

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ELCL CASE NO. E010 OF 2022

**THE REGISTERED TRUSTEES OF CHILD WELFARE
SOCIETY OF KENYA-----**

PLAINTIFF

VERSUS

**THE DIOCESE OF EMBU TRUSTEES, REGISTERED -----1ST
DEFENDANT**

**THE ATTORNEY GENERAL-----2ND
DEFENDANT**

RULING

1. This ruling pertains to the Notice of Motion dated 4th September 2025 brought by the 1st Defendant/Applicant (hereinafter "the Applicant") under Order 42 Rule 6 and Order 51 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3A, and 3B of the Civil Procedure Act, and the inherent jurisdiction of the court. The Applicant seeks the following substantive orders:
 - a) A stay of proceedings in this matter pending the hearing and determination of the Applicant's intended appeal against the court's ruling dated 25th June 2025.
 - b) Costs to be in the appeal.
2. The application is premised on the grounds set out in the motion and supported by the affidavit of Rev. Fr. Eliud Thuku Wanyoike,

sworn on 4th September 2025. In summary, the Applicant contends that:

- o The appeal concerns the court's ruling dismissing the Applicant's preliminary objection on the Plaintiff's locus standi, which raises pure points of law.
 - o A Notice of Appeal was filed on 2nd July 2025, and the appeal is arguable and not frivolous.
 - o Without a stay, the appeal would be rendered nugatory as the suit would proceed to hearing, potentially mooting the appeal.
 - o The court has inherent jurisdiction to grant the stay under Order 42 Rule 6(4) of the Civil Procedure Rules and relevant authorities.
3. The Plaintiff/Respondent (hereinafter "the Respondent") opposes the application via a replying affidavit sworn by Irene Mureithi on 16th October 2025. The Respondent argues that:
- o The application is an abuse of process aimed at delaying the suit, which has been protracted for over ten years, affecting vulnerable children's rights under Articles 40 and 53 of the Constitution.
 - o This is the third interlocutory application by the Applicant, following previous dismissed preliminary objections and abandoned stay attempts.
 - o There is no automatic right of appeal from the dismissal of a preliminary objection, as it is a negative order incapable of stay or execution. Leave to appeal was not sought, rendering the Notice of Appeal incompetent.

- o The application was filed after an inordinate delay of 71 days, post pre-trial compliance.
 - o The Applicant has not demonstrated an arguable appeal or that it would be rendered nugatory. Granting the stay would infringe the Respondent's rights to access justice and a fair trial without delay.
 - o The suit involves public land for vulnerable children, and further delays violate the children's best interests under Article 53(2).
4. Both parties filed written submissions. The Applicant's submissions, dated 22nd October 2025, emphasize that the appeal is arguable under Order 43 Rule 1(1)(a) and that denial of stay would render it nugatory, citing *Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others v Kilach* [2003] KLR 249 and Order 42 Rule 6 CPR.
5. The Respondent's submissions argue that:
- o Dismissal of an application is a negative order incapable of stay, per *Raymond M. Omboga v Austine Pyan Maranga* Kisii HCCA No. 15 of 2010 (unreported) and *Kaushik Panchamatia & 3 Others v Prime Bank Limited & Another* [2020] eKLR.
 - o No automatic right of appeal exists without leave, rendering the Notice incompetent, as held in *Kensilver Services Limited v Mugambi & Another* [2024] KEHC 8733 (KLR) and *Ong'ere v Onyancha & Another* [2023] KEHC 24287 (KLR).
 - o The Applicant fails the test for stay of proceedings under *Makena v Nalwa* [2014] KEHC 13086 (KLR), including arguable appeal, nugatory effect, and balance of hardships.

- o This court lacks jurisdiction to grant stay, as the application should be before the Court of Appeal. Further, the delay and children's interests weigh against the stay.

Issues for Determination

6. Having considered the application, affidavits, submissions, and authorities cited, the key issues are:
 - a) Whether there is a right of appeal from the ruling dated 25th June 2025, and if the Notice of Appeal is competent.
 - b) Whether this court has jurisdiction to grant the stay sought.
 - c) Whether the Applicant has met the threshold for stay of proceedings pending appeal.

Analysis and Determination

7. Order 43 Rule 1 of the Civil Procedure Rules lists specific orders from which an appeal lies as of right. The dismissal of a preliminary objection on *locus standi* does not fall under this list. Such rulings are interlocutory and typically require leave of the court under Section 75 of the Civil Procedure Act and Order 43 Rule 3. As held in *Kensilver Services Limited v Mugambi & Another* [2024] KEHC 8733 (KLR), failure to seek leave renders a Notice of Appeal incompetent and liable for striking out. Similarly, in *Ong'ere v Onyancha & Another* [2023] KEHC 24287 (KLR), the court emphasized that without leave, the appellate court lacks jurisdiction.

8. The Applicant claims an automatic right under Order 43 Rule 1(1) (a), but this is misconceived, as that provision relates to orders on parties to suits, not dismissals of preliminary objections. No leave was sought or granted here, and the Notice of Appeal dated 2nd July 2025 is thus incompetent ab initio. This alone warrants dismissal of the application.
9. Even assuming competence, this court must assess its jurisdiction. Order 42 Rule 6(1) empowers the court appealed from to order a stay of proceedings for sufficient cause. However, as argued by the Respondent and supported by Halsbury's Laws of England (4th Ed., Vol. 37, pp. 330-332), stays of proceedings are stringent and should not infringe access to justice. In *Makena v Nalwa* [2014] KEHC 13086 (KLR), the court held that applications for stay pending appeal from interlocutory rulings should ideally be before the appellate court to avoid jurisdictional overreach. Nonetheless, this court retains inherent powers under Section 3A of the Civil Procedure Act, but exercises them cautiously.
10. The principles for granting stay of proceedings pending appeal mirror those for stay of execution under Order 42 Rule 6(2): (i) an arguable appeal not frivolous; (ii) the appeal would be rendered nugatory without stay; and (iii) the application is timely, with security if applicable. See *Judicial Commission of Inquiry into the Goldenberg Affair v Kilach* [2003] KLR 249. Additionally, the court balances hardships and public interest.

11. On arguability: The appeal challenges the Respondent's locus standi, conferred by Section 3 of the Trustees (Perpetual Succession) Act, Cap. 164. The ruling of 25th June 2025 upheld this statutory locus, a finding grounded in law. The Applicant has not demonstrated compelling grounds with high chances of success, as required in *Raymond M. Omboga v Austine Pyan Maranga* (supra). The appeal appears frivolous, especially given prior dismissed objections.
12. On nugatory effect: Dismissal of a preliminary objection is a negative order, incapable of execution or stay, as it merely allows proceedings to continue. Per *Kaushik Panchamatia v Prime Bank Limited* [2020] eKLR, no positive order flows from such a ruling to warrant stay. Continuing the suit does not render the appeal nugatory; if successful, the appellate court can set aside any subsequent judgment.
13. On timeliness: The application was filed 71 days after the ruling, post pre-trial compliance. This inordinate delay, unexplained, fails the "without unreasonable delay" test under Order 42 Rule 6(2)(a).
14. Balance of hardships and public interest: The suit concerns public land for vulnerable children, delayed for a decade since the National Land Commission's 2015 report and the 2019 judgment in ELC Petition No. 1 of 2018. Further delay violates Articles 40 (property rights), 53 (children's rights), and 159(2)(b) (justice without delay). The Applicant's history of multiple objections suggests dilatory tactics, infringing the Respondent's

right to fair trial. Children's best interests are paramount under Article 53(2).

15. In England, stays pending appeal are discretionary and not automatic, granted only in special circumstances where enforcement is inexpedient (CPR 83.7(4)(a)). An appeal alone does not stay proceedings, and courts weigh risks of injustice, as in *Motorola Credit Corp v Uzan* [2003] EWCA Civ 752. Similarly, in India, tribunals may stay proceedings if the appeal would be nugatory, but emphasize preventing frustration of justice (*State of Maharashtra v Ramdas Shrinivas Nayak* [1982] AIR 1249). These align with Kenyan principles, prioritizing expeditious justice over indefinite delays, especially in public interest matters.

Conclusion

16. The application fails on all fronts: the Notice of Appeal is incompetent, the appeal is not arguable, no nugatory risk exists, the delay is unreasonable, and public/children's interests outweigh the Applicant's claims. Granting stay would perpetuate injustice.

Orders

- a) The Notice of Motion dated 4th September 2025 is dismissed with costs to the Respondent.
- b) The suit shall proceed to hearing on priority basis. Parties to comply with pre-trial directions within 30 days.

**DATED, SIGNED AND DELIVERED AT EMBU THIS 5TH DAY
OF MARCH 2026.**

**HON. E.C CHERONO
ELC JUDGE**

In the presence of;

- 1. Mr. Morris Njage for the 1st Defendant/Applicant**
- 2. M/S Natocho H/B for Magee for plaintiff/Respondent**
- 3. M/S Olao appearing alongside Mr. Magee for the
plaintiff/Respondent**
- 4 Mohammed Koja C/A**