

**IN THE COURT OF APPEAL
AT NYERI**

(CORAM: KANTAI, LESIIT & ALI-ARONI,

JJ.A.) CIVIL APPLICATION NO. E032 OF

2025 BETWEEN

**THE CHIEF OF THE KENYA
DEFENCE FORCES.....1ST APPLICANT**

**THE CABINET SECRETARY
MINISTRY OF DEFENCE.....2ND APPLICANT**

AND

LERUK MURUSI 1ST

RESPONDENT LECHEKU ARIGELE

2ND RESPONDENT HON. LEADO STEPHEN LTERIOS

..... 3RD RESPONDENT LTETIAN LERUPES

..... 4TH RESPONDENT

JIMMY LENEPE 5TH

RESPONDENT JAMES MARLENI

6TH RESPONDENT LPIRIKON NEEPE.....7TH

RESPONDENT

PATRICK KURAKI 8TH

RESPONDENT SAMUEL LOIBARBAN.....9TH

RESPONDENT

FRANCIS LEADUMA 10TH

RESPONDENT HON. DANIEL BURCHA.....11TH

RESPONDENT

HON. ASUNTA 12TH

RESPONDENT LENJODODO MAIDAT LOLBALANGA

13TH RESPONDENT

LETEYON NURE 14TH

RESPONDENT HON. LEADO STEPHEN

15TH RESPONDENT IMARIATON LOIBALANGA

.... 16TH RESPONDENT

**STEPHEN LESOROH GAMBARE 17TH
RESPONDENT**
STEVEN TIMBOR 18TH
**RESPONDENT THE RENDILLE PROFESSIONAL
ASSOCIATION 19TH**
RESPONDENT

*(Being an application for stay of the Judgment of the Environment
and Land Court at Isiolo (P.M Njoroge, C.M Yano, C.K. Nzili, J.)
delivered on 19th July 2024*

in

***ELC Petition No. 007 of
2021)***

RULING OF THE COURT

1. Before the Court is an application by way of a notice of motion dated 17th March 2025, brought under **rules 5(2)(b), 41, 43, 44, 45 and 47** of the Court of Appeal Rules (the Court's Rules), **sections 3, 3A & 3B** of the Appellate Jurisdiction Act, and **Article 50** of the Constitution, seeking a stay of execution.
2. The application is based on the grounds on the face of the application and the supporting affidavit of **Patrick Mariru**, the Principal Secretary of the 2nd applicant. It is stated that, on 19th July 2024, the High Court delivered a judgment with which the applicants are dissatisfied; a notice of appeal was duly filed and typed proceedings requested for to enable the lodging of an appeal; in the meanwhile the applicants await the issuance of typed proceedings, and are concerned that

the respondent may extract the decree and execute it to their detriment; the intended appeal is meritorious, as it raises substantial issues of

law with a high likelihood of success; unless the orders sought are granted, the intended appeal could become moot and prejudicial to the applicants; the respondents would not suffer any irremediable harm that could not be compensated by damages if the application is allowed; it is in the interest of justice and fairness, therefore, that the application be allowed pending the hearing and determination of the intended appeal.

3. The 1st respondent has filed a replying affidavit sworn on 29th May 2025, with the authority of the 2nd to 8th respondents, in which he avers that the application is an afterthought; misconceived, incompetent, fatally defective and an abuse of court process and lacks basis since no appeal has been filed; the application has not been filed timeously as it was filed 9 months after delivery of the judgment; the applicants do not deserve the court's discretion to be exercised in their favour; the draft memorandum of appeal does not present any arguable grounds and is merely an academic exercise; the primary issue raised in the draft memorandum of appeal is whether the suit property constitutes public or unregistered community land, which argument is baseless since the applicants, in an annexure to their replying affidavit in the petition, admitted in a public participation report that the suit property is community land; thus, they cannot contradict their own pleadings at the appeal stage; the applicants forcefully and illegally occupied the suit property immediately upon being served with the petition; they are deemed to have created their own misfortune by

unlawfully entering the suit property and

cannot seek the Court's intervention for such an illegality; the applicants have failed to demonstrate how the intended appeal would become rendered nugatory if the orders are not granted; they have an alternative parcel of land that was allocated to them by the community in 2013, known as MATALAMA, as evidenced by the public participation report; they will therefore, not suffer any prejudice, as they have an alternative site to establish their training camp and security infrastructure; no permanent structures have been built on the suit property, as confirmed by the Deputy Registrar's site visit report; given the existence of an alternative piece of land provided by the community, the issue of public interest is rendered irrelevant.

4. **Stephen Gambare**, the 17th respondent, and a member of the 19th respondent has filed a replying affidavit sworn on 3rd April 2025, with the 9th to 17th respondents' authority. He contends that not all parties from the trial court proceedings have been included in this appeal, rendering the application incompetent; the appeal has not been filed to date, hence the application is un-anchored and void; the time for filing the appeal expired on 20th September 2024, considering that judgment was entered on 19th July 2024; the draft memorandum of appeal does not show any arguable ground; or how the appeal would be rendered nugatory if the orders are not granted; on the other hand the respondents will suffer irreparable prejudice if the stay is granted.

5. Learned counsel for the applicants has filed submissions, a list of authorities, and a case digest, all dated 27th March 2025, and submits that the only issue for determination is whether to grant a stay. On arguability of the appeal, counsel submits that the intended appeal raises serious arguable issues and in supporting his arguments he relies on **Attorney General & Another vs. Nafula & 5 Others [2021] KECA 647 (KLR)**, where the court held that an applicant must show they have a bona fide point of law or fact that calls for a response from the other side, and that the issue need not necessarily succeed upon a full hearing. In **Ngatuny & 2 Others vs. Mosoiko & 2 Others [2024] KECA 1656 (KLR)**, the court stated that an arguable appeal is defined as one which is not frivolous and "ought to be argued fully before the Court," not necessarily one with a high probability of success. Counsel asserts that the intended appeal, as evidenced by the draft memorandum of appeal, raises a number of grounds that meet the arguability test. He asserts that the grounds raised include that the trial court erred by assuming the question before the court was compulsory acquisition of land procedures, whereas the main question was whether the suit property is public or community land; and by applying the wrong principles, or none at all, in awarding the respondents an excessive sum of Kshs. 30,000,000 as damages for violation of their right on community land, when it had not been proved, given that the property is public land.

6. On the nugatory aspect, counsel submits that without the stay orders, the intended appeal will be rendered nugatory, making the whole exercise an academic one. In support of this assertion counsel has cited **Attorney General & Another vs. Nafula & 5 Others: Attorney General (Interested Party) [2021] KECA 647 (KLR)**, where the court held that if stay is not granted and the appeal is successful, the success would be a pyrrhic victory because of an apprehended loss of a great or irreversible kind having occurred in the intervening period.
7. Counsel further submits that the applicants are apprehensive that the execution of the High Court orders would be detrimental to the defence and security of the country, as their military base is on the suit property and is primarily for defence posturing. He adds that the execution would require the Ministry of Defence to vacate the suit property and demolish or remove the structures therein within one year from the judgment date. This loss is not compensable to the interest of citizens and is irreversible. Counsel also argues that the judgment is prejudicial to their right to a fair hearing under **Article 50** of the Constitution.
8. On whether the matter is of public interest, counsel submits that defence is a public good as enshrined under **Article 238** of the Constitution and that it is in the public interest that the primary mandate of the Kenya Defence Forces (KDF) as per **Article 241(3)(a)** of the Constitution is implemented continuously, notwithstanding any land acquisition

challenges.

Counsel further submits that the High Court orders, if executed, would negate the efforts of ensuring the defence and territorial integrity of Kenya by establishing a base at the suit property. He urges the Court to grant the orders to safeguard the functionality of national defence, which is a public interest. In this regard, counsel cited the Supreme Court case of **Gitarau Peter Munya vs. Dickson Mwenda Kithinji, Independent Electoral Commission & Fredrick Njeru Kamundi, County Returning Officer, Meru [2014] KESC 49 (KLR)**, submitting that the Court ought to consider public interest in applications under **rule 5(2) (b)** of the Court Rules.

9. In his further submissions dated 6th May, 2025, the applicant's counsel, in answering the issue on the time of lodging the substantive appeal and the alleged inordinate delay, states that the delay in filing the substantive appeal is not intentional but was due to the court's delay in furnishing the typed proceedings and is not within its control. He explains that the notice of appeal was lodged on 22nd July 2024 and served on all affected parties on time. A letter bespeaking typed copies of the proceedings was also sent on the same date. Counsel argues that in determining if a delay is inordinate, the court must consider all surrounding circumstances, including the reason for the delay. In support, he cited **Leo Mutiso vs. Hellen Wangari Mwangi [1999] 2EA 231**, where this Court held that in deciding whether to grant an extension of time, the Court considers the length of delay, the reason for the delay, the chances of the appeal

succeeding and the degree of prejudice to

the respondent if the application is granted. Counsel also relies on **Fakir Mohamed vs. Joseph Mugambi & 2 Others and Richard Nchapi Leiyagu vs. IEBC & 2 Others, Civil Appeal No. 18 of 2013.**

10. Further counsel submits that there has been no demonstration of any prejudice likely to be suffered by the respondents that is not capable of being compensated. Counsel cites in support, **Touring Cars (K) Ltd & Anor vs. Ashok Kumar N. Mankanji Civil Application No. 78 of 1998,** and contends further that the applicants will suffer irreparable damage if the orders sought are not granted, as the strategic deployment of the Kenya Defence Forces (KDF) through the establishment of the base at the suit property is key to creating a strong foothold in the Northern frontier of the country. To support this contention, counsel relies on **Pius Kipchirchir Kogo vs. Frank Kimeli Tenai [2018] eKLR,** where the Court defined irreparable injury as one that cannot be adequately compensated for in damages and that the existence of a prima facie case itself is sufficient.
11. Learned counsel for the 1st to 8th respondents filed submissions dated 29th May 2025. On the issue of whether or not the appeal is arguable, counsel submits that the draft memorandum of appeal does not raise arguable issues; it is frivolous and merely an academic exercise because the crux of the appeal is whether or not the suit property is public land or unregistered community land. Counsel submits that all the other grounds of appeal raised are dependent on this

ground. He asserts that

the applicants in their own pleadings admitted that the suit property is community land, specifically in the public participation report. In that report, at paragraph 17, the applicants admitted that land in Marsabit County is communally owned, held in trust by the County Government, and dealt with accordingly.

12. Counsel argues that it is trite law that a party is bound by their pleadings and cannot deviate from them at the appeal stage. He submits further that the public participation report was signed by the applicant's representative, the Attorney General, and the Governor of Marsabit County, and thus it binds the applicants herein insofar as its content is concerned. Having admitted in the said report that the suit property is indeed community land, he submits that the applicants are estopped from asserting that it is public land.
13. On the issue of whether or not the appeal will be rendered nugatory, counsel relies on **Reliance Bank Ltd vs. Norlake Investments Limited [2002] 1 EA 227**, wherein this Court held that in determining the second limb of the test, a court is bound to consider the conflicting claims of both sides.
14. Counsel further submits that the applicants have failed to sufficiently demonstrate that the appeal will be rendered nugatory; merely stating in the application and supporting affidavit is not enough, but reasons must be adduced. He further argues that the applicants are the authors of their own misfortune as they forcibly and unlawfully entered

upon the

suit property and immediately constructed temporary structures therein after the petition was filed, despite status quo orders having been issued.

15. Further counsel contends that by seeking orders of stay, which essentially means they continue to occupy the land despite the orders of the court in the judgment that they should vacate the suit property within one year of delivery of the judgment, the applicants are asking this Court to sanction an illegality, and which this Court ought not to allow. Further, he states that the scene visit report prepared by the Deputy Registrar is very clear that the structures on the land are temporary and that the area occupied is 625 acres. No prejudice will be caused to the applicants if the temporary structures are removed in line with the court judgment.
16. Counsel also submits that the suit property is already at an advanced stage of being registered as community land, which is an exercise that cannot be reversed and buttresses the point that the suit property is indeed community land and not public land. Further, he submits that the applicants have an alternative piece of land given to them by the community in 2013 at a place known as MATALAMA, where they can construct the training camp and set up security infrastructure. He urges that, in balancing the interests of the applicants and the respondents, the respondents are likely to suffer more if the orders of stay are granted.

17. Learned counsel for the 9th to 19th respondents filed submissions dated 11th April 2025. On whether there is a competent appeal, counsel argues that the application is not properly anchored because a competent appeal does not exist. The time to lodge an appeal expired around 20th September 2024, and no appeal has been filed to date, approximately 9 months later. In support, counsel relies on ***Kuko & Another vs. Ali & Another, Civil Application No. E023 of 2023 KECA 305 (KLR)***, where this Court held that the law aids the vigilant, not the indolent and in that case found the explanation lacked in quality of persuasion and held that an application for stay does not require typed proceedings to be filed.
18. On whether there is a competent appeal before the Court, counsel submits that the instant application for stay was filed after an inordinate delay of 270 days, after the judgment, and all the necessary parties involved in the High Court have not been enjoined.
19. On whether there is an arguable appeal, counsel submits that the applicants must demonstrate an arguable appeal, and none has been established, noting the absence of a draft memorandum of appeal. According to counsel, the questions that would arise in an intended appeal in this instance are: whether the land is community land or public land; and whether it was properly acquired by the applicants. The respondents contend the applicants have no chance of success on appeal because the suit property is

community land, as

admitted by the appellants, the National Land Commission (NLC), and the Ministry of Lands, but the appellants failed to follow the lawful procedure for acquiring community land and erroneously acquired it as public land; no Environment Impact Assessment (EIA) was conducted, including public participation and certification, before the takeover and works; the NLC and the National Assembly were not involved as required by law; and there was no competent public participation at all levels.

20. On whether there shall be irreparable harm caused, counsel argues that the applicants have failed to show that the appeal is likely to be rendered nugatory if a stay is not granted. Counsel argues that the appeal will not be rendered nugatory and that the applicants will not suffer irreparable harm, as the land parcel remains *in situ* and, if the appeal succeeds, the applicants can re-acquire and reassert possession.
21. Counsel further argues that, on the inverse, the respondents and affected wildlife will suffer irreparable harm if the stay is granted, as it would deny them access to the land:
22. Further, he states that the applicants' allegation of public interest based on their status as the Defence Forces is mala fide and egregious. Counsel argues that the applicants failed to justify acting outside the legal framework or to demonstrate an emergency warranting the suspension of due process. Counsel further states that public interest

favours the observance of the rule of Law and the protection of the Rendille and Samburu communities, the environment, and Kenya's tourism industry.

The Parliament/Senate Report found the land acquisition to be improper, which counsel submits decisively extinguishes the applicants' public-interest claim.

23. To succeed in an application under **rule 5(2)(b)** of the Court Rules, an applicant has to satisfy the twin principles that are enumerated in many decisions of this Court, namely:

(i) An applicant must demonstrate that they have an arguable appeal; and

(ii) That the intended appeal (or appeal if already filed) will be rendered nugatory if the execution of the decree, order or proceedings is not stayed.

24. In **Trust Bank Limited & Another vs. Investech Bank Ltd & 3 Others [2000] KECA 11 (KLR)**, it was held that:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles, but these principles must be considered against facts and circumstances of each case...”

25. Similarly, in **David Morton Silversein vs. Atsango Chesoni [2002] eKLR**, the Court stated that for an order of stay to issue, the applicant must first demonstrate that the

appeal or

intended appeal is arguable, that is, it is not frivolous and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory.

- 26.** The applicants have raised several grounds of appeal. Indeed, the threshold for what constitutes an arguable appeal at this stage is low, and therefore, we do not find the grounds raised in the applicants' affidavit to be idle. Regarding the sufficiency of the pleaded grounds of appeal to warrant a grant of the stay of the orders sought, this Court in **Yellow Horse Inns Ltd vs. A. A Kawir Transporters & 4 Others [2014] eKLR**, observed that an applicant need not show a multiplicity of arguable points, as one arguable point would suffice. Neither is the applicant required at this stage to show that the arguable point would succeed, as this Court held in **Kenya Commercial Bank Limited vs. Nicholas Ombija [2009] eKLR**.
- 27.** On whether the appeal will be rendered nugatory, the applicants have argued that KDF is in occupation of the disputed land and has placed structures on the same. The respondents, on the other hand, maintain that the structures are temporary and that the appellants are playing the national security and public interest card to defeat the respondents' interests in the suit property and to perpetuate an illegality.
- 28.** The structures may be temporary; however, public funds have been expended since KDF is funded from the public

coffers and the loss to the public may not be recoverable in the likelihood of a successful appeal.

29. The applicants have also raised public interest as a ground for consideration, along with the twin principles necessary in granting a stay. The Supreme Court in ***Munya vs. Kithinji & 2 Others (Application 5 of 2014) [2014] KESC 30 (KLR) (2 April 2014) (Ruling)***, in regard to public interest stated:

“9. The principles to be considered before a Court of law can grant orders of stay of execution are, that the Appellant, or intending appellant, has to satisfy the Court that:

i. the Appeal or intended appeal is arguable and not frivolous; and that

ii. unless the order of stay sought is granted, the Appeal or intended appeal, were it eventually to succeed, will have been rendered nugatory.

10. In addition to those conditions of granting an order of stay of execution, the courts ought to consider the condition whether it would be in public interest that the order of stay be granted. This was due to the dictates of the expanded scope of Bill of Rights and the Public spiritedness that ran through the Constitution of Kenya, 2010”.

30. Indeed, KDF is a public body charged with ensuring the security and integrity of our country's resources. Whether KDF adhered to legal processes, including whether the suit property is community or public land, are matters in issue for

determination on appeal. KDF is a public body funded by public resources, and the issues of national security and public

interest are concerns raised in this application. In our considered view, public interest militates in favour of granting the orders of stay pending hearing and determination of the appeal. We allow the application.

31. Costs of the application will abide by the outcome of the appeal.

Dated and delivered at Nyeri this 27th day of February, 2026.

S. ole KANTAI

.....
JUDGE OF APPEAL

J. LESIIT

.....
JUDGE OF APPEAL

ALI-ARONI

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

Signed

DEPUTY REGISTRAR