

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
PETITION NO. 2 OF 2019
IN THE MATTER OF TO ARTICLES 10, 23, 40, 47, AND 60(1) (B) OF
THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF CONTRAVENTION OF THE FUNDAMENTAL
RIGHTS AND FREEDOM OF THE PETITIONER AS ENSHRINED AND
PROTECTED UNDER ARTICLES 10, 40, 47, 60 (1)(B) OF THE
CONSTITUTION OF KENYA

BETWEEN

**KENTAL ENTERPRISES
LIMITED.....PETITIONER/RESPONDENT**

-VERSUS-

**ATTORNEY-GENERAL.....1ST
RESPONDENT**
**NATIONAL ENVIRONMENTAL
MANAGEMENT AUTHORITY (NEMA).....2ND
RESPONDENT**
**WATER RESOURCE
MANAGEMENT AUTHORITY.....3RD
RESPONDENT**
**NATIONAL YOUTH SERVICE.....4TH
RESPONDENT**
**NAIROBI CITY COUNTY.....5TH
RESPONDENT/APPLICANT**

RULING

1. Before the court for determination is the notice of motion application dated 14th April 2025, and the notice of preliminary objection dated 17th June, 2025 respectively. The notice of motion dated 14th April, 2025 is filed by the 5th respondent/applicant, and it is expressed to be brought under **Order 42 Rule 6** and **Order 51 Rule 1** of the

Civil Procedure Rules, Section 13(7) of the Environment and Land Court Act and Sections 1A, 1B and 3A of the Civil Procedure Act, seeking the following orders:-

1. Spent.

2. That, the firm of M/S A.A KHALIF Advocates LLP, IPS Building 5th Floor, KIMATHI Street P.O. BOX 6779-00610 NAIROBI be and is hereby granted leave to come on record as acting for the 5th Respondent/Applicant, NAIROBI CITY COUNTY Government in place of the firm of Prof. MUSILI WAMBUA & CO. ADVOCATES, WESTPARK towers 10th Floor MPESI LANE off MUTHITHI ROAD P.O BOX 54721-00200 NAIROBI, and all future correspondence, pleadings and proceedings be served upon the said firm.

3. That pending the hearing and determination of this Application inter partes, this honourable court be pleased to grant a stay of execution on the judgment and orders issued therewith at the Environment and Land Court, Nairobi the Honourable Mr. Justice Joseph Oguttu Mboya given at Nairobi on the 24th day of March 2025 in Petition No.2 of 2019 where the honourable court awarded the petitioner Ksh. 2, 013, 500,000/- together with costs and interest pending the hearing and determination of the Appeal.

4. That pending the hearing and determination of this intended application, this honourable court be pleased to grant a stay of execution on

the judgment and Orders issued therewith at the Environment and Land Court, Nairobi the Honourable Mr. Justice Joseph Oguttu Mboya given at Nairobi on the 24th day of March 2025 in Petition No.2 of 2019 and all consequential Orders issued therein.

5. That the court be pleased to issue any other orders as it may deem just, appropriate and expedient to grant in the interests of justice.

6. Costs of this application be provided for.

2. The application is premised on the grounds on the face of it and in the supporting affidavit of W.S. Ogola, the county solicitor sworn on 16th April 2025. The 10th respondent/applicant deposed that it is aggrieved with the decision of this court delivered on 24th March, 2025 wherein the court awarded the petitioner/respondent Kshs.2,013,500,000/- as compensation, Kshs.50,000,000/- being exemplary damages with costs and interests thereon at court rates.
3. Consequently, the 5th respondent/applicant instructed the firm of M/S A.A Khalif Advocates LLP to lodge the notice of appeal dated 7th April, 2025 on record together with the request for proceedings dated 8th April 2025. The 5th respondent/applicant further deposed that its' operations as public entity tasked with the delivery of essential services to residents of Nairobi County will be grounded unless a stay of execution of the order dated

24th March, 2025 is allowed due to the magnitude of the judgment debt. Further, that in the event the petitioner/respondent proceeds with execution, its capacity to provide water and sanitation services to the residents of Nairobi county will be crippled and the intended appeal even if successful, will have been rendered nugatory.

4. The petitioner/respondent opposed the application through the replying affidavit of Bimal Shah sworn on 14th July, 2025 in his capacity as its director. The petitioner/respondent deposed that the genesis of the subject dispute is traceable to the unlawful demolition of its mall situated on **LR.209/11307** and **LR.209/11308** within Westlands area of Nairobi by the 5th respondent/applicant's agents on 10th August 2018 which demolition took place despite its compliance with the enforcement notice issued by the 5th respondent/applicant dated 23rd May 2018. Further, that the 5th respondent/applicant demolished the mall on 10th August 2018 in disregard of the Environmental Impact Assessment License dated 25th September 2017 issued by the 2nd respondent and the regulatory approvals dated 30th January 2018 and 18th May 2018. The petitioner/respondent's annexure marked "**BS-1**" indicates the 5th respondent/applicant as recipient of in excess of Ksh. 20 billion from the national government for the 2024/2025 financial year which amount excludes the 5th

respondent/applicant's own source revenue generated by the various taxes, levies and licenses it collects; hence, it is not likely to suffer substantial loss if execution is allowed to proceed.

5. The petitioner/respondent filed the notice of preliminary objection dated 17th June, 2025 challenging the instant application on the following grounds:-

1. That the application dated 14th April, 2025 is fatally defective for violating Order 9 Rule 9 of the Civil Procedure Rules making the application liable to be struck out.

2. That noncompliance with Order 9 Rule 9 affects the court's jurisdiction to entertain proceedings filed by an improperly on record advocate.

3. That the overriding objectives of the court in Sections 1A, 1B and 3A of the Civil Procedure Act cannot be invoked to circumvent a mandatory requirement under Order 9 Rule 9 of the Civil Procedure Rules as amended.

6. The 5th respondent/applicant opposed the objection through the relying affidavit of Abdullahi Khalif sworn on 30th July, 2025 in his capacity as an Advocate having conduct of the matter. The learned counsel deposed that the petitioner/respondent's notice of preliminary objection is misadvised because a written request was issued to the 5th respondent/applicant's previous

advocates on record namely the firm of M/S Prof. Musili Wambua & Co. Advocates on 4th April 2025 however, the aforesaid firm declined to give their consent vide a response dated 7th April, 2025 on grounds of outstanding fees owed by the 5th respondent/applicant. That arising from the foregoing, the 5th respondent/applicant lodged the instant application containing prayer number 2 seeking this court's leave for the firm of M/S A.A Khalif Advocates LLP to come on record pursuant to the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules**.

7. Both the application and the preliminary objection were canvassed by way of written submissions. The 5th respondent/applicant filed its submissions dated 10th October, 2025 where it raised three issues for determination as listed below:-

i. Whether the applicant's present advocates should be granted leave to come on record in place of Messrs Prof. Musili Wambua & Co. Advocates.

ii. Whether the Applicant has satisfied the requirements of Order 42 Rule 6(2) of the Civil Procedure Rules; for grant of stay of execution of the judgment and decree delivered on 24th March, 2025.

iii. Whether the applicant's motion is rendered defective by the manner in which prayers (iii) and (iv) were framed.

- 8.** The 5th respondent/applicant submitted that it is a public entity as opposed to a private party and is tasked with the provision of essential services including health, water, infrastructure and salaries for its workers; therefore, the residents of Nairobi County stand to suffer irreparable and irreversible harm unless execution is stayed by this court as sought. Further, that in the event the appeal succeeds, the residents of Nairobi County cannot be compensated by damages for the losses arising from the execution in question. That the decretal amount is a colossal sum being Kshs.2 billion and Kshs.63.5 million, exclusive costs and interest thereon at court rates.
- 9.** The 5th respondent/applicant submitted that public funds are “ring-fenced” hence not subject to re-allocation or diversion to settle a decree without paralyzing its operations. Furthermore, the appeal raises arguable issues related to liability and quantum of damages.
- 10.** The petitioner/respondent filed its submissions dated 14th November, 2025 where it raised two issues for determination as listed below:-

a. Whether the applicant's prayers are fatally defective from the way they are framed.

b. Whether the applicant has met the threshold for grant of stay of execution of the prayers sought.

11. The petitioner/respondent submitted that the 5th respondent/applicant's prayers are fatally defective in terms of how they are framed. It was submitted that the oxygen principle derived from **Article 159(2) (d)** of the **Constitution of Kenya** is incapable of reviving a fatally defective suit such as in prayers (3) and (4) herein. Relying on the reasoning of the Supreme Court in **Petition No. 20 [E023] of 22 Isaac Alouch Polo Aluochier v Independent Electoral and Boundaries Commission and 17 others KESC [2022] KESC**, the petitioner/respondent submitted that parties are bound by their pleadings hence can only be granted the reliefs they have sought. It was further submitted that the application fails to meet the threshold for grant of stay of execution as provided for under **Order 42 Rule 6** of the **Civil Procedure Rules** by failing to demonstrate that the applicant stands to suffer substantial loss as a result of execution. Further, that the 5th respondent/applicant is well-resourced.

12. I have carefully analyzed and considered the application, the notice of preliminary objection and the written submissions.

The issues for determination are *whether the orders of stay of execution pending appeal should issue, and whether the preliminary objection has merit.*

- 13.** I will begin with the notice of preliminary objection filed by the petitioner/respondent. In the case of **Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd (1989) KLR 1**, it was held that:-

“a court seized of a matter in which the question of jurisdiction is raised is obliged to decide the issue right away on the material before it.”

- 14.** **Order 9 Rules 9 and 10** of the **Civil Procedure Rules** stipulate that any change of advocate or decision to act in person by a party after judgment has been passed requires court’s leave or written consent between the outgoing and incoming advocates. The requirement applies to ensure that the transition of legal representation is lawful and does not prejudice the interests of the parties or advocates.
- 15.** Through a letter dated 7th April, 2025 the firm of M/S Musili Wambua & Co. Advocates which was on record for 5th respondent/applicant declined to give their consent for the firm of M/S A.A Khalif Advocates LLP to come on record for purposes of the appeal and subject application, on account of outstanding fees to the tune of Kshs.72 million.

16. The question which this court must exercise its mind to answer is whether the instant application ought to be struck out for non-compliance with **Order 9 Rule 9** of the **Civil Procedure Rules**.

17. On the other hand, the 5th respondent/applicant is seeking the court's leave for a fresh firm of advocates to come on record post-judgment through prayer number 2 in the application. The preceding fact renders the subject application distinguishable from instances where applicants attempted to lodge either an appeal or application post-judgment through a new firm of advocates or in person without first seeking and obtaining the court's leave.

18. In the case of **Kenya Women Finance Trust v Salome Waithaka Kinyua & Rahab Njeri [2019] KEHC 1301 (KLR)**, the court appreciated the meaning and import of the **Order 9 Rule 10** of the **Civil Procedure Rules** as hereunder:-

"I should also add that Order 9 Rule 10 of the Civil Procedure Rules permits combining of the application under Rule 9 with other prayers except it directs that the change of advocates after judgment be tackled first. This to me does not seem to declare prohibition that a party intending

to act in person or intended incoming advocate after judgment cannot apply in that capacity for substantive orders”

- 19.** While I am persuaded to rely on the above authority, this court is persuaded that the lack of written consent by the advocates having conduct of the matter on behalf of the 5th respondent/ applicant, does not operate to deprive the court of jurisdiction to entertain the instant application as this prayer was sought alongside other prayers.
- 20.** Having stated the above, this court finds that the notice of preliminary objection lacks merit.
- 21.** **Order 42 Rule 6(2) of the Civil Procedure Rules** provides as follows:-

“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.”

22. The petitioner/respondent faulted the 5th respondent/applicant for relying on the legal provisions governing stay of execution pending appeal while craving a stay of execution pending the hearing and determination of the application itself as distinguished from the appeal. The court will first address itself to whether the prayers numbered (3) and (4) in the instant application are spent. Upon careful inspection of the instant motion, the court is satisfied that the 5th respondent/applicant has not sought for stay of execution pending appeal. In the prayers numbered (3) and (4), the 5th respondent/applicant specifically seeks stay of execution pending the hearing and determination of the application.

23. This means that upon the court entering its decision on the application, no stay of execution of the judgment dated 24th March, 2025 can ensue. The petitioner/ respondent submitted that during the trial, the 5th respondent/applicant failed to take advantage of the opportunity offered by its counsel to amend its pleadings in relation to the reliefs craved therein. In the case of **University of Nairobi v N.K Brothers Limited [2022] KEHC 671 (KLR)**, the court ruled that failure to apply for a stay means the court lacks jurisdiction to consider it, and the execution proceeds unimpeded. It is trite that parties are bound by their pleadings. In **Nairobi City Council vs Thabiti Enterprises Limited Civil Appeal No. 264 of 1996** the court,

referenced ***Bullen Leaks, and Jacob*** (12th edition) as hereunder:-

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the twofold purpose of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial court and which the court will have to determine at the trial.”

24. Although the 5th respondent/applicant filed the notice of appeal dated 7th April 2025, the court is satisfied that stay of execution pending appeal has not been sought in these proceedings. Consequently, I am persuaded that the court lacks jurisdiction to determine whether the application before it meets threshold for stay of execution pending appeal as per **Order 42 Rule 6(2)** of the **Civil Procedure Rules**, because the 5th respondent/applicant has not craved that relief.

25. Moreover, the court finds that the prayer (5) as appears in the instant application, despite it's broad sweep, is incapable of subsuming a prayer for stay of execution pending appeal.
26. Save to find that the firm of A.A Khalif Advocates LLP is hereby allowed to come on record on behalf of the 5th respondent/applicant, the rest of the prayers as sought in the notice of motion dated 14th April 2025 cannot issue and the same is hereby dismissed. The notice of preliminary objection dated 17th June, 2025 is also hereby dismissed. Each party to bear its own costs.
- Orders accordingly.

**DATED, SIGNED & DELIVERED VIRTUALLY
THIS 15TH DAY OF DECEMBER, 2025.**

**HON. MBOGO C.G.
JUDGE
15/12/2025.**

In the presence of:

Mr. Benson Agunga - Court assistant

Mr. Mwangi and Mr. Wanyoike for the Petitioner/Respondent

Mr. Allan Kamau for the 1st and 4th Respondents

Mr. Khalif for the 5th Respondent/Applicant