IN THE COURT OF APPEAL AT KISUMU

(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU, JJ.A.) CIVIL APPLICATION NO. E114 OF 2025

BETWEEN

GEORGE OKIMARU IRARU Alias KENYATTA.....1ST APPLICANT WILLYSHARE IRARU..... .....2ND APPLICANT ELLY EPALA .....3RD APPLICANT DAVID OSIRU ..... 4TH APPLICANT JULIUS NYONGESA WANYONYI..... .....5TH APPLICANT GEOFFREY IRARU JUMA ....6TH APPLICANT WALTER ETYANG.....7TH APPLICANT COSMAS IRARU..... .....8TH APPLICANT

AND

NICHOLAS SITATI WELIME (suing as the legal representative of the estate of DAVID WANJALA WELIME - DCD) … RESPONDENT

(Being an Application for stay of execution from the Ruling and Order of the Environment and Land Court at Bungoma, (Cherono, J.) dated and delivered on 11th December, 2024, and confirmed on 27th February, 2025

in

ELC No. E018 of 2024)
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RULING OF THE COURT

[1] Before us is an application dated 22nd July 2025, brought pursuant to **Article 159** of the Constitution of Kenya, **Rule 5(2)(b)** of the Court of

Appeal Rules, and all other enabling provisions of the law. The applicants seek, in the main, an order for stay of execution of the rulings delivered by the Environment and Land Court **"the ELC"** on 11th December 2024 and 27th February 2025 respectively, pending the hearing and determination of an intended appeal. The application is anchored on the grounds set out on the face of the application and the supporting affidavit sworn by George Okimaru, the 1st applicant who did so on his own behalf and on behalf of the other seven applicants.

[2] The applicants assert that the impugned rulings and orders arose from an interlocutory application, wherein the ELC at Bungoma granted mandatory injunctive orders directing their eviction from land parcel **Bungoma/Kamukuywa/138 "the suit property"**. They contend that the relief granted was final in nature and prematurely issued at an interlocutory stage, notwithstanding that the substantive suit, whose principal prayer is their eviction, remains undetermined.

[3] They also raise concerns about judicial impartiality, citing a complaint lodged by the respondent against the trial court in relation to the proceedings, which they believe may have influenced the

court’s disposition. That although the court disclosed the existence of the complaint and invited parties to express any objection to its continued

handling of the dispute, the applicants now contend that the court ought to have recused itself to preserve the integrity of the proceedings.

[4] The applicants emphasize that they and their families, comprising of over 300 individuals face imminent eviction, which would not only render them homeless but also frustrate their ability to prosecute the intended appeal. That they lodged a notice of appeal on 28th February 2025 out of time and duly served. However, an application for enlargement of time being Civil Application No. E079 of 2025 was currently pending before this Court for hearing and determination.

[5] In urging the Court to grant stay, the applicants maintain that the proceedings before the superior court and the intended appeal would be rendered nugatory if eviction is effected. They undertake to comply with any conditions the Court may impose and to compensate the respondent should the appeal ultimately fail.

[6] In opposing the application the respondent, through his replying affidavit, argues that, the application lacks merit, urgency, and is only intended to delay the hearing of Bungoma ELC Case No. E018 of 2024, scheduled for 29th September 2025. He asserts that the impugned orders were lawfully granted after a fair hearing and

proper judicial exercise of discretion. He deposes that the applicants were evicted from the suit

property in 1982 but unlawfully re-entered the same in 2024, destroyed crops, erected structures, and buried their father therein without legal authority. He deposes that any harm claimed by the applicants is self- inflicted and that their appeal lacks merit. He ultimately urges the Court to dismiss the application with costs, or if inclined to allow it, to impose conditions including payment of costs and deposit of security.

[7] When the application came up for hearing, **Mr. Angima**, learned counsel who was meant to appear for the applicants experienced technical hitches and was unable to log in on our virtual platform, whereas **Mrs. Chunge**, learned counsel appeared for the respondent. Since all parties had filed their respective written submissions and the hitches experienced by Mr. Angima notwithstanding and with the approval of Mrs. Chunge, we opted to consider only their written submissions in crafting this ruling.

[8] Counsel for the applicants, in his submissions merely reiterated and expounded on grounds in support of the application as well as the depositions in the affidavit in support thereof. We need not therefore rehash the same. The foregoing notwithstanding counsel submitted that the intended appeal will be arguable, given the

grounds set out on the face of the application. To support this position, counsel cited the case

of **Principal Secretary, Ministry of Interior and Coordination of National Government & another v Kaguthi & 11 others (Civil Application E298 of 2023) [2024] KECA 96 (KLR)**, where this Court reaffirmed that for stay of execution to be granted under **Rule 5(2)(b)**, of the Court of Appeal Rules, an applicant must demonstrate that the appeal is arguable and that, absent stay, it would be rendered nugatory. On the basis of the foregoing, counsel urged the Court to preserve the status quo to protect the integrity of both the appeal and the pending suit.

[9] Similarly, in opposition to the application, the respondent's counsel merely reiterated what the respondent had deposed in the replying affidavit and we also need not rehash again. Suffice to add that the applicants had failed to show any irreparable harm or merit in their intended appeal, and that their conduct undermined their entitlement to the equitable relief. He otherwise urged the Court to dismiss the application with costs.

[10] Upon consideration of the record, it is evident that the applicants have filed a notice of appeal in respect of the ruling and order delivered on 27th February, 2025 **"hereinafter the second ruling"**. No notice of appeal has been filed in respect of the ruling

and order of 11th December

2024 "**hereinafter the first ruling"**. Yet the application seeks stay of execution of the orders issued in both rulings. The prayer is coined thus *"...That there be stay of the ruling of the superior court delivered on 11th December 2024 and confirmed in the ruling delivered on 27th February 2025 pending an intended appeal"*. We doubt whether this is possible. First in the absence of a valid notice of appeal in respect of the first ruling we have no jurisdiction to entertain any prayers in this application arising from that ruling. Again, we note that all the prayers in the application are in in respect of that first ruling.

[11]There is nothing in the prayers touching on the second ruling which was an application to review the ruling and order of the second ruling that resulted in a dismissal. Secondly, the wording of the above prayer is deliberately misleading. The first application that resulted in the first ruling was by the respondent seeking mandatory injunctive orders against the applicants. The second application was by the applicants and sought the review of the first ruling. The two applications were totally different and therefore to say that the second ruling confirmed the first ruling is incorrect and a misnomer. Thirdly, it is not lost on us that the applicants in their affidavit in

support of the application have

adverted to Civil Application No. E079 of 2025 in which they claim they are seeking enlargement of time.

[12] Surprisingly and deliberately so we think, they do not state in respect of what that application, they are seeking the enlargement of time. Ordinarily, one would have expected that a copy of the application would be annexed to the affidavit in support of the application but they did not do that. Instead, they annexed a copy of the directions on the application by the Deputy Registrar of this Court as to how the application for extension of time will be deposed of which is of little help in this regard. These obfuscation of facts and pleadings by the applicants is to our mind, deliberate so as to avoid the elephant in the house which is whether we have jurisdiction to entertain the application in the absence of a valid notice of appeal in respect of the first ruling.

[13] It is trite law that jurisdiction is everything and without it, a court must down its tools. As was stated in **Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**:

> ***"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending***

other evidence."

[14] **Rule 5(2)(b)** of this Court Rules presupposes the existence of a valid notice of appeal and, where applicable, a properly lodged appeal. In **Equity Bank Ltd v West Link MBO Ltd [2013] eKLR**, the Court emphasized that:

> ***"The jurisdiction of this Court under Rule 5(2)(b) is predicated upon the existence of a valid notice of appeal or an appeal that has been lodged."***

[15] In the present case, whereas a valid notice of appeal has been filed in respect of the second ruling, no such notice is available in respect of the first ruling, yet all the prayers and urgings in the application are in respect of the first ruling, which has no notice of appeal and which time for so filing has long expired. Could this be the reason for the pending application for enlargement of time? We do not know but your guess is as good as ours.

[16] On the other hand and even assuming that the application is solely anchored on the second ruling which is underpinned by a valid notice of appeal, the prayers sought are not available to the applicants. Why? Their application for review was dismissed. A dismissal normally results in a negative order which is incapable of being stayed. It is said that an order that dismisses a claim or does not require a party to do or refrain from doing something and is

therefore generally incapable of being

stayed, because there is nothing to stay. See **Mokua v Mokua (Civil Application E078 of 2023) [2025] KECA 238 (KLR).** This is the fate of the second ruling. It cannot be stayed, period!

[17] In the ultimate, it is our view that, the jurisdiction of this Court under **Rule 5(2)(b)** has not been properly invoked. The application is accordingly struck out with costs to the respondent.

Dated and delivered at Kisumu this 19th day of December, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original
Signed
DEPUTY REGISTRAR