REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION (APPLICATION) NO. E002 OF 2026

-BETWEEN-

KAHIA TRANSPORTERS LIMITED ..... 1ST APPLICANT

TRADE LEAD LIMITED ..... 2ND APPLICANT

-AND-

DOPP INVESTMENTS LIMITED ..... 1ST RESPONDENT

KENYA RAILWAYS CORPORATION ..... 2ND RESPONDENT

NATIONAL LAND COMISSION ..... 3RD RESPONDENT

CHIEF LAND REGISTRAR ..... 4TH RESPONDENT

KACHUNGO EDWARD BEKWEKWE ..... 5TH RESPONDENT

CHARLES MULOLE SHANGA ..... 6TH RESPONDENT

HAMSI TSUMA MWERO ..... 7TH RESPONDENT

REDALU MBOVU MGAIDI ..... 8TH RESPONDENT

(Being application for stay of execution of the Judgment and Order of the Court of Appeal at Mombasa (Murgor, Ngenye-Macharia, & Laibuta JJ. A) delivered on the 19th December 2025 in Civil Appeal No. E045 of 2025)

Representation:

Mr. Paul Buti together with Mr. Peter Omwenga for the Applicants
(*Mogaka Omwenga & Mabeya Advocates LLP*)

Mr. Agimba for the 1st Respondent
(*Agimba & Associates Advocates*)

Mr. Billy Kongere for the 2nd Respondent
(*Muriu Mungai & Company Advocates*)

Ms. Nyakundi h/b for Mr. Osewo for the 3rd Respondent
(*National Land Commission*)

Mr. Kemei for the 4th Respondent
(*Attorney General's Chambers*)

Mr. Asige for the 5th, 6th, 7th, and 8th Respondents
(*Asige Keverenge & Anyanzwa Advocates*)

RULING OF THE COURT

[1] UPON PERUSING the Notice of Motion dated 22nd January 2026 and filed on 26th January 2026 pursuant to Articles 40, 50, 159, 163 (4) (a), and 201 of the Constitution; Sections 3, 3A, and 23 (1) (a) of the Supreme Court Act; Rules 17, 31, and 32 of the Supreme Court Rules, 2020; and all other enabling provisions of the law seeking *inter alia*: that pending the hearing and determination of the Petition of Appeal, this Court be pleased to order a stay of execution of the Judgment and Decree of the Court of Appeal at Mombasa dated 19th December 2025 including the order directing payment of Kshs.667,903,887/- and all consequential orders on interest and costs; and to restrain the respondents whether by themselves, their agents, servants, or otherwise howsoever, from enforcing, executing, or giving effect to the said Judgment and Decree; and

[2] UPON CONSIDERING the supporting affidavit sworn by Osman Ahmed Kahia, director of the 1st and 2nd applicants, and written submissions both dated 22nd January 2026 wherein it is contended that: based on the gist of the suit that was instituted by the 1st respondent seeking compensation of Kshs. 667, 903, 887/- for the compulsory acquisition of Plot No. MN/VI/1040/2 (hereinafter *the suit property*); they were joined as Interested Parties and proceeded to file defences together with a counterclaim asserting ownership of LR No. 31537; on the basis that the suit property was extinct/non-existent, that the pleaded title could not

lawfully attract compensation, and that the Standard Gauge Railway (SGR) traversed on their land in respect of which no compensation had been paid; notwithstanding this, the Environment and Land Court (ELC) entered judgment in favour of the 1st respondent, effectively substituting the suit property with LR No. 1040/2 without any formal amendment of pleadings; and on appeal, the Court of Appeal upheld the ELC judgment subject to modification of interest, holding that reference to the suit property using the prefix *"MN/VI"* constituted a clerical error curable under Section 100 of the Civil Procedure Act and Article 159 of the Constitution;

[3] NOTING the applicants' submission that the appeal is not a mere attempt to re-litigate factual disputes but is properly anchored under Article 163 (4) (a) of the Constitution. This is because the courts below misapplied constitutional and procedural principles governing pleadings, evidence, and the right to a fair hearing thereby raising constitutional import on the limits of Article 159 (2) (d), the scope of Section 100 of the Civil Procedure Act, and the right to a fair hearing under Article 50; which ultimately led to an award of compensation and interest founded on a fundamentally defective process;

[4] FURTHER NOTING, the applicants' argument that the appeal is arguable and raises substantial constitutional questions including adjudication on unpleaded matters, reliance on untested and extraneous material, and post-hoc expansion of issues to their prejudice; moreover, that payment of the decretal sum would occasion irreparable harm and render the appeal nugatory; considering that, enforcement at this stage would prejudice their rights and risk rendering constitutional claims ineffective before determination, contrary to public interest; furthermore, that execution of the judgment would not only occasion irreparable harm to them but would raise concerns regarding the prudent use of public funds under Article 201 of the Constitution. In the premises, the applicants invite this Court to exercise its discretion and grant the orders sought; and

[5] UPON CONSIDERING the replying affidavit sworn by Harshil Patel, Director of the 1st respondent, and written submissions both dated 2nd February

2026 and filed on 5th February 2026 in opposition to the application to the extent that: at the outset, the 1st respondent attests that it was not served with the Notice of Appeal as required under Rule 37 of the Supreme Court Rules; moreover, the email address cited does not belong to it or its advocates; accordingly, it only became aware of the existence of the Notice filed by the firm of Ahmednasir LLP on 27th January 2026 upon service of the Petition of Appeal to which the Notice is annexed;

[6] TAKING INTO ACCOUNT the 1st respondent's submission that the application fails to meet the requisite threshold. That first, on arguability, the intended appeal raises no constitutional issues as the dispute before the trial court concerned ownership of property and right to compensation; therefore, the mere citation of Articles 40, 50 and 159 of the Constitution does not elevate a factual dispute into a constitutional question warranting this Court's intervention; secondly, given that a monetary decree does not render an appeal nugatory, no evidence has been tendered to show that restitution would be impossible; in any event, the 1st respondent avers that it is financially capable of refunding any sums paid; consequently, no irreparable harm has been demonstrated; third and lastly, that reliance on Article 201 is misplaced, as payment being pursuant to a court decree is an expenditure that is subject to audit and accountability; and

[7] BEARING IN MIND, that the 2nd respondent opposes the application through the replying affidavit sworn by Stanley Gitari, its Acting Corporation Secretary, and written submissions both dated and filed on 4th February 2026 largely aligning with the position of the 1st respondent. In addition, it raises four grounds: first, that this Court lacks jurisdiction, both substantively, as the decision of the Court of Appeal did not turn on the interpretation or application of Article 159, but merely bolstered it, and procedurally, owing to the absence of evidence that the Notice of Appeal was properly lodged and transmitted, or served upon it or its advocates; secondly, that the impugned judgment is a negative order dismissing the appeal and is therefore incapable of being stayed; thirdly, that the appeal will not be rendered nugatory, as the decretal obligation rests on the 2nd and 3rd respondents, and inability to refund should the appeal succeed has not been

demonstrated; and fourthly, that public interest militates against the stay, as it would delay the settlement and lead to continued accrual of interest, contrary to the principles of prudent public finance under Article 201 of the Constitution; accordingly, the 2nd respondent urges that the Motion be dismissed for want of merit;

[8] APPRECIATING that similarly, the 3rd respondent, through the replying affidavit sworn on 5th February 2026 by Brian Ikol, its Director of Legal Services and Dispute Resolution and filed on 6th February 2026; and written submissions dated and filed on 5th February 2026, echo the averments of the 2nd respondent; and

[9] UPON CONSIDERING the 4th respondent's grounds of objection and written submissions both dated 2nd February 2026 and filed on 9th February 2026 wherein it posits that: this Court lacks jurisdiction as no constitutional issues for determination were before the courts below, the matter having commenced as an ordinary suit via a plaint; further, that the applicants have neither demonstrated any exceptional circumstances nor obtained certification to warrant this Court's intervention; that the application is an attempt to reopen and relitigate the matter so as to cure deficiencies identified at the trial; even so, the applicants' grievance is, in any event, confined to the monetary award; consequently, the application is frivolous, vexatious and an abuse of the court process, as the threshold for stay of execution has not been met, and is prejudicial to the public interest for it exposes public funds to unwarranted interests and costs; and

[10] FURTHER CONSIDERING the 5th to 8th respondents' replying affidavit sworn on their behalf by the 6th respondent, and written submissions both dated 2nd February 2026 and filed online on 4th February 2026 wherein, though the respondents support the appeal as raising weighty and unresolved constitutional questions, they contend that the impugned judgment effectively disinherited them, notwithstanding their demonstration that the 1st respondent does not own the suit property, which is their ancestral land; and accordingly, the appeal would be rendered nugatory if execution proceeds, as they are unlikely to receive any

compensation once public funds earmarked for the same are exhausted; which would also be contrary to public interest, as disbursement of public funds on disputed claims prior to final determination would prejudice rightful beneficiaries and undermine the rule of law; that thus, no party will suffer prejudice if *status quo* is maintained pending determination of appeal; that execution would permanently extinguish their ancestral and community interests, reducing the protections enshrined in Article 63 of the Constitution to theoretical abstractions, undermining both the appeal and judicial integrity; in any event, execution would expose them to joint and several liability for costs, with a risk of financial ruin before determination of the constitutional issues; and

[11] MINDFUL of the applicants' reply through their further affidavit dated 13th February 2026 and written submissions dated 16th February 2026 and filed on 17th February 2026 wherein they reiterate their earlier position and confirm that the Notice of Appeal was duly lodged at the appropriate registry, and served on all the parties; accordingly, they contend that the objection is made in bad faith; further, they profess that the impugned judgment is not a negative order incapable of stay, as the Court of Appeal affirmed the ELC judgment thereby constituting a positive order; and that, in any event, the 1st respondent's capacity to refund is not self-evident, since it is a private company and has not exhibited audited accounts, bank statements, or asset valuations to demonstrate its financial standing; and

[12] HAVING CONSIDERED the totality of the application, responses, reply and submissions of the parties **WE NOW OPINE** as follows:

(i) The Court's affirmation of jurisdiction to grant interlocutory orders in the nature of a stay of execution was settled in ***Board of Governors, Moi High School, Kabarak & Another v. Malcolm Bell, SC Applications Nos. 12 and 13 of 2012***. The principles to be considered before a Court of law may grant stay of execution have been crystallized. In ***Munya v Kithinji & 2 others*** **(Application 5 of 2014) [2014] KESC 30 (KLR),** the Court emphasised that before it grants an order for stay of execution, the appellant, or intending appellant, must

satisfy the Court that the appeal or intended appeal is arguable and not frivolous; that unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory and that it is in the public interest that the order of stay be granted.

(ii) In response to the application for stay orders now before us, a challenge to our jurisdiction has been raised. It is a settled and cardinal principle of law that jurisdiction is the foundation upon which all judicial authority rests. In its absence, a court is bereft of power to take any further step. It follows, therefore, that questions of jurisdiction are preliminary in nature and must be determined at the onset. Where jurisdiction is absent, a court must down its tools, as it does not have the power to proceed and adjudicate the matter before it.

(iii) The jurisdictional objection raised in this matter is two-fold: first, on the lodging, transmission, and service of the Notice of Appeal; and secondly, to this Court's jurisdiction under Article 163(4)(a) of the Constitution, it being contended that the impugned decision does not turn on the interpretation or application of the Constitution, and therefore does not fall within the ambit of this Court's jurisdiction.

(iv) This Court has, in a long line of decisions, including ***University of Eldoret & another Vs Sitienei & 3 others (Application No. 8 of 2020)*** [2020] KESC 76, consistently held that a Notice of Appeal is a jurisdiction pre-requisite, as it signifies the intention of the appeal and serves to notify both the Court and the opposing parties of a party's intention to challenge a decision. It constitutes the foundational step that activates the appellate process.

(v) From a perusal of the record, the impugned judgment was delivered on 19th December 2025 by the Court of Appeal at Mombasa and the applicants' Notice of Appeal was lodged at the registry at the Court of Appeal at Mombasa on 27th December 2025. This was done within the 14-

day window. Though the produced Notice of Appeal indicates that the same was lodged by the Deputy Registrar, Court of Appeal at Nairobi, we are satisfied that the same was typographic as the rest of the heading together with the forwarding letter prepared by the appellant to the Deputy Registrar rightly refer to the Court of Appeal at Mombasa. Moreover, understanding that pleadings are filed virtually, it has not been demonstrated that the Notice of Appeal was filed before the wrong registry or that the Notice is missing in the appropriate portal. The 1st to 3rd respondents, however, contend that the said Notice was not served on them, and further disassociate with the email addresses cited therein.

(vi) While this Court does not discount the centrality of lodging and service of a Notice of Appeal as part of procedural framework underpinning the appellate process, we do take into account the respondents' contention that they became aware of the intended appeal upon service of the Petition, to which the Notice of Appeal is duly annexed, and have since entered appearance and filed responses. In the circumstances, and in the absence of any demonstratable prejudice having been occasioned on the respondents, the omission does not warrant the striking out of the appeal. This, however, should not in any way be construed as condoning disregard for procedural requirements, and the Court reiterates, as it has always done, the need for strict compliance with its Rules.

(vii) On whether this appeal turns on interpretation or application of the Constitution, it is necessary to first ascertain the gist of the dispute. The suit was instituted by the 1st respondent by way of a plaint, wherein it sought that the 2nd and 3rd respondents be held jointly and severally liable to pay Kshs.667,903,887/- being compensation for the compulsory acquisition of its suit property. The applicants together with the 5th to 8th respondents were subsequently joined to the proceedings as Interested Parties. Thereafter, the applicants successfully moved the Court and joined the 4th respondent.

(viii) The applicants filed an amended statement of defence, and advanced a counterclaim against the 1st to 3rd respondents, contending that the suit property encroached and or overlapped into their property, *LR No. 31537*, through which the SGR has passed. They further alleged that the 2nd and 3rd respondents had illegally and unlawfully undertaken to compensate the 1st respondent, and in turn sought compensation of the sum of Kshs.1,084,790,000/-. Conversely, the 5th to 8th respondents asserted ownership over the suit property on the basis that it constituted their ancestral community land.

(ix) The High Court (*N.A. Matheka J*) determined that the 1st respondent had demonstrated the manner in which it had acquired the property. In contrast, the applicants' title was found to be tainted with fraud and irregularities going to its root, while the 5th to 8th respondents adduced no evidence of occupation of the property. Further, the learned Judge acknowledged that the prefix *"MN/VI"* was an admitted error by the 2nd respondent, who conceded that the suit property had been erroneously referenced as MN/VI/1040/2 instead of LR No. 1040/2. Consequently, the Court ultimately concluded that ***"the Constitution is clear in Article 159 (2)(d) that the courts are guided by the principle that justice shall be administered with undue regard to procedural technicalities."***, finding that the error was a mere typographical error and did not go to the root of the judgment.

(x) On appeal, the Court of Appeal upheld the ELC judgment and held that rectification by trial court did not amount to an overreach. It affirmed the trial court's approach in the application of Section 100 of the Civil Procedure Act as being guided by the letter and spirit of Article 159(2)(d) of the Constitution, which enjoins courts to administer justice without undue regard to procedural technicalities.

(xi) As this Court has previously clarified in ***Milly Glass Works Limited Vs Kenya Railways Corporation & another*** [2025] KESC 26

(KLR), for an appeal to properly invoke the Court's jurisdiction under Article 163(4)(a), it must be demonstrated that the determination by the Court of Appeal turned on the interpretation or application of the Constitution, and that the constitutional question formed the core of the dispute. A mere reference to constitutional principles is insufficient where the gravamen of the dispute remains essentially factual or statutory in nature.

(xii) It is argued that the issue before the superior courts concerned ownership of property, its compulsory acquisition and the attendant compensation. While this may *prima facie* suggest a factual contestation, the applicants have mounted an argument that the trial court, in its finding went beyond its constitutional and statutory delimitation in relying upon Article 159(2)(d) of the Constitution to make a substantive determination devoid of pleadings and evidence. In ***Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others [2023] KESC 14 (KLR)*** we observed as follows:

> ***"It is worthy of note that the way the dispute is prosecuted through litigation and the surrounding issues determine whether indeed it qualifies to be considered as a constitutional question or not. It is readily determinable for some of them and almost improbable to distinguish constitutional and other underlying issues in others. It is therefore best left to the court on a case to case basis upon critically evaluating the facts, evidence and arguments before it. There will be a level of factual contestations that will inform the court's determination even at an interim stage to determine whether or not the court should***

exercise its discretion in favour of the applicant seeking conservatory orders."

Against this backdrop, we are inclined at this stage, to assume jurisdiction over the appeal as it will allow the Court, at the trial, to interrogate the application of Article 159(2)(d) of the Constitution and the constitutional arguments made.

(xiii) In addressing the interim conservatory orders sought, can it be said that the orders sought to be stayed are negative orders incapable of being stayed, as submitted in opposition? It bears noting that the trial court's order directed the 1st and 2nd defendant to forthwith pay the plaintiff the sum of Kenya Shillings 667,903,887/- together with interest and costs. It is this finding that is subject of execution, subject to the revised order on costs in the appeal being dismissed. We are persuaded that this is not a negative order as submitted by the respondents and the same is capable of being stayed as sought in the application before us. The objection in this regard is therefore unsustainable.

(xiv) In dealing with the application now before us, we have to examine whether the applicants meet the threshold as encapsulated in the principles adverted to earlier. As already stated above, it is evident that the applicants have satisfied the first limb on arguability. We say so against the backdrop that the existence of a single argument in the intended appeal is sufficient as the Court is not, at this juncture, concerned with whether the argument will succeed. In the present case, we are satisfied of the existence of arguable issues including on jurisdiction.

(xv) On the second limb, the applicant maintains that the intended appeal will be rendered nugatory as a result of potential payment of the monumental decretal sum and such payment being made as a result of a decision made contrary to the constitutional principles. In countering that, the respondents assert that any payments made are in fulfilment of a valid

court decision. Further, it is contended that the 1st and 2nd respondents are capable of reimbursing the funds, should it be found that the applicants are entitled to the compensation. On our part, we are persuaded that there is no prejudice in maintaining the status quo to allow the conclusive determination of the appeal.

(xvi) As to public interest, the same militates towards grant of the proposed orders. This is because the appeal revolves around payment of enormous public funds in compensation, whichever way they are released. This is in line with constitutional imperatives on prudent use of public resources.

(xvii) In the end, the application is allowed as prayed. This being an interlocutory application, the costs shall abide the outcome of the appeal.

[13] CONSEQUENTLY, for the reasons aforesaid, we make the following Orders:

(i) The Notice of Motion dated 22nd January 2026 and filed on 26th January 2026 be and is hereby allowed.

(ii) An order of stay of execution of the Judgment and Decree of the Court of Appeal at Mombasa dated 19th December 2025 in Civil Appeal No. E045 of 2025 including the order directing payment of Kshs. 667,903,887/- and all consequential orders on interest and costs be and is hereby issued pending the hearing and determination of the appeal;

(iii) An order be and is hereby issued restraining the respondents whether by themselves, their agents, servants, or otherwise howsoever, from enforcing, executing, or giving effect to the Court of Appeal at Mombasa Judgment and Decree dated 19th December 2025 in Civil Appeal No. E045 of 2025

(iv) The costs to abide the outcome of the appeal.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **23rd** day of **October, 2026.**

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

.....	**.....**
S. C. WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	**.....**
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA