



## REPUBLIC OF KENYA

### IN THE SUPREME COURT OF KENYA

(Coram: Koome CJ & P, Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola, & Ouko, SCJJ)

### PETITION (APPLICATION) NO. E035 OF 2025

– BETWEEN –

**KAKUZI PLC..... APPLICANT**

-AND-

**MAKUYU CLUB** (*Suing through Joel Nyoike,  
Irungu Ndirangu and S. Kirubi as trustees of the club*) ..... **RESPONDENT**

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*(Being an application for stay of execution of the judgment and decree of the Court of Appeal sitting in Nairobi (Gatembu, Lesiit & Ngenye JJ. A) delivered on 18<sup>th</sup> November 2025 in Civil Appeal No. 78 of 2020)*

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#### Representation:

Dr. Fred Ojiambo, SC for the Applicant  
(Kaplan and Stratton Advocates)

David Mukii Mereka for the Respondent  
(Mereka & Company Advocates)

### **RULING OF THE COURT**

**[1] UPON PERUSING** the applicant's Notice of Motion dated 12<sup>th</sup> August 2025 and filed in this Court on 15<sup>th</sup> August 2025 seeking stay of execution of THE

Judgment and Decree of the Court of Appeal delivered on 8<sup>th</sup> November 2024 in Civil Appeal No. 78 of 2020 as well as the Judgment and Decree of the Thika Environment and Land Court in ELC No. 115 of 2017 delivered on 18<sup>th</sup> October 2019 and costs of the application; and

**[2] UPON READING** the affidavit in support of the motion sworn by Denis Gitaka, the applicant's legal officer dated 12<sup>th</sup> August 2025 and filed in this Court on 15<sup>th</sup> August 2025 wherein the applicant avers that it is the registered owner of land parcel L.R No.11764, the suit land herein which it contends that it acquired in 1967 for agricultural use; that the respondent has been utilizing approximately 70 acres of the suit land as a golf course with its knowledge and express consent; that in 2002, the respondent filed a suit seeking a declaration that it had acquired the suit land by virtue of adverse possession having occupied the same for a period exceeding 12 years since 1934; that the Environment and Land Court (ELC) at Thika delivered a judgment dated 18<sup>th</sup> October, 2019 wherein it held that the applicant's title had been extinguished by the respondent's adverse possession thereof for a period of more than 12 years and ordered that the respondent be registered as an absolute owner of the 70 acres of the suit land; that dissatisfied by the Judgment of the ELC, the applicant filed an appeal at the Court of Appeal; that in its judgment of 8<sup>th</sup> November 2024, the Court of Appeal dismissed the applicant's appeal on grounds that time begun to run either in 1934 when the respondent set up a golf course on the suit land or in 1967 when the applicant purchased the suit property; that dissatisfied with the decision of the Court Appeal, the applicant preferred an appeal to this Court; that before filing the said appeal, the applicant sought for certification of its appeal as raising questions of general public importance; that the Court of Appeal certified its appeal as raising questions of general public importance in its ruling delivered on 4<sup>th</sup> July 2024; and that the applicant proceeded to file its appeal to this Court on 30<sup>th</sup> July 2024 and subsequently this application; and

**[3] UPON CONSIDERING** the applicant's further averments that its appeal is at risk of being rendered nugatory if stay of execution of the judgment and decree of the trial court is not granted; that it is at risk of suffering substantial financial loss, particularly loss of approximately 70 acres of its land; that the Court of Appeal granted it leave to appeal but declined the application for stay hence the application herein; that it is reasonably apprehensive that unless this Court grants stay, the respondent will proceed with execution of the trial court's decree thereby rendering its appeal an academic exercise; that the respondent is taking active steps to execute the decree and has forwarded it a draft decree for approval and has written to the Deputy Registrar of the Court of Appeal requesting for the settling terms; that the respondent has additionally filed its Bill of Costs for taxation before the ELC; that it is willing to abide by any such conditions attendant to the grant of stay as this Court may determine; that it has expeditiously filed the appeal herein upon grant of the certification application and has served the same upon the respondent as directed by this Court on 1<sup>st</sup> August 2025; and

**[4] UPON CONSIDERING** the respondent's replying affidavit sworn by Joel Wanyoike dated 27<sup>th</sup> August 2025 wherein the respondent avers that the applicant has not demonstrated how failure to grant stay will render its appeal pending before this Court nugatory; that the subject matter relates to land and therefore the same cannot be dissipated in a manner that is irreversible; that in an unlikely event the appeal succeeds and execution has taken place the suit property will still be available for restitution orders; that it has been in occupation of the suit land since 1934 to the exclusion of the applicant and as such, the applicant cannot claim that it risks to suffer substantial financial loss since no legitimate utilization by them is being interrupted; that the claim for adverse possession arises precisely because the registered owner failed, neglected or refused to assert their rights over land and therefore its claim of financial loss is an afterthought and goes contrary to the circumstances that gave rise to the respondents claim in the superior courts; that the subject land has a golf course, a Club House and other amenities and

therefore a grant of stay will greatly prejudice its use of the golf course and Club House; that the extraction of a decree, the filing of the Bill of costs and the request for settlement of terms took place prior to the filing of the present appeal and therefore the same cannot be cited as evidence of prejudice by the applicant; that the applicant has not met threshold for stay which include presenting an arguable appeal, showing that the appeal will be rendered nugatory unless stay is granted and demonstrating that it will be in the public interest that stay be granted; and

**[5] BEARING IN MIND** that the primary issue before us is whether the applicant has laid a sufficient basis to warrant the exercise of this Court's discretion to grant orders of stay of execution pending the hearing and determination of its appeal; and

**[6] WE NOW OPINE AND DETERMINE** as follows:

- i. Under Section 21 (2) of the Supreme Court Act, and Rule 3(5) of the Supreme Court Rules, this Court has inherent power to make interlocutory orders that it deems fit to make as may be necessary for the ends of justice or to prevent abuse of the process of the court.
- ii. This Court established principles for the grant of an order of stay in the case of ***Gatirau Peter Munya Vs Dickson Mwenda & 2 others***, (Application 5 of 2014) [2014] KESC 30 (KLR) where we held that an applicant must satisfy three conditions being that the appeal is arguable and not frivolous; that the appeal would be rendered nugatory if the stay orders are not granted; and that it would be in the public interest to do so.
- iii. On whether the applicant's appeal is arguable, in the case of ***Kenya Hotel Properties Limited Vs Attorney General & 5 others***; (Application 27 of 2020) [2020] KESC 6 (KLR) this Court defined what constitutes an arguable appeal as follows:

*“Arguability of an appeal would entail this Court looking at the record and the Petition of Appeal and determine, without finality but at a prima facie level, whether the appeal has substance and/or is not made of straw. It also entails interrogating its foundation and confirming that it is not built on quicksand.”*

iv. When determining whether an appeal is arguable, the Court is not called upon to interrogate the merits of the appeal but merely to see if at this stage there is a *prima facie* case to justify the grant of the order. An arguable appeal is not one which must necessarily succeed but one which ought to be argued fully before the court. The applicant has filed its appeal upon the same being certified by the Court of Appeal as raising matters of general public importance, thereby granting this Court jurisdiction under Article 163(4)(b) of the Constitution to hear and determine it. It therefore goes without saying that the applicant’s appeal is arguable and not a frivolous one.

v. On whether the appeal will be rendered nugatory if an order of stay is not granted, we observed in the ***Haki Na Sheria Initiative Vs Inspector General of Police & 2 others; Kenya National Human Rights and Equality Commission (Interested Party)***; (Petition 5 (E007) of 2021) [2021] KESC 22 (KLR) as follows:

*“On the nugatory aspect, the concern is whether what is sought to be stayed if allowed to happen is reversible; or if it is not reversible, whether damages will reasonably compensate the party aggrieved.”*

vi. The Court, in considering an application for stay, cannot ignore the impact of such an order beyond the parties to the case, should an order of stay be granted or denied. Consequently, the Court will make a

general inquiry as to where the public interest lies. The applicant has claimed that the respondent is making steps towards the execution of the judgment at ELC, which the respondent has confirmed to be true. On the other hand, the respondent submits that it has remained in occupation of the suit property, which contains a golf course, clubhouse and related amenities. Bearing in mind the nature of the competing claims of both parties over the suit property, we find it is just to preserve the *status quo* by granting an order of stay of execution pending the hearing and determination of the judgment. Therefore, in our view, the impending execution of the decision of the trial court will render the appeal nugatory should the execution be concluded before the hearing and determination of the applicant's appeal.

- vii. We are equally of the view that issuing an order of stay will not be prejudicial to the respondent, as it is still in occupation and use of the property, meaning it will not suffer any irreparable damage if the stay orders are granted.

**[7] CONSEQUENTLY**, and for the reasons aforesaid, we make the following Orders:

- i. *The Notice of Motion dated 12<sup>th</sup> August, 2025 is hereby allowed.***
- ii. *Pending the hearing and determination of the appeal, the execution of the decision of the Court of Appeal of 8<sup>th</sup> November 2024 in Civil Appeal No. 78 of 2020 and the Judgment and Decree of the Thika ELC Case No. 115 of 2017 delivered on 18<sup>th</sup> October 2019 is hereby stayed.***
- iii. *Costs of this application shall abide the outcome of the Petition.***

It is so ordered.

**DATED and DELIVERED at NAIROBI this 23<sup>rd</sup> day of January, 2026.**

.....  
**M.K. KOOME**  
**CHIEF JUSTICE & PRESIDENT OF**  
**THE SUPREME COURT OF KENYA**

.....  
**P.M. MWILU**  
**DEPUTY CHIEF JUSTICE &**  
**VICE PRESIDENT OF THE**  
**SUPREME COURT OF KENYA**

.....  
**S.C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....  
**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR**  
**SUPREME COURT OF KENYA**

