

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT GARISSA**

**ELCA NO. E009 OF 2025**

**DOLOLOMIDE IRRIGATION  
SCHEME ..... APPELLANT**

**VERSUS**

**GURAY OMAR SHEIKH HASSAN & MOHAMED ALI  
HUSSEIN (SUING AS THE CHAIRPERSON AND THE  
VICE CHAIRPERSON OF LIEN GURAY SIQLEY**

**FARM GROUP) .....  
RESPONDENT**

**RULING**

***[Notice of Motion dated 26<sup>th</sup> June 2025]***

1. The appellant moved the court through the Notice of Motion dated 26<sup>th</sup> June 2025, brought under **Article 159 of the Constitution, Sections 1A, 1B, 3A of the Civil Procedure Act, and Order 42 Rule 6 of the Civil Procedure Rules**, seeking for orders for stay of proceedings and execution of the ruling and consequential orders issued on 11<sup>th</sup> June 2025 by **Hon. J. Omwange in Garissa MCELC E004 of 2025**, namely **Guray Omar Sheikh Hassan & Mohamed Ali Hussein versus Dololomide Irrigation Scheme Management**, pending

the hearing and determination of both the present application and the intended appeal, and that costs to abide the outcome of the appeal.

The application is based on the eighteen (18) grounds on its face and the supported by the affidavit of Khalif Hassan Yussuf, Chairperson of the Applicant, sworn on the 26<sup>th</sup> June 2025.

2. He deposed inter alia that in **Garissa MCELC E004 of 2025**, the trial court delivered a ruling on 11<sup>th</sup> June 2025 (dated 10<sup>th</sup> June 2025) in which it dismissed the Applicant's Preliminary Objection dated 7<sup>th</sup> February 2025 and, at the same time, allowed the Respondents' application dated 30<sup>th</sup> January 2025.

That it is the effect of that ruling, which forms the gravamen of the present application. He states that the orders issued by the trial court have the practical consequence of restraining members of the Applicant, who are said to be in occupation of the suit land, from entering, remaining upon, or utilising the land. He emphasizes that these members have been in occupation since the 1980s and that the land constitutes their only source of livelihood. To that end, he annexes a list of members and photographic evidence said to depict the farming activities undertaken on the land.

3. He elaborates that the Applicant's members are small-scale farmers whose economic survival depends on irrigated farming carried out on the suit property. According to him, the land in question comprises approximately 326 acres and forms part of a broader socio-economic ecosystem within the Dololomide community. He asserts that the community's wellbeing is closely tied to irrigation-based agriculture supported not only by the farmers themselves but also by donors and the County Government of Garissa.
4. In that regard, he depones that the Applicant's members have received irrigation infrastructure and farming inputs through donor support. He expresses apprehension that, unless the members are permitted to continue their farming activities, those resources will remain idle and wasted, leading to financial loss that, in his view, cannot be adequately compensated by an award of damages.

The deponent further states that the Applicant is aggrieved by the ruling of the trial court and has lodged an appeal. He contends that the intended appeal raises arguable issues of law. In particular, he faults the trial court for issuing what he characterises as final orders at an interlocutory stage, effectively barring the Applicant's members from the land without, in his view, proper consideration of the Applicant's responses and written submissions.

5. He also raises a jurisdictional challenge, asserting that the suit property measures approximately 326 acres and that its value exceeds the pecuniary jurisdiction of the Chief Magistrate's Court. He contends that this issue forms a substantive ground in the appeal.

Further, he points out that directions have already been issued in the lower court matter and that the suit was slated for pre-trial conference on 2<sup>nd</sup> July 2025, thereby underscoring the imminence of further proceedings. He reiterates that unless stay is granted, the Applicant's members stand to suffer substantial loss, including eviction or continued restraint from accessing the land, disruption of farming activities, and inability to utilise irrigation infrastructure. He maintains that this would render the appeal nugatory.

Finally, he raises a further issue relating to the manner in which the Applicant, described as a self-help group, was sued, contending that the proceedings in the lower court may culminate in orders against a non-juristic entity. On that basis, he urges the Court to allow the application.

6. The application is opposed by the respondent through the replying affidavit of Guray Omar Sheikh Hassan, Chairperson of the Respondent, sworn on 3<sup>rd</sup> October 2025, inter alia deposing that the application is misconceived, devoid of merit and, an abuse of the court process, and only intended to interfere with the

Respondent's lawful ownership, use, and enjoyment of the suit property.

On the question of ownership, she asserts that the Respondents are the rightful owners of the suit land, a position she states is confirmed by a letter from the Sub-County Agricultural Officer dated 26<sup>th</sup> April 2024. She makes reference to the record of appeal where that document is said to appear.

That contrary to the Applicant's characterisation, the trial court in dismissing the Preliminary Objection, exercised its discretion within the law and issued preservative orders in the form of an interim injunction aimed at restraining interference with the suit property pending the hearing and determination of the suit.

7. She characterises the present application as part of a pattern of conduct by the Applicant intended to delay the proceedings and to improperly interfere with the discretion of the trial court.

On the issue of jurisdiction, she directly rebuts the Applicant's contention. She states that the Respondents expressly pleaded in the lower court that the value of the suit property does not exceed **Kshs.20,000,000/=**, which is within the pecuniary jurisdiction of the Chief Magistrate's Court as provided under **Section 7(1) of the Magistrates' Courts Act**. He notes that the trial

magistrate was satisfied with that pleading in the absence of any contrary evidence.

8. She emphasizes that the Applicant has not produced any valuation report, expert assessment, or documentary material to support the assertion that the land exceeds the jurisdictional limit. In her view, the jurisdictional objection remains speculative and unsubstantiated, and the burden lay on the Applicant to demonstrate otherwise.

Turning to the requirements for stay, she contends that the Applicant has failed to satisfy the conditions under **Order 42 Rule 6(2) of the Civil Procedure Rules.**

On substantial loss, she argues that the Applicant's claims are general and unparticularised. She takes the position that allegations regarding disruption of livelihood and underutilisation of farming equipment do not amount to irreparable loss, as such losses are quantifiable and compensable in damages.

9. She further asserts that the Applicant's members have no legal entitlement to remain on the land and therefore cannot claim loss arising from restraint against what he terms as continued trespass. She also raises the issue of prejudice to the Respondents. She contends that if the stay is granted and the Applicant's members are allowed back onto the land, there is a real risk of environmental

degradation, depletion of water resources, and destruction of crops or infrastructure, thereby permanently altering the character of the land. In his view, such harm would not be adequately compensable by damages. She adds that the Respondents themselves have livelihoods tied to the land, and that the injunction issued by the trial court was intended to safeguard those interests.

10. Accordingly, she contends that the balance of convenience tilts in favour of maintaining the orders of the lower court. On security, she points out that the Applicant has not offered any form of security and urges that, should the Court be inclined to grant stay, it should order security in the sum of **Kshs.3,000,000/=**. She concludes by urging the Court to dismiss the application with costs

11. Pursuant to directions issued by this Court on 29<sup>th</sup> July 2025, the application was canvassed by way of written submissions. In their written submissions dated 23<sup>rd</sup> October 2025, the learned counsel for the Applicant identified two principal issues for determination: whether the Applicant has satisfied the threshold for stay of execution pending appeal, and the issue of costs.

On the first issue, counsel submitted that the jurisdiction of the Court to grant stay of execution is discretionary but

is circumscribed by the conditions set out under **Order 42 Rule 6(2) of the Civil Procedure Rules.**

Counsel submitted that the Applicant has satisfied the requirement of substantial loss, contending that the effect of the orders issued by the trial court is to restrain the Applicant's members from accessing and cultivating the suit property. It was emphasized that the members have been in occupation since the 1980<sup>s</sup> and depend on the land for their livelihood.

12. It was further submitted that the Applicant's members have benefited from donor-funded irrigation infrastructure, which will be rendered idle and wasted if the injunction remains in force pending appeal. Counsel argued that such loss is not merely financial but goes to livelihood and cannot be adequately compensated by damages. On this limb, counsel urged the Court to adopt the principle that substantial loss refers to prejudice that would render the appeal nugatory if stay is not granted.

On delay, counsel submitted that the application was filed timeously, noting that the ruling was delivered on 11<sup>th</sup> June 2025 and the present application filed on 26<sup>th</sup> June 2025. It was argued that this period does not amount to inordinate delay in the circumstances of the case.

On security for due performance, counsel submitted that the Applicant is willing to abide by any conditions imposed

by the Court. It was contended that the requirement under **Order 42 Rule 6(2)(b)** does not necessarily require actual deposit of security at the application stage, but a demonstration of willingness to comply suffices.

On costs, counsel submitted that costs should abide the outcome of the appeal, invoking the general principle that costs follow the event.

13. In their submissions dated 22<sup>nd</sup> November 2025, the learned counsel for the Respondents identified two issues: whether the Applicant has met the threshold for stay of execution, and whether the trial court properly exercised its jurisdiction in issuing the impugned orders.

On the first issue, counsel submitted that the Applicant has failed to satisfy the mandatory conditions under **Order 42 Rule 6(2) of Civil Procedure Rules**. It was contended that no substantial loss has been demonstrated. Counsel argued that the Applicant's assertions of loss arising from disruption of farming activities and alleged loss of donor-funded infrastructure are speculative and unparticularised. It was submitted that such loss, if any, is quantifiable and compensable in damages.

14. It was further submitted that the Applicant has not provided any valuation, expert report, or documentary evidence to substantiate the alleged loss, and that bare

allegations in an affidavit are insufficient to meet the threshold required by law. Reliance was placed on the principle that substantial loss must be real, imminent, and not merely apprehended. Counsel emphasized that the Applicant's claim is founded on conjecture rather than proof.

On security, counsel submitted that the Applicant has failed to offer any security for the due performance of the decree. It was argued that this failure demonstrates lack of good faith, particularly where the Applicant seeks to maintain possession during the pendency of the appeal while offering no safeguard to the Respondents. Counsel proposed that, should the Court be inclined to grant stay, security in the sum of **Kshs.3,000,000/=** would be reasonable in the circumstances.

15. On the second issue, counsel submitted that the challenge to jurisdiction is misconceived. It was argued that the Respondents had pleaded the value of the subject matter as being within the pecuniary jurisdiction of the Chief Magistrate's Court under **Section 7(1) of the Magistrates' Courts Act**. Counsel contended that the Applicant had not discharged the burden of proving otherwise, as no valuation report or evidential basis had been placed before the Court to displace the pleaded value.

It was further submitted that the trial court properly exercised its discretion in issuing preservatory orders and that there is no basis for appellate interference with that discretion unless shown to be plainly wrong or exercised on erroneous principles. Counsel ultimately urged the Court to dismiss the application with costs, contending that it is an abuse of process intended to delay the hearing of the suit.

16. The main issues arising from the application for determination by the court are as follows:
  - a. Whether the Applicant has satisfied the conditions for grant of stay of execution under **Order 42 Rule 6 of the Civil Procedure Rules.**
  - b. Who pays the costs?
17. I have carefully considered the grounds on the notice of motion, affidavit evidence, submissions by the learned counsel and come to the following determinations:
  - a. The application is for stay of execution of the ruling and consequential orders issued on 11<sup>th</sup> June 2025 in **Garissa MCELC E004 of 2025** pending the hearing and determination of the intended appeal. The power of this Court to grant stay of execution pending appeal is discretionary but circumscribed by **Order 42 Rule 6(2) of the Civil Procedure Rules**, which requires an applicant to demonstrate:

- 1) Substantial loss may result unless stay is granted;**
- 2) The application has been made without unreasonable delay; and**
- 3) Security for the due performance of the decree has been offered.**

These requirements are conjunctive and not disjunctive. The Court is also guided by the broader principle that the purpose of stay is to preserve the subject matter of the appeal so that the appeal, if successful, is not rendered nugatory.

- b. On whether the application was made without unreasonable delay, it is a fact it was filed on 26<sup>th</sup> June 2025, which was about fifteen (15) days after the ruling sought to be stayed was delivered on 11<sup>th</sup> June 2025. The Respondent did not seriously contest this limb, save to suggest that the application is part of a delaying tactic. However, delay must be assessed objectively. A period of approximately two weeks, in the context of preparation of an appeal and interlocutory motion, cannot be said to be inordinate. No prejudice attributable to the alleged 'delay' of two weeks has been demonstrated. Accordingly, the Court is satisfied that the application was brought without unreasonable delay.

- c. The requirement of demonstration of substantial loss is the central contest in the application. The Applicant's case, as deponed in the supporting affidavit and reiterated in submissions, is that the impugned orders have the effect of restraining its members from accessing and cultivating the suit land. It is contended that:
- i. The members have been in occupation since the 1980<sup>s</sup>;
  - ii. The land is their sole source of livelihood;
  - iii. They undertake irrigation farming on approximately 326 acres;
  - iv. And that donor-funded irrigation infrastructure will lie idle and be wasted if the orders remain in force.

The Applicant further contends that such loss is not merely financial but affects livelihood and community socio-economic survival, and is therefore not adequately compensable in damages. The Respondent contests this claim on several fronts.

Firstly, it is contended that the Applicant's alleged loss is speculative, general, and unparticularised. No valuation, audit, or expert evidence has been provided to quantify the alleged harm.

Secondly, the Respondent argues that any loss arising from the injunction is compensable in damages, particularly because the Applicant's occupation is, in the Respondent's view, unlawful.

Thirdly, it is argued that the Applicant's members have no legal right to remain on the land and therefore cannot claim prejudice from being restrained from what is characterised as trespass.

Finally, the Respondent warns that lifting the injunction may expose the land to degradation, destruction of infrastructure, and irreversible environmental harm.

- d. The Court is alive to the competing narratives before it, of the Applicant's assertion of long-standing occupation, livelihood dependence, and established agricultural activity supported by irrigation infrastructure.

On the other hand, the Respondent asserts ownership, lawful protection by injunctive orders, and the absence of any legal entitlement on the part of the Applicant.

At this interlocutory stage, the Court is not called upon to determine any issue of facts or law including

ownership or legality of occupation with finality. Those issues remain for the trial court and the appeal. The narrow question before the court at this stage is whether refusal of stay will occasion loss of such a nature that the appeal, if successful, would be rendered nugatory.

e. The Respondent is correct that courts have consistently held that not every loss amounts to substantial loss. Substantial loss must be demonstrated, not merely asserted. It must go beyond ordinary inconvenience. However, the Court must also be careful not to reduce the inquiry into a purely monetary calculus where the subject matter concerns land-based occupation and livelihood activity, particularly where the facts asserted point to long-standing possession and ongoing cultivation. In the present case, the effect of the impugned orders is not merely monetary. They operate to restrain access to and use of land which is said to support ongoing agricultural activity and livelihood systems. If stay is declined and the injunction remains in force throughout the pendency of the appeal, the Applicant's members will remain excluded from the land; the ongoing cultivation activities will be interrupted, and the agricultural cycle, which is inherently seasonal, may be irretrievably disrupted.

f. While it is true that certain components of loss, such as value of inputs or crops, may be quantifiable, the Court is not persuaded that the totality of the prejudice described can be neatly or fully reduced into a monetary award, particularly in the context of alleged long-term occupation and livelihood dependence.

Equally, the Respondent's concern that lifting the injunction may result in degradation or interference with the land is not without weight. That concern, however, is properly addressed in the appeal proceedings and in the balance of convenience rather than as a basis for denying stay outright.

The Court is guided by the principle that the purpose of stay is to ensure that an appeal, if successful, is not rendered nugatory. In the circumstances of this case, the practical effect of refusing stay would be to allow the injunctive orders to operate fully throughout the appellate process, thereby effectively determining the question of occupation before the appeal is heard. Balancing the competing positions, and without making any definitive findings on the merits of either party's claim to the land, the Court is persuaded that the Applicant has demonstrated a sufficient risk of substantial loss within the meaning of **Order 42 Rule 6 of Civil Procedure Rules**.

*g.* On security for due performance of the decree, the Respondent has proposed a sum of **Kshs. 3,000,000/=** in the event stay is granted. The Applicant has not proposed a specific figure but has expressed willingness to comply with any conditions imposed by the Court. Security under **Order 42 Rule 6 of Civil Procedure Rules** is not supposed to be punitive. It is intended to balance the rights of the parties and to ensure that the Respondent is not prejudiced by the stay should the appeal fail. In the circumstances of this case, where the dispute concerns use and occupation of land rather than a liquidated decree, the Court is of the view that a deposit of **Kshs. 1,000,000/=** would suffice as security.

*h.* Under **Section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya**, costs follow the event unless where the court for good reasons orders differently. In this instance, I am of the considered view that justice would be served by an order that costs abide the outcome of the appeal.

18. Having considered the factual materials and the law as presented by both sides, the court finds the application has merit and the Applicant has met the threshold under

**Order 42 Rule 6 of the Civil Procedure Rules, and orders as follows:**

- a. That a conditional stay of execution in terms of prayer (3) of the notice of motion dated 26<sup>th</sup> June 2025 is granted pending the hearing and determination of the appeal.**
- b. That stay of proceedings in terms of prayer (5) of the notice of motion dated 26<sup>th</sup> June 2025 is granted pending the hearing and determination of the appeal.**
- c. The stay of execution order above is issued on the condition that the appellant deposits a sum of Kshs. 1,000,000/= [one million], as security for the due performance of the decree, in an interest-earning account in the joint names of parties' counsel or with the court within thirty (30) days from today, and in default the stay order to lapse automatically.**
- d. That the costs to abide the outcome of the appeal.**

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS  
30<sup>TH</sup> DAY OF APRIL 2026.**

**Kibunja**

**S. M.**

**ELC**

**JUDGE**

**In the presence of:**

Appellant - Mr. Langat

Respondent - Mr. Omar

Mohammed - Court Assistant

**Kibunja**

**S. M.**

**ELC**

**JUDGE**