

(d) Costs of this application be provided for.

2. The facts in support of the prayers above are contained on the Supporting Affidavit sworn by the 1st Applicant and can be summarized as follows; -
- (i) According to the Applicants, the Trial Court in the proceedings known as ELDORET CHIEF MAGISTRATES COURT ELC NO. 212 OF 2018 did pronounce its judgement on the 24.02.2022.
 - (ii) Thereafter, the Respondent herein did file an Application dated 05.09.2024 seeking to set-aside the Judgement pronounced on the 24.02.2022 in the proceedings known as ELDORET CHIEF MAGISTRATES COURT ELC NO. 212 OF 2018.
 - (iii) Upon hearing the Respondent's Application dated 05.09.2024, the Trial Court did deliver its Ruling dated 25.11.2024 allowing the same and set-aside or vacated the Judgement pronounced on the 24.02.2022.
 - (iv) the Applicants being Aggrieved by the Ruling pronounced on the 25.11.2024 regarding the Application dated 05.09.2024 did file an Application dated 15.05.2025 seeking to set-side and/or review the Ruling pronounced on the 25.11.2024.
 - (v) The Applicant's Application dated 15.05.2024 was heard on its merit and a Ruling pronounced on the 12.08.2025 dismissing the said application.
 - (vi) According to the Applicants, the Ruling pronounced on the 25.11.2024 did create a threat of the Respondent evicting them from the property known as LR.NO.CHERANGANY/CHEBORORWA/117 (hereinafter referred to as **"the suit property"**) before the intended Appeal would be heard and determined.

- (vii) The Applicants were of the view that the pending Appeal was arguable and with a high chance of success and therefore in the interest of justice, an Order of Stay should be granted forthwith.
 - (viii) Further to that, the Applicants did state that there would be no prejudice occasioned to the Respondent if the Order of Stay sought would be granted.
 - (ix) Lastly, the Applicants did indicate that they were willing and ready to comply with any direction and/or orders relating to security of costs as a condition to granting the Order of Stay sought herein.
3. The present Application was duly served on the Respondent.
 4. The Respondent did oppose the present Application by filing a Replying Affidavit dated 16.09.2025.
 5. In the Replying Affidavit dated 16.09.2025, the Respondent did oppose the present Application on the following grounds; -
 - (i) According to the Respondent, the present Application was deemed to lack merit, frivolous, did not disclose any reasonable cause of action, was an abuse of court process, was fatally defective thus it ought to be dismissed forthwith.
 - (ii) The Respondent did state that the Applicants herein had filed a similar Application dated 20.01.2025 before the Trial Court seeking for Orders of Stay of Execution which was dismissed through a Ruling pronounced on 14.04.2025.
 - (iii) On the 15.05.2025, the Applicants again made a second Application dated 15.05.2025 before the Trial Court seeking a Review and Stay Orders which Application was dismissed by the Ruling pronounced on the 12.08.2025.

- (iv) In essence therefore, the Respondent did plead that the present Application was Res Judicata.
- (v) Lastly, the Respondent did plead and submit that the Applicants herein did not demonstrate any form of loss and/or injury that they stand to suffer if the Orders sought in the present Application would not be issued.
6. The Replying Affidavit was duly served on the Applicants but they did not file any Further or Supplementary Affidavit to rebut the issues raised by the Respondent.
7. The Court then did direct that the present Application would be canvassed by way of written submissions.
8. In compliance, the Applicants did file their submissions dated 27.11.2025 while the Respondent did file her submissions on the 25.11.2025.
9. The Court has carefully perused the present Application, the Response thereof and the submissions by both parties and identifies the issues for determination as follows; -

ISSUE NO. 1 - WHETHER THE PRESENT APPLICATION IS RES JUDICATA OR NOT?

ISSUE NO. 2 - WHETHER THE APPLICANTS HAVE SATISFIED THE PRINCIPLES OF GRANTING AN ORDER OF STAY PENDING APPEAL OR NOT?

ISSUE NO. 3 - WHETHER THE APPLICATION IS MERITED OR NOT?

ISSUE NO. 4 - WHO BEARS THE COSTS OF THIS APPLICATION?

10. The Court having identified the above issues for determination will now be discussed hereinbelow.

ISSUE NO. 1 - WHETHER THE PRESENT APPLICATION IS RES JUDICATA OR NOT?

11. The first issue for determination is whether the present Application is Res Judicata to any previous Applications or not.
12. The reason why this is the first issue is that it goes to the jurisdiction of this Court to either consider the present Application or not.
13. According to the Respondent, the Applicants herein had filed an Application dated 20.01.2024.
14. In the Applicants Application dated 20.01.2024, they sought for Orders of Stay of Execution of the Ruling pronounced on the 24.11.2025 and all other consequential Orders thereof.
15. The Application dated 20.01.2024 by the Applicants was subsequently dismissed through a Ruling pronounced on the 14.04.2025.
16. Once again, on the 15.05.2025, the Applicants did file a second Application seeking Orders of Stay of the Trial Court proceedings and Review and/or setting aside of the Ruling pronounced on the 25.11.2024.
17. The Application dated 15.05.2025 was heard on merit and dismissed through a Ruling pronounced on the 12.08.2025.
18. As such, the Respondent was of the considered view that the present Application was Res Judicata the previous Applications dated 20.01.2024 and 15.05.2025.
19. The issues of Res Judicata is provided in Section 7 of the Civil Procedure Act, Cap 21 which states as follows; -

“ No court shall try any suit or issue in which the matter directly and substantially in issue had been directly and substantially in issue in a former suit between the same parties, or between parties under

whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such a Court.”

20. The Court’s interpretation of the above proviso is that in evaluating if an issue is Res Judicata, the Court needs to look at the four ingredients which are as follows; -
- i) Whether or not the parties in the previous matter and the subsequent matter are the same.
 - ii) Whether or not the issues and/or subject matter in the previous matter and the subsequent matter are substantively the same or are in fact the same.
 - iii) Whether or not the previous matter were handled by a Court of competent jurisdiction.
 - iv) Whether or not the issues between the parties in the previous matter were heard and determined on merit.
21. Having established the four cardinal ingredients of Res Judicata, the Court will now apply the same to the previous Applications dated 20.01.2025 and 15.05.2025 as against the present Application herein.
22. The first Application for consideration is the one dated 20.01.2024 made before the Trial Court.
23. In this Application dated 20.01.2025 made before the Trial Court, the parties therein are the same as those in the present Application.

24. The issue for determination for a Stay of Execution of the Ruling pronounced on the 24.11.2024 pending the hearing and determination of an Intended Appeal.
25. The Application dated 20.01.2025 was indeed filed before the Trial Court which had made the Ruling being sought to be set-aside on the 24.11.2024 hence had the jurisdiction to entertain the same.
26. Lastly, the Application dated 20.01.2025 was indeed heard and determined in a Ruling pronounced on the 14.04.2025.
27. As regards the previous Application dated 15.05.2025, the parties therein were the same as those in the present Application.
28. The issues for determination was whether or not the Trial Court could review the Orders pronounced on the 25.11.2024 and instead reinstate the Judgement that had been pronounced on the 24.02.2022.
29. In addition to the above-mentioned Order, the Applicants thereof were seeking for an Order of Stay of the Trial Court proceedings pending the hearing and determination of the Succession proceeding known as ELDORET SUCCESSION CASE NO. 143 OF 2010.
30. The Application dated 15.05.2025 was made before the Trial Court that had pronounced both the Ruling dated 25.11.2024 as well as the Judgement dated 24.02.2024.
31. In the present Application, the parties herein are the same as through in the previous two applications.
32. The issue in the present Application is whether or not the Applicants are entitled to an Order of Stay of Execution of the

Ruling pronounced on the 12.08.2025 and the proceedings before the Trial Court.

33. The Ruling pronounced on the 12.08.2025 was relating to the Application dated 15.05.2025.
34. The Application dated 15.05.2025 had been filed before the Trial Court and therefore had jurisdiction to hear the same.
35. Looking at the above facts, this Court does not see the similarity of the two previous Applications and the one before the Court.
36. In the Application dated 20.01.2025, the Applicants herein were seeking for a Stay of the Ruling pronounced on the 24.11.2024 pending an Intended Appeal thereof which Ruling is different from the one pronounced on the 12.08.2025 which is what the Applicants intend to Appeal before this Court.
37. In the Application dated 15.05.2025, the Applicants were seeking to review and set-aside the Ruling pronounced on the 24.11.2024 and a Stay of the Trial Court proceedings pending the hearing and determination of the Succession Case No. 143 of 2010.
38. In the previous Application dated 15.05.2025, the Applicants were not seeking for a Stay of Execution of the Ruling dated 24.11.2024 for purposes of filing an Appeal to this Court as is in the present Application.
39. In essence, this Court is of the considered view and finding that the previous two Applications dated 20.01.2025 and 15.05.2025 were not dealing with the same issue(s) as that contained in the present Application and therefore the Respondent's claim of Res Judicata is not merited.

ISSUE NO. 2 - WHETHER THE APPLICANTS HAVE SATISFIED THE PRINCIPLES OF GRANTING

AN ORDER OF STAY PENDING APPEAL OR NOT?

40. The second issue for determination is whether or not the Applicants are entitled to any Orders of Stay of Execution pending the hearing and determination of the intended Appeal before this Court.
41. An Order of Stay Pending Appeal is premised on the provisions of Order 40 Rule 6 of the Civil Procedure Rules, 2010.
42. The two main objectives that guide a Court of law in the issuance of an Order of Stay ending Appeal are basically to ensure that no substantial loss is occasioned to the intended Appellant during the hearing and determination of the Appeal and secondly that the Intended Appeal is not rendered nugatory.
43. Turning to the Memorandum of Appeal dated 19.08.2025, the Applicants are seeking to Appeal against the Ruling pronounced on the 12.08.2025 in the Trial Court proceedings.
44. The Ruling pronounced on the 12.08.2025 before the Trial Court is annexed in the present Application.
45. The outcome contained in the Ruling pronounced on the 12.08.2025 before the Trial Court was a dismissal order of the Application dated 15.05.2025.
46. In essence, the Ruling pronounced on the 12.08.2025 did give a negative order in determination of the Application dated 15.05.2025.
47. In the case of **KENYA COMMERCIAL BANK LIMITED- VERSUS- TAMARIND MEADOWS LIMITED & 7 OTHERS (2016) eKLR**, the Court did state as follows;

“16. In Kanwal Sarjit Singh Dhiman vs Keshavji Jivraj Shah (2008) eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

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

17. The same reasoning was applied in the case of Raymond M Omboga v Austine Pyan Maranga (supra), that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay.

Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an

order...The applicant seeks to appeal against the order dismissing his application.

This is not an order capable of being stayed because there is nothing that the applicant has lost.

The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise...”

48. Based on the above authorities, it is clear that where a Court pronounces a negative Order, such an Order cannot be stayed.
49. Consequently, this Court is of the considered view and finding that the Orders issued in the Ruling pronounced on the 12.08.2025 as regards the Application dated 15.05.2025 are incapable of being stayed as sought by the Applicants in the present Application.

ISSUE NO. 3 - WHETHER THE APPLICATION IS MERITED OR NOT?

50. Based on the finding in Issue No.2 hereinabove, this Court is of the view and finding that the present Application is not merited.

ISSUE NO. 4 - WHO BEARS THE COSTS OF THIS APPLICATION?

51. On costs, the Applicants having failed to succeed in the present Application are condemned to pay the same to the Respondent.

CONCLUSION

52. In conclusion, the Court hereby makes the following Orders in relation to the present Application; -

A. THE NOTICE OF MOTION APPLICATION DATED 19TH AUGUST, 2025 LACKS MERIT AND IS HEREBY DISMISSED.

B. THE APPELLANTS SHALL BEAR THE COSTS OF THE PRESENT APPLICATION.

DATED, SIGNED and DELIVERED in ELDORET this 12TH DAY OF FEBRUARY, 2026.

**EMMANUEL.M. WASHE
JUDGE**

IN THE PRESENCE OF:

Court Assistant: Brian

Counsel for the Applicants: Ms. Cherop

Counsel for the Respondent: Mr. Rotich