



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION (APPLICATION) NO. E023 OF 2025

—BETWEEN —

KENYA RAILWAYS CORPORATION.....PETITIONER/APPLICANT

—AND—

FATUMA KHAMIS BILAL.....1ST RESPONDENT

RASHID SADI KEMIS.....2ND RESPONDENT

KADMALA AHMED.....3RD RESPONDENT

RUKIA KHAMIS.....4TH RESPONDENT

NOOR RAJAB.....5TH RESPONDENT

MICHAEL ODHIAMBO *(on his own behalf and on behalf of 3,500 co-residents of Kibos Settlement located in Kisumu facing evictions)*6TH RESPONDENT

**THE CABINET SECRETARY FOR TRANSPORT,
INFRASTRUCTURE, HOUSING AND
URBAN DEVELOPMENT.....7TH RESPONDENT**

CABINET SECRETARY FOR LANDS.....8TH RESPONDENT

**CABINET SECRETARY MINISTRY OF INTERIOR AND
COORDINATION OF NATIONAL GOVERNMENT....9TH RESPONDENT**

THE NATIONAL LAND COMMISSION.....10TH RESPONDENT

THE COUNTY GOVERNMENT OF KISUMU.....11TH RESPONDENT

THE HON. ATTORNEY GENERAL.....12TH RESPONDENT

**LEGAL ADVICE CENTRE (TRADING AS
KITUO CHA SHERIA)13TH RESPONDENT**

KISUMU MUSLIM ASSOCIATION.....14TH RESPONDENT

**KENYA NATIONAL COMMISSION ON
HUMAN RIGHTS.....15TH RESPONDENT**

Being an application for Conservatory Orders of Stay of Execution of judgment and further proceedings pending an appeal against the Judgment and Decree of the Court of Appeal at Kisumu (Asike-Makhandia, Omondi & Kimaru, JJ. A), delivered on 21st March 2025 in Civil Appeal No. E206 of 2021

Representation:

Mr. Ouma for the Applicant
(TripleOKLaw LLP)

Mr. Mauwa for the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents
(Mauwa & Co. Associates)

Mr. Bitta for the 7th, 8th, 9th, 10th and 12th Respondents
(State Law Office)

Mr. Nyamori for the 13th Respondent
(Joshua Odhiambo Nyamori & Associates Advocates)

No appearance for the 11th and 14th Respondents

Mr. Odongo for the 15th Respondent
(Odongo Awino & Company Advocates)

RULING OF THE COURT

[1] UPON PERUSING the Notice of Motion dated 27th May 2025 and filed on 30th May 2025, brought under Rule 31(1), (2) & (6) of the Supreme Court Rules 2020, seeking *a conservatory order staying the implementation of the Judgment and decree of the Environment and Land Court at Kisumu (Ombwayo J.) delivered on the 27th day of August 2021 in Petition No. E001 of 2020 as consolidated with Petition E004 of 2021, pending the hearing and determination of this petition; a conservatory order restraining the 8th and 10th respondents either by themselves, their servants or agents from conducting any survey, processing and issuing any grants, leases and certificates of title in respect of Land Reference No. 655 Kibos Township, pending the hearing and determination of this petition; a conservatory order staying further proceedings in Kisumu Environment and Land Court Civil Suit No. E012 of 2023, pending the hearing and determination of this petition; and costs; and*

[2] UPON EXAMINING the grounds on the face of the application, the supporting affidavit sworn by *Geoffrey Wekesa* on even date, wherein it is contended that the Court of Appeal erred in: upholding the trial court's finding that colonial-era temporary occupation licences issued to the Nubian families on 30th March 1938 conferred on them enforceable property rights; failing to recognize that the suit property formed part of the Kenya–Uganda Railway Reserve lawfully vested in the applicant under Legal Notices Nos. 440/1963 and 24/1986; affirming findings that the applicant violated the 1st to 6th respondents' property, socio-economic and cultural rights; and endorsing the 1st to 6th respondents' claims of historical occupation without formal documentation, thereby setting a precedent which undermines the formal land tenure system in Kenya; the applicant also contends that: the court ignored its compliance with the eviction procedures under Section 152B of the Land Laws (Amendment) Act 2016; improperly shifted the burden of proof; failed to address all issues raised; and infringed on its rights to a fair trial, fair hearing, and fair administrative action; and

[3] UPON CONSIDERING the applicant's submissions dated 27th May 2025 and rejoinder submissions dated 18th June 2025, restating the grounds set out in the affidavits and, in addition, urging that the petition raises arguable issues, in support thereof relying on *Freedom Limited Vs Mbarak* [2024] KESC 36 (KLR), *Cabinet Secretary for the National Treasury and Planning & 4 others Vs Okoiti & 52 others* [2024] KESC 47 (KLR) and *Dina Management Limited Vs County Government of Mombasa & 5 others* [2023] KESC 30 (KLR). The applicant further contends that the interim orders sought are necessary to preserve the substratum of the appeal and prevent the petition from being rendered nugatory, and in support thereof, cites this Court's decision in *Munya Vs Kithinji & 2 others* [2014] KESC 30 (KLR) (*Munya Case*); and

[4] FURTHER CONSIDERING the applicant's contention that; preserving the suit property pending determination of the petition serves the public interest and will not prejudice the respondents; contrary to its pleaded orders, the instant application seeks stay of the judgment and decree of the Court of Appeal delivered on 21st March 2025, hence it does not controvert the principle established by the Court in *Dande & 3 others Vs Director of Public Prosecutions* [2022] KESC 23 (KLR) (*Dande Case*) and *Kwale Sugar International Co. Ltd Vs EPCO Builders Ltd* [2025] KESC 32 (KLR); and

[5] NOTING the 1st to 6th respondents' replying affidavit sworn by *Fatuma Khamis Bilal* on 11th June 2025, and their submissions dated 9th June 2025, wherein they urge that: the application does not meet the legal threshold for grant of Stay; the court does not have jurisdiction to stay proceedings before the Environment and Land Court, on the basis of this Court's decisions in *Dande* and *Kwale Sugar International Company Limited Cases [supra]*; the intended appeal is both frivolous and incompetent; the 1st to 6th respondents have been in occupation of the suit property for more than eighty years; and the

applicant has not sufficiently demonstrated any substantial loss it stands to suffer if the orders sought herein are not granted; and

[6] FURTHER NOTING the 13th respondent's Replying Affidavit sworn by *Emmanuel Wambua Kituku* on 19th June 2025 and his submissions dated 20th June 2025, to the effect that: the application does not meet the threshold for grant of conservatory orders as settled by this Court in ***Munya Case*** [supra]; the suit property was lawfully alienated in 1937 through licences issued to the Nubian community under the Crown Lands Ordinance, and that Legal Notice No. 24 of 1986, relied on by the applicant, expressly excludes previously alienated land; the applicant has never possessed the property for over 80 years; the applicant has not demonstrated the existence of a *prima facie* case or risk of irreparable harm; the Stay be declined; this Court lacks jurisdiction to stay proceedings in Kisumu ELC No. E012 of 2023; the applicant has approached the Court with unclean hands, with the intention of delaying the enforcement of lawful judgments, (citing ***Mitu-Bell Welfare Society Vs Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*** [2021] KESC 34 (KLR); in support thereof); long-term occupation of public land creates protectable interests under Article 43 of the Constitution; conservatory relief should not be used to suspend the enforcement of lawful judgments that affirm constitutional rights, absent compelling justification, as held by this Court in ***Salaries and Remuneration Commission Vs Judicial Service Commission*** [2022] KESC 25 (KLR); and

[7] APPRECIATING that the 7th to 12th, 14th and 15th respondents neither participated in, nor filed any responses or submissions to the application, despite having been duly served as evidenced by the Affidavit of Service sworn by *Kenvine O. Ouma* on 13th June 2025, and electronically filed on 16th June 2025; and

[8] CONSIDERING the facts which precipitated the dispute following the forceful eviction and demolition of homes of the 1st to 6th respondents, and the judgment of the Environment and Land Court (*Ombwayo, J.*) wherein it was held

that: the eviction of the respondents from Kibos Township Crown Land (LR No. 655) was irregular, illegal, and procedurally flawed, as it violated a court order and the due process requirements under Section 152B of the Land Laws (Amendment) Act 2016; the applicant violated the 1st to 6th respondents' rights to fair administrative action, right to life, human dignity, personal security, access to information, property protection, freedom from hunger, clean water, fair administrative action, the rights of children and the elderly; contravened national values and principles of governance, as provided for under the Constitution; and

[9] FURTHER APPRECIATING that the Court of Appeal (*Asike-Makhandia, Omondi & Kimaru, JJA*), upheld the trial court's findings in its judgment dated 21st March 2025 and noted that the statutory procedure for evictions was not followed; the respondents were not given sufficient notice; the applicant violated the 1st to 6th respondents' socio-economic and cultural rights by destroying their houses, churches and schools; and

[10] TAKING INTO ACCOUNT that the applicant seeks interlocutory relief in the nature of stay of execution and conservatory orders against the judgment and decree of the Environment and Land Court delivered on 27th August 2021 in Petition No. E001 of 2020, as consolidated with Petition No. E004 of 2021, as well as a conservatory order staying further proceedings in Kisumu Environment and Land Court Civil Suit No. E012 of 2023, pending the hearing and determination of the appeal before this Court; and

[11] COGNISANT of Article 163(4) of the Constitution and Sections 15, 15A, 15B, and 15C of the Supreme Court Act, which limit this Court's appellate jurisdiction to appeals from the Court of Appeal, as of right where such appeals involve the interpretation or application of the Constitution; appeals certified as raising matters of general public importance; and appeals arising from decisions of tribunals constituted under Article 168 of the Constitution; and

[12] **RESTATING** this Court's pronouncement in *Dande* (supra) that:

“[15]...it is fairly elementary that this Court can only grant an order of stay of a decree or order of the Court of Appeal or stay of further proceedings in the Court of Appeal but not of proceedings pending hearing in the Magistrate's Court, as sought in this application; and that reference to “any other court or tribunal as prescribed by national legislation” in article 163(3)(b)(ii) is definitely not reference to the Magistrate's Court; and that this court has, in the cases of *Cyrus Shakhhalaga Khwa Jirongo v Soy Developers Limited & 9 others, SC Application 22 of 2019; [2019] eKLR* and *Peter Ayodo Omenda & 6 others v Ethics & AntiCorruption Commission & 2 others, SC Application 31 of 2019; [2020] eKLR*, granted orders to stay the respective decisions of the Court of Appeal and not the proceedings that were pending before the Magistrate's Courts...” [Emphasis added].

[13] **HAVING CONSIDERED** the decisions of the superior courts, totality of the pleadings, affidavits, and rival arguments by the parties, **WE OPINE** as follows:

- i. This Court's jurisdiction to grant stay orders is confined to decrees or orders of the Court of Appeal, or to further proceedings before that Court, as provided under Article 163(4) (a) and (b) of the Constitution, and affirmed in the *Dande* case (supra), and does not extend to orders/decrees of or proceedings pending before the Environment and Land Court, as sought in the present application.
- ii. The application lacks merit and is for dismissal.

[14] ACCORDINGLY, we make the following orders:

- i) *The Motion dated 27th May 2025 and filed on 30th May 2025 is hereby dismissed.*
- ii) *The costs of this Application shall abide the outcome of the appeal.*

It is so ordered.

DATED and DELIVERED at NAIROBI this 30th Day of January, 2026.

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

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

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

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

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

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA