

**IN THE COURT OF
APPEAL AT KISUMU**

(CORAM: ASIKE-MAKHANDIA, OMONDI &

KIMARU, JJA) CIVIL APPLICATION NO. E166 OF 2024

BETWEEN

JAMES KAYIONI KAIKAI1ST

APPLICANT BENJAMIN OLODARU KIRUTARI (Suing as
the next friend of and on behalf of

NDEGE KIPOS.....2ND

APPLICANT

AND

KORINKO NKOLIA.....1ST

RESPONDENT

BERNARD KETERE.....2ND

RESPONDENT

KETERE.....3RD JONATHAN

REGISTRAR, TRANS MARA SUB

COUNTY.....4TH LAND

RESPONDENT HON. ATTORNEY GENERAL.....

5TH RESPONDENT

DANIEL KALASINGA.....6TH

RESPONDENT JAMES OLKIYAI OLE

SERIANI.....7TH RESPONDENT

*(Being an application for Stay of execution of the impugned ruling
and subsequent orders from the Ruling of the Environment &
Land Court at Narok, (Washe, J.) dated 15th October, 2024*

in

**ELCLPET/E004 of
2024)**

*** RULING OF THE COURT**

1. The applicants moved this Court by notice of motion predicated essentially under **Rule 5(2)(b)** of the **Court of Appeal Rules** seeking to be granted, *inter alia*, the following order:

“That, pending the hearing and determination of this application and the applicants’ appeal, this Honourable Court be pleased to grant an order of stay of execution of the impugned ruling and subsequent orders by Hon. Justice Emanuel Washe Mutwana, (Judge) Environment and Land Court on the 15th October, 2024.”

2. The application is supported by the grounds stated on the face of the application. The applicants state that they were aggrieved by the trial court’s ruling which was delivered on 15th October, 2024. The said Ruling struck out the applicants’ petition with costs to the respondents. The applicants filed a notice of appeal indicating their intention to appeal against the said Ruling to this Court. Their application seeking to stay execution of the decision was dismissed by the trial court necessitating the applicants to file the present application before this Court.
3. The applicants state that their appeal has overwhelming chances of success. They will suffer great inconvenience and hardship and further their intended appeal would be rendered nugatory if the order of stay craved for in the application is not granted. The application is further supported by the annexed affidavit of **James Kayioni**

Kaikai, the 1st applicant herein. He filed a further affidavit in support of the application.

4. The application is opposed. The other respondents did not file any pleadings in opposition to the application despite being served. The 6th and 7th respondents denied the claim by the applicants to the effect that they have commenced execution process. They had not made any application before the trial court to execute the ruling and order that was made in their favour on 15th October, 2024. They stated that the order granted by the trial court was a negative order which is incapable of being stayed. They contended that the applicants had not placed sufficient reasons before this Court to enable it grant the orders craved in the application. The applicants had not given any security nor have they demonstrated that they would abide by any conditions that this Court may impose should the application be granted. The 6th and 7th respondents were of the firm view that the application lacks merit and should be disallowed.

5. The applicants and the 6th and 7th respondents both filed written submissions in support of their respective opposing positions prior to plenary hearing of the application. During plenary hearing, the 1st applicant **Mr. Kaikai** and **Mr.**

Onchwang'i learned counsel for the 6th and 7th respondents made brief oral highlights of the written submissions.

6. We have carefully considered the application, the affidavits filed and the submissions, both written and oral made by the parties to this application. As stated earlier in this Ruling, the applicants crave for the exercise by this Court of its jurisdiction under **Rule 5(2)(b)** of the **Court of Appeal Rules**. The principles to be considered by this Court in determining such an application are not a mystery. In **Trust Bank Ltd & another v. Investect Bank Ltd & 3 others [2000] KECA (KLR)**, this Court held thus:

“The jurisdiction of the Court under Rule 5(2)(b) aforesaid, 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, or put another way, it is not frivolous, and secondly, that unless he is granted stay the appeal or intended appeal, if successful, will be rendered nugatory.”

7. In this present application, the applicants seek to stay the execution of the Ruling of the trial court which struck out their petition with costs. As correctly observed by the 6th and 7th respondents, this was a negative order which, *prima facie*, is incapable of being stayed. The applicants, however,

insisted

that if the order of stay of execution is not granted, the costs which have been assessed at Kshs. 739,000/= will be executed by the respondents thus rendering their intended appeal nugatory.

8. We agree with the 6th and 7th respondents that by striking out the applicants' petition, the trial court did not make a positive order requiring anything to be done or restraining anything from being done. It was a negative order incapable of execution. Award of costs usually follow the event. It cannot form a basis for an application before this Court for order of stay of execution pending the hearing of an appeal or an intended appeal.

9. This court in **Mwanthii & 2 others -vs- Mukami [2024]**

KECA 624 (KLR) held as follows:

“As already stated, the jurisprudence of this Court on applications for stay of execution pending appeal is now settled. The position taken by this Court in respect of such applications for stay of execution of negative order is that they cannot be stayed. In other words, for an order of stay of execution to lie, the order or decree sought to be stayed must be positive in nature.”

10. It is clear from the above reasoning of the Court that

the applicants' application cannot succeed. The applicants failed to

cross the first hurdle which required them to establish that there was indeed in existence a positive order capable of being stayed by this Court.

11. The application lacks merit and is hereby dismissed with costs to the 6th and 7th respondents.

Dated and delivered at Kisumu this 24th day of April,2026.

ASIKE-MAKHANDIA

.....
JUDGE OF APPEAL

H.A. OMONDI

.....
**JUDGE OF
APPEAL**

L. KIMARU

.....
**JUDGE OF
APPEAL**

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

Signed

DEPUTY REGISTRAR.