

REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT  
AT KISII  
ELCC NO. 37 OF 2015

JOYCE BOCHERE NYAMWEYA [Suing as the Legal Representative of the Estate of TABITHA MOIGE NYAMWEYA (Deceased) ] ..... PLAINTIFF

VERSUS

DORCAS MABERA [Sued as Legal Representative of the Estate of CHARLES RATEMO NYAMWEYA (Deceased)] ..... 1<sup>ST</sup> DEFENDANT

JEMIMAH KERUBO NYAMWEYA [Sued as Legal Representative of the Estate of Hon. James Nyamweya (Deceased)] ..... 2<sup>ND</sup> DEFENDANT

PAUL NYAMWEYA ..... 3<sup>RD</sup> DEFENDANT

JAMESPARK HOLDINGS LIMITED ..... 4<sup>TH</sup> DEFENDANT

GEORGE OMARI NYAMWEYA ..... 5<sup>TH</sup> DEFENDANT

JAMES OGENDI NYAMWEYA ..... 6<sup>TH</sup> DEFENDANT

CHRISTOPHER NYAMBANE NYAMWEYA..... 7<sup>TH</sup> DEFENDANT

MOIGE GARDENS LIMITED ..... 8<sup>TH</sup> DEFENDANT

TANYA HOLDINGS LIMITED ..... 9<sup>TH</sup> DEFENDANT

HOTEL PHOENIX LIMITED ..... 10<sup>TH</sup> DEFENDANT

RULING

(On application dated 22 July 2025 for stay of execution pending appeal)

1. What is before me is an application dated 22 July 2025 filed by the unsuccessful plaintiff. It is an application for stay of execution pending appeal. Specifically, the applicant seeks orders that pending the hearing and determination of her intended appeal to the Court of Appeal, “*the Defendants be restrained by themselves, their agents and/or servants from further alienating, further sub-dividing, selling, further mortgaging, further charging or dealing in whatsoever manner with the suit properties herein as listed in paragraph 37 of this court's judgment delivered on 3rd July, 2025,*

*pending the lodging, hearing and determination of the Applicant's intended appeal from the said judgment.”*

2. Paragraph 37 of the judgment of 3 July 2025 copied the orders that the applicant had sought in the plaint and that paragraph is as follows :

*37. In the plaint, she (plaintiff) seeks the following orders :*

- i. A declaration that the purported transfers of;*
  - a. LR No. Nyaribari Chache/B/B/Boburia/2351 in Kisii Town to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in 2009,*
  - b. Kisii Town/Block III/156 to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in 2009,*
  - c. Matutu Settlement Scheme/B/B/Boboburia/2351 in Kisii town to the 4<sup>th</sup> Defendants,*

*are null and void to the extent that they include Mama Tabitha Moige Nyamweya's Estate to which they are not entitled*

- ii. A declaration that the 3<sup>rd</sup>, 6<sup>th</sup>, and 7<sup>th</sup> Defendants hold Matutu Settlement Scheme/369, Matutu Settlement Scheme/366, Matutu Settlement Scheme/367, Matutu Settlement Scheme/368, Matutu Settlement Scheme/363, upon trust to the estates of Honourable James Nyamweya and Mama Tabitha Moige Nyamweya in equal shares;*
- iii. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants hold the following subdivisions LR No. 4388/40, upon trust for the estates of the Plaintiff's mother and the Plaintiff's father in equal shares:*

*i. LR No. 4380/2*

*ii. LR No. 4380/3*

*iii. LR No. 4380/4*

*iv. LR No. 4380/5*

*v. LR No. 4380/6*

- vi. *LR No. 4380/7*
- vii. *LR No. 4380/8*
- viii. *LR No. 4380/9*
- ix. *LR No. 4380/10*
- x. *LR No. 4380/11*
- xi. *LR No. 4380/12*
- xii. *LR No. 4380/13*
- xiii. *LR No. 4380/14*
- xiv. *LR No. 4380/15*
- xv. *LR No. 4380/16*
- xvi. *LR No. 4380/17*
- xvii. *LR No. 4380/18*

- iv. *A declaration that the 4<sup>th</sup> Defendant holds LR No. Nyaribari Chache/B/B/Boburia/2351 in Kisii Town upon trust for the estates of Honourable James Nyamweya and Mama Tabitha Moige Nyamweya;*
- v. *A declaration that the 4<sup>th</sup> Defendant holds Kisii Municipality/Block III/156 upon trust for the estates of Honourable James Nyamweya and Mama Tabitha Moige Nyamweya in equal shares;*
- vi. *A declaration that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants hold their shares in the following companies upon trust for the estates of Honourable James Nyamweya (Deceased) and Mama Tabitha Moige Nyamweya in equal shares;*
  - a. *British American Tobacco Limited – 622 shares*
  - b. *Kenya Power and Lighting Company – 309 shares*

- c. *Coopers Motor Corporation Limited – 217 shares*
  - d. *Kenya Breweries Limited -1164 shares*
  - e. *Industrial & Commercial Development Corporation – 168 shares*
  - f. *East African Breweries Limited – 1000 Shares*
  - g. *Kenya Cooperative Creameries Limited – 272 shares*
  - h. *Kulia Investments Ltd – 150 shares*
  - i. *East African Bag and Cordage Ltd – 829 shares*
  - j. *Kenya Planters Cooperative Union – 1000 shares*
  - k. *Kenya Grain Growers Cooperative Union Limited 500,000 shares*
  - l. *Kenya Farmers Association – 94 Shares*
  - m. *Pyrethrum Board of Kenya – 1000 Shares*
  - n. *Hotel Pigali Limited – 300 shares*
- vii. *An order that the 1<sup>st</sup> and 2<sup>nd</sup> defendants do account for*
- 1. *The 402 head of cattle*
  - 2. *Tractors*
  - 3. *Ploughs*
  - 4. *Other farm equipment on LR. No 4380 at the time of the death of the deceased*
  - 5. *Proceeds of sale of maize for the year 1996*
- viii. *An order that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants do transfer forthwith to the Plaintiff*
- a. *Half interest in LR No. Nyaribari Chache/B/B/Boburia/2351*

*b. A half interest in Kisii Town/Block III/156*

*c. A half of shares pleaded in paragraph (v) above*

- ix. An order that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants do account to the Plaintiff a half of the dividends received by them in respect of the shares pleaded in paragraph (vi) above*
  - x. An order that the properties referred to in paragraph (iii) above LR No. 4380 be partitioned and equal shares be transferred to the estates of Honourable James Nyamweya and Mama Tabitha Moige Nyamweya*
  - xi. An order that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants do supply to the Plaintiff accounts and inventory in respect of the estates of Hon James Nyamweya and Mama Tabith Moige Nyamweya*
  - xii. An order that the appointment of the 1<sup>st</sup> and 2<sup>nd</sup> defendants as executor and executrix be terminated forthwith*
  - xiii. A declaration that the shares in the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants are held upon trust for the estates of Hon James Nyamweya and Mama Tabith Moige Nyamweya*
  - xiv. The costs of this suit.*
3. The application is opposed by the 1<sup>st</sup> – 4<sup>th</sup> , and 6<sup>th</sup> - 7<sup>th</sup> defendants. The 1<sup>st</sup> defendant relies on a replying affidavit that she swore on 22 September 2025; the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants rely on a replying affidavit sworn by the 3<sup>rd</sup> defendant on 15 August 2025; the 6<sup>th</sup> defendant relies on a replying affidavit sworn by himself on 24 September 2025; and the 7<sup>th</sup> defendant relies on a replying affidavit that he swore on 29 September 2025. I will get to these shortly. For the moment I think it prudent that I give a little background to the suit.

4. The suit was commenced by the applicant, through a plaint, wherein she sued as administrator of the estate of her late mother Tabitha Moige Nyamweya (Tabitha). Tabitha was first wife of Hon. James Nyamweya, whereas the 2<sup>nd</sup> defendant, Jemimah Kerubo Nyamweya (Jemimah) was his second wife. Tabitha got married to Hon. Nyamweya in the 1940s or thereabouts and they had 8 children, four male and four female. The male children are Charles Ratemo Nyamweya (now deceased and represented by his wife Dorcas Mabera, the 1<sup>st</sup> defendant), George Omari Nyamweya (5<sup>th</sup> defendant), James Ogendi Nyamweya (6<sup>th</sup> defendant) and Christopher Nyambane Nyamweya (7<sup>th</sup> defendant). The female children are Joyce Bochere Nyamweya (plaintiff/applicant), Rebecaa Moraa Masese, Kenyalyn Monyenche Makone and Mary Nyaboke Kimoro (not parties to this suit). Hon. Nyamweya had one child with Jemimah, that is Paul Nyamweya, the 3<sup>rd</sup> defendant. Tabitha died on 18 July 1995 and Hon. Nyamweya died shortly thereafter on 25 September 1995. Save for one property, Sotik LR No. 7288/12 (which was in name of Tabitha and two other persons) all the other properties were registered in name of Hon. Nyamweya. The Estate of Hon. Nyamweya was distributed in the case Kisii High Court Succession Cause No.451 of 1996 and a grant was confirmed on 27 November 2001. Following that confirmation of grant, the Estate of Hon. Nyamweya was distributed. Some properties were sold whereas others were transferred to the beneficiaries of the estate.
5. In the year 2013, the applicant filed an application within the succession matter to set aside the distribution, on the basis inter alia, that some of the properties were held in trust for her late mother Tabitha, and therefore ought not to have been distributed as if they were solely owned by Hon. Nyamweya. In a ruling delivered on 17 December 2014, Sitati J, allowed her application and proceeded to revoke the confirmed grant and order fresh administration of the estate of Hon. Nyamweya. She however could not

make a determination of what belonged to Hon. Nyamweya and what belonged to Tabitha. The applicant subsequently filed this suit to have that determination made. Her contention was that the properties ought to be shared equally between the estates of Hon. Nyamweya and Tabitha, so that each estate can then be distributed differently.

6. I heard the case but I was not convinced that it had any support in law. My holding was that if at all Tabitha had a right to separate the property between herself and her husband, then she needed to exercise that right in her lifetime. I dismissed the suit with costs to the 1<sup>st</sup> – 4<sup>th</sup>, and 5<sup>th</sup> and 7<sup>th</sup> defendant. Aggrieved, the applicant filed a notice of appeal and has followed that up with this application seeking stay pending appeal.
7. In her supporting affidavit, she has averred that she is aggrieved by the judgment, and has filed a notice of appeal and has sought for proceedings. She has deposed that this court has jurisdiction under Order 40 Rule 10, Order 46 Rule 2, and Order 51 Rule 1, to make orders for preservation of the properties. She has then referred to some decided cases, which is completely unnecessary in an affidavit, for that, in my humble view, would be the purview of submissions. She has also proceeded to give reasons as to why she is aggrieved by the judgment and the arguments she wishes to make at the Court of Appeal concluding that this court's interpretation of the law was erroneous.
8. In opposing the application, the 1<sup>st</sup> defendant has deposed inter alia that the property Nyaribari Chache/B/B/Boburia/2351 and Kisii Municipality/Block III/156 was transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in 2009; that the properties Matutu Settlement Scheme/363, 366-369 were transferred to the 3<sup>rd</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants; that LR No. 4388/40 had been subdivided before the suit was filed; that they have been on the parcels of land and some have been sold to third parties; that she has been in possession and residing on the land parcel Matutu Settlement Scheme No. 4380/6; that the applicant has

failed to include properties where she has an interest as shareholder of the companies owning them i.e the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants, being Kisii Municipality/Block III/508-511. She does not see what prejudice the applicant stands to suffer as the properties have remained the same since subdivision and she does not live in them. She deposes that the balance of convenience tilts in her favour as she has been in possession for a long time and the applicant stands to suffer no loss if the application is dismissed.

9. The affidavits of the 6<sup>th</sup> and 7<sup>th</sup> defendants are more or less drawn along similar lines as the above affidavit of the 1<sup>st</sup> defendant, save that the 6<sup>th</sup> defendant has averred that he has been residing on the land parcel LR No. 4380/3 and 4, which he has sold to third parties, and the 7<sup>th</sup> defendant averred that he has been residing in the land parcel LR No. 4380/3 which he has partly sold to third parties.

10. The 3<sup>rd</sup> defendant deposed that no evidence has been adduced that they intend to dispose of the properties ; that the properties Nyaribari Chache/B/B/Boburia/2351 and Kisii Municipality/Block III/156 have been in occupation of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and not the plaintiff; that the plot Kisii Municipality/Block III/156 which is in name of the 4<sup>th</sup> defendant is charged and the rent proceeds are used to pay off the loan; that the applicant has not been in possession and stands to suffer no loss if the application is dismissed.

11. I have taken account of all the above alongside the submissions of Dr. Kamau Kuria, Senior Counsel, for the applicant, Mr. Nyachiro for the 1<sup>st</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants, and Mr. Naeku for the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants/respondents. The other defendants filed nothing towards the application.

12. What I have before me is an application for stay pending appeal and although Order 40 was cited, and also Order 51, applications for stay pending appeal are actually governed by Order 42, particularly Order 42

Rule 6. Order 40 is for interlocutory injunctions pending hearing of suits, and Order 51 is a general provision on applications. In assessing this application, I stand guided by the criteria set out in Order 42 Rule 6 (2) which provides as follows :

*2) No order for stay of execution shall be made under subrule (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.*

The above law directs the court not to make an order of stay of execution unless the court is satisfied of three things, being :

- (i) That the applicant stands to suffer substantial loss.
- (ii) That the application has been made without unreasonable delay.
- (iii) That there is provided such security for the due performance of the decree in the event that the applicant loses the appeal.

13. Although the applicant went at length to try and demonstrate that she has a good appeal, that is actually not a consideration under Order 42 Rule 6 (2), but would probably be a consideration if the application was before the Court of Appeal under Rule 5 (2) (b) of the Court of Appeal Rules. I will stick to what is prescribed in Order 42 Rule 6 (2).

14. But before I go to the principles, there are some vital matters regarding the properties sought to be stayed which are material to this application. The applicant of course seeks stay on all the properties pointed out in Paragraph 37 of the judgment which I already copied. In my judgment, I did hold that I do not have jurisdiction over the properties identified as shares and the other

movable properties. I held that this being the Environment and Land Court, jurisdiction would only be on the immovable properties. I still hold that view, and I will not dwell into properties that are not in the realms of immovable properties.

15. On the immovable properties, I narrow them down to three categories being :

- (i) Properties in Kisii being Nyaribari Chache/B/B/Boburia/2351; and Kisii Municipality Block III/156.
- (ii) Properties in Matutu Settlement Scheme i.e Matutu Settlement Scheme LR Nos. 363, 366, 367, 368, 369.
- (iii) Properties in Kitale, being LR Nos. 4380/2, 4380/3, 4380/4, 4380/5, 4380/6, 4380/7, 4380/8, 4380/9, 4380/10, 4380/11, 4380/12, 4380/13, 4380/14, 4380/15, 4380/16, 4380/17, 4380/18 (all arising from LR No. 4380).

16. It is my view that I cannot make orders on some of the above properties for reasons that third parties who are not parties to this suit have an interest in the properties. If I proceed to make any orders on them then I will be condemning these third parties unheard which will violate the principles of natural justice.

17. For the properties in Kisii, I cannot grant stay orders over the property Kisii Municipality Block III/156 for reason that this property is charged and the chargee was not a party to this suit. If I issue orders to stop any transaction over this property, that would mean affecting the rights of the chargee without first giving the chargee an opportunity to be heard. Thus, the only Kisii property that I can make orders on is Nyaribari Chache/B/B/Boburia/2351 which is registered in the name of the 4<sup>th</sup> defendant.

18. For Matutu Settlement Scheme/366, 367 and 368, from the evidence adduced in this case by the Land Registrar, Nyamira, these properties are registered in the joint names of James Ogendi Nyamweya (6<sup>th</sup> defendant) and

Rose C. Nyamweya (Rose). Rose is not a party to this suit. Again, if I issue any orders, then I will be condemning Rose unheard. Apart from the foregoing, the land parcel Matutu Settlement Scheme/368 does not exist, as it was subdivided into the parcels No. 903 and 904. These subdivisions No. 903 and 904 were not litigated in this case. For Matutu Settlement Scheme/369, that property, according to the evidence of the Land Registrar, was transferred by the 3<sup>rd</sup> defendant to Kaleji Limited. Kaleji Limited is not a party to this suit and as I have mentioned, it would be imprudent to make orders over property owned by persons who are not parties to this suit. Thus, for Matutu Settlement Scheme, the only property that I can make orders on is Matutu Settlement Scheme/No. 363 which is in name of Christopher Nyamweya, whose estate is represented by the 1<sup>st</sup> defendant.

19. Let me now turn to the Kitale properties. The original property was LR No. 4380 which was in name of Hon. James Nyamweya. Prior to his death, he had subdivided this property into various parcels. From the report of the Chief Land Registrar, the titles that were in name of Hon. James Nyamweya are LR Nos. 4380/2, 4380/3, 4380/4, 4380/6, 4380/9, 4380/10, and 4380/18. It follows that any other property not falling within these parcels cannot be subject of this ruling. But even then, the evidence as to who owns what of these properties was never very clear to me. What the Land Registrar did was to produce evidence that these properties were in the name of Hon. Nyamweya at the time of his death. As to who owns what, of these seven properties, I am unable to point at any concrete evidence. To complicate issues, I have evidence of exchanges of some portions of these properties and also sales of portions of some. In those circumstances, the risk of affecting third parties who are not parties to this case is very high and it is best not to make any orders on these properties. I am simply being careful here and exercising some abundance of caution given the lack of clarity on

their ownership. I therefore regret inability to issue orders regarding the Kitale properties.

20. Having mapped out the properties that may be subject to orders of stay, I now turn to the principles in Order 42 Rule 6. I opt to start with delay. The judgment was delivered on 3 July 2025. The application was filed on 22 July 2025. I do not think that there was any delay.

21. The next principle that I need to be satisfied on is that the applicant has demonstrated that she stands to suffer substantial loss if the application is not allowed. It is apparent that if the applicant succeeds on appeal, and the properties that this court is able to make orders on are disposed of, then the success will be pyrrhic as the properties will not be available. What I understand the applicant to be seeking is to stop any dealings over these properties, but not to affect their occupation or possession, which I observe the respondents were particularly keen in expressing their fears on. I think the applicant has demonstrated substantial loss. T

22. The last issue is security. The respondents have not stated that they will suffer any loss for not being able to deal with the properties for the duration of the appeal which would invite the order for security. Thus, save for deposit of taxed costs, I do not see any need to order for any further security.

23. From the foregoing, it can be distilled that the following are the final orders of the court :

- (i) That there is issued an order stopping the respondents from selling, charging, or otherwise entering into any registrable dealing with the properties Nyaribari Chache/B/B/Boburia/2351, and Matutu Settlement Scheme/363, until the hearing and determination of the intended appeal.
- (ii) That the above order is subject to the applicant depositing the taxed costs, if the respondents are minded to tax the same, within 90 days of taxation.

(iii) That the present status quo as to possession and use to remain until the appeal is heard and determined.

(iv) That costs of the application to abide the costs of the appeal.

24. Orders accordingly.

DATED AND DELIVERED THIS 10 DAY OF FEBRUARY 2026

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Mwenda h/b for Dr. Kamau Kuria, SC, for the applicant

Mr. Nyachiro for the 1<sup>st</sup>, 6<sup>th</sup> & 7<sup>th</sup> defendants

Mr. Naeku for the 2<sup>nd</sup>, 3<sup>rd</sup>, & 4<sup>th</sup> defendants

No appearance for the other defendants

Court Assistant – Michael Oyuko.