Order 42 Rule 6** of the Civil Procedure Rules reads as follows: -

“6. Stay in case of appeal [Order 42, rule 6]

(1) No appeal or second appeal shall operate as a stay of execution or proceedings 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 sub rule (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.

(3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

20. In an application for stay, the applicant must demonstrate that the application has been made without unreasonable delay, that they will suffer substantial loss unless the order is made, and that they are willing to provide security for the due performance of the decree. It was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

21. The respondent stated in response that there is now no dispute than the issue of ownership of plots **835** and **841** has already been determined by Courts and in various pieces of litigation involving the parties herein; that the lands being owned by the respondent, the present applicants have no right to be on the suit premises which belong to the present respondent. It is stated that granting orders of stay of execution of the ruling delivered on 14<sup>th</sup> of November 2024 will be tantamount to giving with one hand and taking away with the other hand. It is further urged that the applicants have not met the threshold for the granting orders of stay of execution. Clearly, this argument by itself can not form a valid basis for declining a stay of execution application. However, beyond the respondent’s attempts to discredit the stay of application as unmerited lies the ineluctable burden incumbent on the applicant to establish substantial loss and timeous lodging of their application.
22. As to whether the present applicants would suffer substantial loss unless the order is made, this court has noted that flowing from the

decisions of courts issued in the past regarding ownership of the suit lands, they do not belong to the applicants. However, falling into the snare of imprecise pleading of the same species as has been forborne above in this very ruling, the applicants state that they are in occupation of the suit land without stating expressly whether they have developed the said lands, or whether their occupation is limited to occasional or regular cultivation and the like. As seen from James Wangalwa & Another (supra), 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. In this case it is stated that an eviction is intended, but whether a notice of eviction has been issued or not, there is absolutely nothing in the application to establish before this court that the applicants may suffer substantial loss in that eviction. In the circumstances, it is not clear to this court how the execution of judgment would render the appeal nugatory.

23. The ruling of this court was delivered on 14/11/2024. The present application was filed on 20/12/2025, that is after about **36** days. This court does not consider that to be inordinate delay.

24. Lastly, though the applicants have not undertaken to abide by any orders as to security, this court is mandated to issue orders as to appropriate security in such an application as the present where necessary; that hurdle, however can not be considered or even be helpful to the applicant now that the requirement of proof of substantial loss has not been met.

25. In the final analysis, the application dated 20<sup>th</sup> December 2024 fails and it is hereby dismissed with costs to the respondent.

**Dated, signed and delivered at Malindi on this 25<sup>th</sup> day of November, 2025.**

A rectangular box containing a handwritten signature in blue ink, which appears to read "Mwangi Njoroge".

**MWANGI NJOROGE  
JUDGE, ELC, MALINDI.**