

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**  
**ELCEPJR CASE NO. E003 OF 2023**

**IN THE MATTER OF AN APPLICATION BY DAVID KISAULU  
REPRESENTATIVE OF JOHN K. MUTUNGI (DECEASED) AND JOEL  
MICHAEL MWONGELA MUIA REPRESENTATIVE OF ISAIAH M.  
MUTUNGI (DECEASED) FOR JUDICIAL REVIEW SEEKING ORDERS  
OF  
CERTIORARI, PROHIBITION AND MANDAMUS**

**-AND-  
IN THE MATTER OF ARTICLES 23(3)(F), 25(C), 40, 48 & 50  
OF THE CONSTITUTION OF KENYA**

**-AND-  
IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**-AND-  
IN THE MATTER OF AN APPEAL TO THE MINISTER IN CHARGE OF  
LANDS AND PHYSICAL PLANNING CASE NO. 150 OF 2012**

**-AND-  
IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284 LAWS  
OF KENYA**

**-AND-  
IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT  
CAP 26 LAWS OF KENYA**

**-BETWEEN-**  
**REPUBLIC .....APPLICANT**

**-VERSUS-**  
**THE CABINET SECRETARY MINISTRY OF LANDS  
AND PHYSICAL PLANNING .....1<sup>ST</sup> RESPONDENT  
THE DIRECTOR OF LAND**

ADJUDICATION & SETTLEMENT .....2<sup>ND</sup> RESPONDENT  
THE CHIEF LAND REGISTRAR .....3<sup>RD</sup>  
RESPONDENT  
THE ATTORNEY GENERAL OF KENYA .....4<sup>TH</sup> RESPONDENT  
MICHAEL WAMBUA .....5<sup>TH</sup> RESPONDENT

-AND-

EZEKIEL MWAKA MUSAU .....1<sup>ST</sup> INTERESTED  
PARTY  
SYLVESTER MULUMBA .....2<sup>ND</sup> INTERESTED PARTY  
*EX-PARTE APPLICANTS: DAVID KISAULU REPRESENTATIVE OF JOHN  
K. MUTUNGI (DECEASED) AND JOEL MICHAEL MWONGELA MUIA  
REPRESENTATIVE OF ISAIAH M. MUTUNGI (DECEASED)*

### RULING

1. Before this court for determination is the Notice of Motion filed in court on 18<sup>th</sup> February, 2025 in which the Ex-parte Applicants seek issuance of the following orders: -
  - 1) [SPENT]
  - 2) [SPENT]
  - 3) **THAT there be an order staying the execution of the judgment delivered on 12<sup>th</sup> February, 2025 by this court in this matter pending the hearing and determination of the intended appeal.**
  - 4) **THAT costs of this application be provided for.**
2. The application is premised on the grounds appearing on its face in addition to the supporting affidavit sworn by David Kisaulu on even date. The Ex-parte Applicant averred that a judgment was delivered in this suit on 12<sup>th</sup> February, 2025 dismissing the judicial review application for lack of merit. He added that being dissatisfied with the judgment, the Ex-parte Applicants have initiated the

process of appeal by filing a Notice of Appeal in addition to writing a letter requesting for proceedings.

3. The Ex-parte Applicant averred that there is a real risk that the 5<sup>th</sup> Respondent will adversely deal with the suit property if stay of execution is not granted causing substantial loss to the Ex-parte Applicants. He added that if the order sought is not granted then the intended appeal would be rendered nugatory.
4. The Applicant contended that the Ex-parte Applicants have an arguable appeal with high chances of success and that the application herein has been made without unreasonable delay. He urged the court to issue the orders sought in the interest of justice.
5. Opposing the application, the 5<sup>th</sup> Respondent swore a replying affidavit on 25<sup>th</sup> March, 2025. He averred that there was nothing to be stayed at all and that the application is an abuse of court process. He further averred that he has been in occupation of the suit property ever since the time of his grandfather and his father before him. He asserted that they have succeeded in all the cases that have been previously filed and that they have the title deed for the suit property.
6. The 2<sup>nd</sup> Interested Party filed a replying affidavit sworn by himself on 2<sup>nd</sup> May, 2025. In support of the application, it was contended that as a result of this court's judgment, the decision of the 1<sup>st</sup> Respondent dated 7/3/2023 remains valid and enforceable thereby confirming the adjudication of the suit property in favour of the 5<sup>th</sup> Respondent.
7. The 2<sup>nd</sup> Interested Party contended that the 5<sup>th</sup> Respondent could exploit the judgment herein to alienate, dispose of or otherwise interfere with the suit property in a manner that would be prejudicial to his proprietary interests and those of the Ex-parte Applicants. It was further argued that the 5<sup>th</sup> Respondent will not suffer any prejudice, loss or hardship should the orders sought be granted.

8. The 1<sup>st</sup> Interested Party swore a replying affidavit on 6<sup>th</sup> May, 2025. In support of the application, it was averred that the 5<sup>th</sup> Respondent might alter the status quo of his part-ownership of Parcel Nos. Makueni/Kalongo/4546 and Makueni/Kalongo/3447.
9. The application was canvassed by way of written submissions.
10. In the Ex-parte Applicants' submissions dated 10<sup>th</sup> April, 2025, Counsel submitted that the application is properly grounded on the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules. In support of the contention that the Applicants risk substantial loss, Counsel asserted that the suit property was originally owned by the late John K. Mutungi and Isaiah K. Mutungi who later sold it to the 5<sup>th</sup> Respondent's deceased father and the two Interested Parties. It was argued that if the 5<sup>th</sup> Respondent adversely deals with the suit property in any way, the Ex-parte Applicants will be forced to refund to the Interested Parties their purchase price and the intended appeal will be rendered nugatory.
11. Submitting on undue delay, Counsel contended that the instant application was filed on 18/2/2025 less than a week after delivery of the judgment.
12. Lastly, it was contended that the Ex-parte Applicants undertake to abide by any directions given by the court for the provision of security for the ultimate performance of the decree.
13. The 1<sup>st</sup> Interested Party filed his submissions dated 27<sup>th</sup> May, 2025. Counsel endorsed the Ex-parte Applicants' submissions and reiterated that if the stay orders are not granted, there is a risk that the 5<sup>th</sup> Respondent will adversely deal with the suit property.
14. The 2<sup>nd</sup> Interested Party filed his submissions dated 2<sup>nd</sup> May, 2025. Similarly endorsing the Ex-parte Applicants' submissions, Counsel contended that the order for stay sought will preserve the efficacy of the intended appeal and prevent it from being rendered nugatory.

15. In the 5<sup>th</sup> Respondent's submissions dated 6<sup>th</sup> May, 2025, Counsel contended that there is nothing to be stayed in respect of the judgment that was delivered by the court on 12/2/2025. Counsel was of the view that the judgment of the court was in the nature of a negative order because neither party was ordered to do anything or to refrain from doing anything. It was contended that there is no decree capable of being stayed.

16. Reliance was placed on the following caselaw to buttress the 5<sup>th</sup> Respondent's submissions: -

- i) **Salim N. Yamani t/a Mbao & Allied Enterprises Limited v Jubilee Insurance Company of Kenya Limited**  
**[2023] KEHC 21463 (KLR)**

17. The sole issue for determination is whether the Ex-parte Applicants have demonstrated merit in their application for the issuance of an order for stay of execution.

18. The governing law in an application for stay of execution pending appeal is Order 42 Rule 6 (1) and (2) which provides as follows: -

- 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 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.

19. In the case of **Kenya Shell Ltd v Kibiru [1986] KLR 416** Platt Ag. J.A. (as he then was) held as follows: -

*“It is usually a good rule to see if Order XLI 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 a stay. That is what has to be prevented.”*

20. Upon perusal of this court’s judgment delivered on 12<sup>th</sup> February, 2025, the learned judge observed as follows: -

*“66. The Applicants as well as the Interested Parties levelled various allegations that go to the merit of this case. The Applicants have not demonstrated that the decision making process was flawed therefore resulting in an illegal decision. From the foregoing, I find that the Applicants are not entitled to the orders sought.*

*67. In the end, I find the application is devoid of merit and the same is hereby dismissed. Each party to bear its own costs.”*

21. It is manifestly clear that in dismissing the Ex-parte Applicants' judicial review application with orders that each party bears its own costs, a negative order ensued. Agreeing with the 5<sup>th</sup> Respondent's submissions, the above judgment neither required either party to do anything or to refrain from doing anything. As such, no substantial loss has been demonstrated and therefore no orders for stay are capable of being granted.

22. To buttress this position, the Court of Appeal in **Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah [2008] eKLR**, while dealing with a similar application for stay of a negative order aptly held as follows:-

*“The 2<sup>nd</sup> prayer in the application is for stay (of execution) of the order of the superior court made on 18<sup>th</sup> December, 2006. The order of 18<sup>th</sup> 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).”*

23. Similarly, in **Western College of Arts and Applied Sciences v EP Oranga & 3 others [1976] eKLR** the Court of Appeal eruditely observed 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 fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the 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 an application for a stay, it is so ordered.”*

24. Lastly, in **Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Millimo, Muthomi & Co. Advocates & 2 others [2022] KECA 491 (KLR)**, the Court of Appeal reaffirmed the position as follows:-

*“We start by acknowledging the fact that the ruling appealed against was a compounded one dealing with 2 applications, which yielded two different results. The first application, which was made by the applicant, was dismissed. As submitted by learned counsel for the 1st respondent, the position taken by this Court in respect of applications for stay of execution in respect of negative orders is clear. Negative orders cannot be stayed.”*

25. In the circumstances of the case, the Ex-parte Applicants have not demonstrated merit in the application for stay of execution. The application is hereby dismissed with costs.

.....  
**HON. E. O. OBAGA**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS  
THIS 2<sup>ND</sup> DAY OF DECEMBER, 2025.**

**IN THE PRESENCE OF:**

Ms. Mwikali for Mr. Murango for Exparte Applicant and for Ms. Nyaata for 1<sup>st</sup> Interested Party.

Court assistant – Steve Musyoki

ORIGINAL