

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT CHUKA**  
**HCCA. NO. E028 OF 2024**

MBAAKA BOORE.....1<sup>ST</sup> APPELLANT  
GODFREY KIRIMI.....2<sup>ND</sup> APPELLANT

VERSUS

JUSTIN KIMATHI MUTHARAKA.....1<sup>ST</sup> RESPONDENT  
JAMLICK MAINA NTHIGAI.....2<sup>ND</sup> RESPONDENT  
TIMOTHY MUTWIRI MWONGERA.....3<sup>RD</sup> RESPONDENT  
DENIS MUGAMBI PETER.....4<sup>TH</sup> RESPONDENT  
ANTHONY MUGENDI KABURU.....5<sup>TH</sup> RESPONDENT  
GATUNGI NGOROI.....6<sup>TH</sup> RESPONDENT  
FLORENCE ITHIMAGITIRIA.....7<sup>TH</sup> RESPONDENT  
MEDRIN NJOKI MANENE.....8<sup>TH</sup> RESPONDENT  
ELIPHAS NTHIRI NJOKA.....9<sup>TH</sup> RESPONDENT  
HEZRON MUGO MWIBIGA.....10<sup>TH</sup> RESPONDENT  
EPHANUEL RUGENDO IRAMBU.....11<sup>TH</sup> RESPONDENT  
MARTIN MUTEGI NYAGA.....12<sup>TH</sup> RESPONDENT  
CHRISTOPHER KINYUA ELIAS.....13<sup>TH</sup> RESPONDENT  
JUSTIN NTWIGA PETER.....14<sup>TH</sup> RESPONDENT

**R U L I N G**

1. The Applicants filed the present Application dated  
24<sup>th</sup> March 2025 seeking the following orders:-

(i) Spent

- (ii) There do issue an ex-parte order for stay of execution of the orders in the ruling dated 29<sup>th</sup> August 2024 passed by the Trial Court in Chuka CMCC E195 of 2023 Justin Kimanthi Mutharaka & 13 Others v Mbaka Boore & Another pending the hearing of this Application *inter-partes* or until further orders of this Honourable Court.
- (iii) There do issue an order of stay of the orders in the ruling dated 29<sup>th</sup> August 2024 passed by the trial court in Chuka CMCC e195 of 2023 Justin Kimanthi Mutharaka & 13 Others V Mbaka Mboore & Another pending the hearing and determination of the appeal herein or until further orders by the honourable court
- (iv) Costs be provided for.

2. The Application was brought on the grounds reproduced verbatim that:-

- (i) The Applicants being aggrieved by the Ruling of the Trial Court in Chuka CMCC E195 of 2023 Justin Kimanthi Mutharaka & 13 Others v Mbaka Boore & Another, made on 29<sup>th</sup> August 2024 have lodged the appeal herein and intend to pursue the same to its logical conclusion.
- (ii) That the Applicants on 18<sup>th</sup> September, 2024 filed an application for stay of execution of the said ruling which was heard and unfortunately dismissed on 11<sup>th</sup> March, 2025 and hence the present Application.
- (iii) The Applicants now face threat of imminent execution for the orders passed by the Trial Court on 29<sup>th</sup> August, 2024.
- (iv) The Applicants are members of Rubate Irrigation Farmers' Cooperative Society Ltd and as members of the society the applicants are bound to act in accordance

with the society's by-laws, and general internal regulations a fact that the trial court ignored.

- (v) The orders direct the Applicants to reconnect water supply to the Respondents properties. The Respondents are not members of the society, that the by-laws strictly prohibit members from making connections to non-members without proper authorizations from the society.
- (vi) The Applicants have no authority or access from the society to execute the orders by forcefully connecting water to themselves or incarcerating the Applicants in civil jail for failing to obey orders which they clearly do not have the capacity to comply with.
- (vii) The Respondents are now threatening to execute the orders by forcefully connecting water to themselves or incarcerating the

Applicants in civil jail for failing to obey orders which they clearly do not have the capacity to comply with.

(viii) Unless this honourable court grants an order to stay the execution of the orders, pending the hearing and determination of the appeal herein, the Applicants will be forced to suffer for failing to honour court orders which are not within the mandate.

(ix) The Appeal herein will also be rendered nugatory if the orders sought are not granted.

(x) The Applicants are willing to offer/comply with any reasonable security as may be ordered by this Honourable Court.

3. The 1<sup>st</sup> Applicant filed a Supporting Affidavit dated 24<sup>th</sup> March 2025 whose averments mirror the grounds set out above.

4. The Application is opposed. The 1<sup>st</sup> Respondent Justin Kimanthi Mutharaka filed a Replying Affidavit dated 2<sup>nd</sup> May 2025. He deposed that the Application was overtaken by events as there was a similar Application dated 18<sup>th</sup> September 2024 which was heard and dismissed by the trial court. He stated that the orders issued on 29<sup>th</sup> August 2024 had been revoked by the ruling of Hon. Mwendwa dated 11<sup>th</sup> March 2025.
5. The Respondents stated that the Applicants had not demonstrated any irreparable harm, loss or prejudice. They prayed that the stay order issued on 8<sup>th</sup> April 2025 be set aside as it had been revoked by the ruling delivered on 11<sup>th</sup> March 2025.
6. The Applicant filed a Supplementary Affidavit dated 16<sup>th</sup> May 2025. He stated that his Application for stay of execution dated 18<sup>th</sup> September 2024 was dismissed by the trial court on 11<sup>th</sup> March 2028, a fact he had disclosed in his Supporting Affidavit.

That Order 42 R 6 of the Civil Procedure Code allowed him to bring a fresh application to an appeal court. He reiterated that the society would suffer substantial loss since they had no authority to reconnect the water outside the membership for the Co-operative Society.

### **Submissions**

7. Parties were directed to file submissions. On record are the Applicants' submissions dated 29<sup>th</sup> July 2025 which I have considered. The Respondent did not file submissions.

8. From my reading of the rival affidavits and the Applicants' submissions, the only issue for my determination is whether the Applicant had made out a case for the grant of the order of stay of execution pending appeal.

**9. Order 42 Rule 6 of the Civil Procedure Rules stipulates: -**

**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 orders 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.**

10. The Applicant must therefore satisfy the court that substantial loss may result if the order is not granted; that the Application was made without unreasonable delay and that the Applicant had given security for due performance.

**(i). Substantial loss**

11. The Applicants urged that they would suffer substantial loss as they risked being cited for

contempt of court if they failed to comply with the trial court's orders to reconnect water to the Respondents. They submitted that they had no capacity as individuals to implement the judgement as the duty rested with Rubate Irrigation Famers' Co-operative Society Ltd which the Respondents had failed to sue.

12. The concept of substantial loss was explained by the Court in **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** where the Court observed that:-

***“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. This is what substantial loss would entail...”***

13. In this case the Applicants have demonstrated that they risked being cited for contempt for their inability to implement the judgement which they have since appealed. I am satisfied that they have met the 1<sup>st</sup> Condition.

**(ii). Delay**

14. The Applicants stated that the impugned ruling was rendered by the trial court on 29<sup>th</sup> August 2024. They applied to the trial court for stay of execution and the court ruled on 11<sup>th</sup> March 2025 dismissing the Application. They then filed a new Application to this court on 24<sup>th</sup> March 2025.

15. The Respondents did not submit on this issue. They however stated in the Replying Affidavit that the Applicants were forum shopping when they filed the present Application in this court after being denied the orders in the trial court. Order 42 Rule 6(1) however allows a party to apply to the

court to which an appeal is preferred. The section provides:-

**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 orders set aside. [Underline mine].**

16. I find that the Applicants brought the instant Application without unreasonable delay. It is my further finding that they acted within the law.

17. The last requirement is security. The Applicants have stated that they were willing to provide reasonable security as directed by the court.

18. In this case the order was compelling order to connect water. It was not a money decree. I can therefore only order security for costs.

19. In the end, I find that the Applicants have satisfied the conditions under Order 42 Rule 6.

20. I exercise discretion to grant an order for stay of execution pending appeal on the following conditions: -

- (i) The Applicants shall deposit in court Kshs.300,000/- as security for costs within 15 days of today.

- (ii) The Applicants shall file and serve their Record of Appeal within 30 days of today.
- (iii) Failure to comply with (i) and (ii) will lead to automatic lapse of the stay orders.

Orders accordingly.

**Ruling delivered, dated and signed at Chuka this 12<sup>th</sup> day of February, 2026.**

.....  
**R. LAGAT-KORIR**  
**JUDGE**

**Ruling delivered in the presence of Mr. Atheru for the Appellants and N/A for the Respondents. Muriuki (Court Assistant).**