

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELCLA NO. E029 OF 2023

CATHOLIC DIOCESE OF MALINDI REGISTERED TRUSTEES.....
APPELLANT

VERSUS

KAZUNGU MWATETE MLEWA & 3 OTHERS
RESPONDENTS

RULING

1. The Notice of Motion dated 16th October 2025 seeks the following orders:

- a. **That this court do issue a stay of execution of the orders issued in the subordinate court on 11th October 2023 in Malindi Miscellaneous Application Number E028 Of 2023 Kazungu Mulewa and Another Versus The Land Registrar by Hon. James Mwaniki pending the hearing and determination of the intended appeal;**
- b. **That the costs of the application be provided for.**

2. The grounds upon which the application is made are that the appeal herein was dismissed by the court on 30th September 2025 and a decree thereof issued on the same date. The respondents are now in the process of executing the orders of 11th October 2023 in **Malindi Miscellaneous Application Number E028 of 2023** and the applicant are risks losing his suit properties which were procedurally acquired and which would adversely affect its rights over the property as enshrined under **Article 40** of the Constitution of Kenya; that the applicant has filed and served upon the respondents a Notice Of Appeal dated 7th October 2025 against the judgment and the decree of 30th September 2025; that failure to grant the orders sought would render the appeal nugatory; that the appeal is arguable and has high chances of success.

3. The 2nd respondent filed Grounds of Opposition dated 30th October 2025 while the 1st respondent filed a Replying Affidavit dated 5th November 2025 in opposition to the motion. The cumulative response of the respondent is as follows: this court is *functus officio* and it cannot grant the prayers sought; that the Notice of Appeal is against the decision of this court yet the Notice of Motion seeks to stay orders issued on 11th of October 2023 in **Malindi Misc Application number E028 of 2023** and is therefore incurably defective; that a stay of execution order can only be sought under **Order 42 rule 6(1)** of the CPR in respect of a decree appealed from; that the court struck out the appeal for want of leave and there was no decree capable of being stayed; that the court has not been addressed substantively on the issue of the orders issued by the lower Court hence it lacks jurisdiction to grant a stay of execution. No sufficient grounds have been set out to support the ground of stay of execution; that mere apprehension of possible eviction without demonstration that steps towards eviction have been undertaken is not sufficient to warrant issuance of a stay of execution.
4. All parties filed their respective submissions. Counsel for the appellant narrated the brief facts of the case, stating that the applicant is the registered proprietor of the 4 parcels of land in question yet the 1st and 2nd respondents moved the subordinate court for very far-reaching orders against the Land Registrar alone notwithstanding the fact that the applicant had a legitimate interest in the suit lands, which were

subdivisions of Kilifi/Jimba/42, and the Magistrate ordered that the Land Registrar to cancel the titles to Kilifi/Jimba/42 and any other title arising from the transfer of that parcel to Robert Muriithi, and revert the title back to the 1st and 2nd respondents herein; that after becoming aware of the proceedings before the subordinate Court the applicant lodged and Notice Of Motion seeking to be joined as an affected party in the suit and to set aside and vary all the orders given on 11th October 2023 and also seeking to strike out the Miscellaneous Application before the subordinate court in its entirety. The appellant's application was however dismissed by the Magistrate and it appealed to this court but the appeal was also dismissed with costs (that submission is wrong because the record shows that the appeal was struck out and each party was to bear their own costs). Now the appellant has moved to the Court of Appeal, impugning the judgment of this court striking out its appeal.

5. Counsel identified issues for determination as follows:

- a. Whether the applicant has satisfied or the conditions for a grant of injunctive orders;**
- b. Whether the application is rightfully before this court;**
- c. Whether the appeal will be rendered nugatory should no stay be granted;**
- d. Who is to bear the costs of the application.**

6. Regarding the first issue, counsel, citing **Hezron Kamau Gichuru Versus Kianjoya Enterprises Limited & Another 2022 KLR**, submitted that a *prima facie* case has been established and that the applicant would suffer irreparable harm if the orders it is seeking are not granted.

7. On the second issue, counsel referred to **Order 46 Rule 6 (6) CPR** and the case of **Mathiu & 5 Others Versus Mwirigi And Two Others 2025 KEELC 317 KLR** and submitted that **Order 46** gives power the courts to preserve a property pending appeal, and since the applicant has filed a Notice Of Appeal and a Memorandum Of Appeal, it has an appeal in place for the purposes of that order and this court should excise it's power to preserve the suit property pending the hearing and determination of the appeal which is within the jurisdiction of this court.
8. Counsel further relied on **Butt Versus Rent Restriction Tribunal 1979 KECA 22 KLR** and submitted that the application is rightfully before this court and that this court has jurisdiction to determine the matter.
9. As to whether the appeal would be rendered nugatory if stay of execution is not granted, it was submitted that failure to grant the order of stay of execution would expose the property to execution of the order from the subordinate court and the claim of costs in respect of the superior court proceedings, thus rendering the appeal nugatory.
10. On costs, it was submitted that the award of costs is discretionary and costs should be granted to the applicant.
11. The 1st respondent's counsel identified and addressed the following issues:
 - a. Whether the appellant has *locus standi* to make the application;
 - b. Whether the court has jurisdiction to entertain the application;
 - c. Whether the application of the provisions of **order 42 rule 6(1) CPR**
 - d. Whether the application is merited?

12. Counsel submitted that the appellant lacks *locus standi* and relied on the case of **Mombasa Bricks and Titus Limited Versus Avid Shah and Others 2018 eKLR** to the effect that only parties to suit may appeal. Counsel also relied on **Attorney General Versus David Ndi & Others, Supreme Court Petition 12 Of 2021 Kariuki Versus Kariuki 1983 eKLR 225** and **Rhoda Wairimu Karanja and Another Versus Mary Wangui Karanja and Another 2014 eKLR**. It is stated that unless a person first obtains leave to appeal, an appeal is incompetent.
13. Counsel also submitted that the appeal was struck out for want of leave and that in the absence of such leave, this court lacks jurisdiction to entertain this application. Counsel cited the case **Nyutu Agrovat Limited Versus Airtel Network Kenya Limited and Another 2019 eKLR** among others; he submitted that the court not have an appeal before it for consideration, which means that this court cannot issue orders on the same as it lacks jurisdiction to do so.
14. As to whether the application offends the provisions of **Order 42 Rule 6(1) CPR**, it was stated that the application as framed and the orders sought offend those provisions and this court therefore lacks jurisdiction.
15. Regarding the fourth issue, citing **Kenya Shell Versus Benjamin Karuga Kibiru and Another 1986 KLR** among other cases, it was indicated that the application is not merited because the appellant has not demonstrated that it has an arguable appeal with chances of

succeeding or that it has adduced any evidence of substantial loss they shall incur.

16. The second respondent's counsel identified and addressed the following issues:

- a. **Whether this court has jurisdiction to grant the stay of execution in respect of orders not forming the subject of the intended appeal;**
- b. **Whether the applicant has met the legal threshold for grant of stay pending appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules 2010;**
- c. **Whether the application is otherwise merited in law and equity.**

17. On the first issue, counsel, citing **Stanley Ngera Versus Sarah Kaburo Mbui & Another- High Court Civil Appeal Number 140 Of 2010 eKLR** submitted that the applicant's only recourse is to approach the Court of Appeal under **Rule 5(2)(b)** of its rules for relief.

18. Regarding the second issue, counsel submitted, citing the case of **Charles Kirema Ikiao Versus Hassan Mwambia Imwaine ELC Appeal Number E094 Of 2021** as cited in **Kenya Share Limited Versus Benjamin Karuga Kibiru And Another 1986 KLR 410** that a party must demonstrate through cogent evidence the substantial loss is likely to suffer if the grant of an order of stay is not granted yet the applicant has failed to identify any specific substantial loss arising directly from the ELC judgment, or offer any security for the due performance, or demonstrate that the application was filed promptly in relation to the judgment entered on 30th September 2025.

19. Regarding the last issue, it was submitted that the application is an abuse of the process of court seeking to secure a stay of orders of a subordinate court that are not under appeal which the appellant can not legally achieve in this court.

ANALYSIS AND DETERMINATION.

20. The issues arising for determination in the present application are as follows:

- a. Whether this court has jurisdiction to grant the stay of execution;**
- b. Whether the applicant has met the legal threshold for grant of stay pending appeal;**
- c. Whether the appeal will be rendered nugatory should no stay be granted;**
- d. Who is to bear the costs of the application.**

21. Regarding issue **no (a)**, this court has considered the sequence of events leading up to its judgment and the provisions of **Order 42 CPR** in a wholistic manner. It is correct as submitted by the applicant that **Order 42 Rule 6** as a whole grants the court power to preserve suit property pending appeal. I understand the respondents to be preliminarily objecting to the exercise of this court's jurisdiction on the sole basis that the prayer for stay of execution is directed at orders issued in the subordinate court and not this court. The situation that the applicant finds himself in is strange in that the appeal it filed against the subordinate court decision was struck out by this court; it is correct that no

substantive orders regarding the suit property were made in this court, this court having merely struck out the appellant's appeal.

22. It need not be gainsaid that the striking out of the appellant's appeal has left the appellant at the mercy of the 1st and 2nd respondents who could execute the orders of the subordinate court at will unless restrained. Should the appellant head back to the subordinate court and seek an injunction there on the basis that the orders sought to be executed emanated from that court? That court issued those orders on what it considered as the merits of an application before it and it is unlikely that it would issue an injunction restraining the execution of its own order.

23. The respondents are of the view that the applicant should have proceeded to the Court of Appeal to seek the injunctive ordered that it now seeks in this court. In this court's view, the respondents have attempted to hoist themselves by their own bootstraps by pegging the jurisdiction of this court to the question as to whether or not there was a proper appeal before it in the first place. They seem to think that since the appeal was struck out for want of leave, that absence of leave meant that there was never any appeal before me in the first place. In this court's view, that issue is for the Court of Appeal to determine with finality in the appeal that will be lodged before it. While there is still another higher forum in which that issue can be addressed and possibly overruled, this court should not discourse on the merits of the issue, for it would be

pre-empting the court of appeal's decision on the same. In the circumstances, it would be too presumptuous to dismiss the application before me solely on that objection.

24. Another reason for rejecting that objection is that any failure to grant the orders sought, assuming the principles for the grant of stay have been observed in the present application, coupled with the respondent's possible execution of the lower court's orders, may render the appeal before the court of appeal nugatory. This is a court of justice and is bound to jealously protect the appellant from being barred from seeking an appellate opinion on such a novel and untested objection.

25. This court has considered that the main purpose of **Order 42(1)** is to grant any court appealed from the power to issue a stay of execution. This is the court that issued the impugned order, but that order has far-reaching ramifications, however indirect. The very fact that the decision of this court opened the doors wide for the respondents to effect execution means that there has to be remedy for the situation its decision created. Normally, stay is sought in one court while an appellant urges an appeal in the court hierarchically immediately above it. If the appellant were to go to the lower court to seek stay, it would be to seek stay pending appeal in a court two levels above it, which is an unusual scenario. Since the order sought to be appealed from emanates from this court, this court is the proper court in which to seek a stay of execution. Holding that this court lacks jurisdiction to issue orders of stay in the

exigencies created by its own judgment and decree in the face of power expressly granted in Order **42 Rule 1(1)** is applying an exceedingly restrictive view of the interpretation of **Order 42 CPR** generally on the jurisdiction of this court with regard to stay of execution. It is this court's view that though the execution is in another court, the interests of justice demand that this court do apply provisions granting it power to halt all execution process as long as other conditions have been met with regard to stay. Consequently, I hold that this court has jurisdiction to hear and determine the motion and thus, to preserve the suit properties safely while an appeal is pending, this court should inquire into whether the other requirements needed for a stay order are fulfilled so that it may avail the applicant relief.

26. Regarding the second issue, it is noted that a notice of appeal has been lodged. There is thus an appeal in place for the purposes of **Order 42 Rule 6(1)**, it having been filed on 7/10/2025.
27. Regarding whether the application has been presented before this court without inordinate delay, it is noteworthy that it was filed on 16th October 2025 while the judgment was delivered on 30/9/2025. I do not find that to amount to inordinate delay.
28. As to whether the appeal may be rendered nugatory, it is clear that if the suit lands are transferred to the respondents and the appellant evicted before the appeal is determined, it may put the suit lands beyond the reach of the appellant in the event the appeal were to terminate in its

favour. Consequently, the appeal may be rendered nugatory if the stay of execution sought does not issue.

29. This court must consider the issue of security. The applicant has expressed itself at **para 14** of its supporting affidavit that it is ready to abide by any conditions that the court may issue. This court will issue the conditions it deems fit in the circumstances.

30. In the final analysis I find that the application dated **16/10/25** has merit and the same is allowed in terms of **prayer no 4**. The condition for the grant of that stay order, imposed at the instance of this court, is that the appellant shall file and serve its record of appeal, if it has not yet done so, upon the respondents within 60 days from today failure to which the orders of stay granted herein above will automatically lapse and the respondents will be at liberty to proceed to execution. The costs of the application shall abide the outcome of the appeal.

Dated, signed and delivered at Malindi on this 18th day of February 2026.

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

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

