



Malakwen (Suing as the Legal Representative of the Late Raphael Kiptoo Biebei) v Engairo & 3 others (Environment and Land Case 102 of 2018) [2026] KEELC 278 (KLR) (28 January 2026) (Ruling)

Neutral citation: [2026] KEELC 278 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND CASE 102 OF 2018
CK NZILI, J
JANUARY 28, 2026**

BETWEEN

CHRISTINA BARABARA MALAKWEN (SUING AS THE LEGAL REPRESENTATIVE OF THE LATE RAPHAEL KIPTOO BIEBEI) PLAINTIFF

AND

BENJAMIN MWALE ENGAIRO 1ST DEFENDANT

TITUS KIPYAB 2ND DEFENDANT

**LAND ADJUDICATION & SETTLEMENT OFFICER TRANS
NZOIA 3RD DEFENDANT**

IBRAHIM WAFULA 4TH DEFENDANT

RULING

1. Before the court is an application dated 21/10/2025. The 1st defendant seeks a stay of execution of the judgment and decree delivered on 17/9/2023. The reasons are contained on the face of the application and in a supporting affidavit of David Mwale Engairo, sworn on 21/10/2025.
2. It is deposed that the applicant has occupied the suit land for 36 years. He faults the medical evidence and marital status in the documents used by the respondent as her evidence at the trial, terming them as unverified. The applicant deposes that despite these glaring evidential gaps and contradictions, the court granted the respondent the reliefs sought in the plaint, leading to a notice of appeal dated 23/9/2025.
3. The applicant deposes that he has been served with an eviction notice dated 11/10/2025, which, if effected, will render the appeal nugatory, yet he has arguable grounds of appeal. The applicant deposes that unless the stay is granted, the substratum of the intended appeal will be destroyed, in that land



- being unique and an irreparable asset, restoration would be impossible. The applicant deposes that he is elderly, has lived on the suit property for over three decades, and has raised his family on the suit property.
4. The application is opposed through a replying affidavit sworn by Christina Barabara Malakwen on 7/11/2025. It is deposed that the application is incompetent for having been filed by a law firm not properly on record, and in breach of Order 9 Rule 9 of the Civil Procedure Rules. The respondent deposes that although a consent was signed by the two firms, it was not adopted, and no court order could flow therefrom.
 5. The respondent deposes that by the time the notice of change of advocates was filed and paid for on 23/4/2025, there was no order on record allowing the firm of KMT Law Advocates to come on record and indeed to date no such order is on record.
 6. Further, the respondent deposes that by the time the notice of appeal and the letter requesting for proceedings was filed on 23/9/2025, there was no such court order for leave to come on record to replace the law firm of Teti & Co. Advocates, hence the present applicant's law firm is improperly on record as per annexures marked CM-(1), (2), and (3).
 7. The respondent deposes that to the extent that an application is filed by a law firm improperly on record, it remains incompetent and is subject to striking out. The respondent deposes that the application fails to satisfy the requirements for a stay of execution to stop her from enjoying the fruits of her judgment. The respondent deposes that the suit land was fraudulently transferred on 19/6/1972, after the death of her husband on 15/1/1972, by the 4th respondent, who had no good title to pass to the 1st and 2nd defendants.
 8. Again, the respondent deposes that she and her family have been kept out of the suit land for 53 years, and hence will be greatly prejudiced by the issuance of any stay orders. The respondent deposes that, other than alleging an eviction notice has been served, the applicant has made no attempts to demonstrate or quantify the alleged substantial loss.
 9. The respondent deposes that no security has been offered for the due performance of the decree issued by the court. The respondent deposes that the application has been prompted by the service of the notice of eviction upon the applicant, and the delay in applying is inordinate.
 10. The respondent deposes that once given the possession of the suit property, she undertakes not to part with the same in any way or commit any acts of wastage whatsoever as the intended appeal is heard and determined.
 11. The respondent relies on the written submission dated 7/11/2025. It is submitted that the applicant's law firm is improperly on record, rendering the application incompetent. The respondent submits that the defect is not a procedural technicality as held in *Nicholas Kiptoo Arap Salat -vs- Independent Electoral and Boundaries Commission & Others* [2013] eKLR, *Julieta Marigu Njagi -vs- Virginia Njoki Mwangi & Another* [2014] eKLR, *Florence Hare Mkaha -vs- Pwani Tawakal Mini Coach & Another* [2014] KEHC 5859 [KLR], *Joseph Mathenge Kabiru & Another -vs Edwin Shisanya Amboso* [2024] KEHC 14287 [KLR], and in *Pascal Wafula -vs- Ronald Sawenja Walubengo & Others Kitale ELC No. 74 of 2019*.
 12. On the merits of the application, the respondent submits that the grounds of stay have not been met. Reliance is placed on *Halal & Another -vs- Thorton & Turpin* [1963] Ltd [1990] eKLR, *James Wangalwa & Another -vs- Agnes Naliaka Cheseto* [2012] eKLR, *Charles Wahome Gethi -vs- Angela*



Wairimu Gethi [2008] eKLR, and Jonathan Kiprotich Barsulai -vs- John Kiprop Chemweno & Others [2017] KEELC 1513 (KLR).

13. There is no dispute that the applicant was represented by the firm of Teti & Co. Advocates until the delivery of judgment on 17/9/2025.
14. The court record shows that a notice of change was uploaded to the Case tracking system dated 23/9/2025, alongside the consent dated 23/9/2025 signed by the firm of Teti & Co. Advocates and K.M.T. Law Advocates. The consent was not addressed to the Deputy Registrar seeking an endorsement by the court. The letter dated 23/9/2025 seeking proceedings, judgment, and the decree did not refer to the said consent and or a notice of change of advocates, or seek its endorsement as an order of the court.
15. There is no record that the notice of change and the consent were ever formally filed, endorsed, or bar coded as a duly filed document. There is equally no evidence that, before filing the application dated 21/10/2025, the applicant had extracted a duly filed and endorsed order and served a duly filed notice of change of advocates upon all the parties to this court, in conformity with Order 9 Rule 9 of the Civil Procedure Rules.
16. The applicant, once the preliminary objection was raised, made attempts to seek to regularize the appearance and have the consent adopted and the notice of change deemed as duly filed. The applicant does not explain why he overlooked the law and opted to apply before formally moving the court to change his advocates on record. The applicant terms the error a mere formality which the court should overlook, guided by the cited caselaw.
17. On the other hand, the plaintiff respondent submits that the mistake is not curable under the law, since the application remains a nullity ab initio for being filed by a law firm improperly on record.
18. In Julieta Marigu Njagi (supra), the court observed that in any application filed post judgment, Order 9 Rule 9 of the Civil Procedure Rules must apply. The court cited Florence Hare Mkaha (supra) and John Langat -vs- Kipkemoi Terer & Others [2013] eKLR, that a consent could not effect the change of advocates, without an order of the court.
19. The court cited Kazungu Ngari Yaa -vs- Mistry Mulji & Co. [2014] eKLR, on the need to give notice to the other parties and then satisfy the court to grant leave to effect a notice of change. The court further cited Nicholas Kiptoo Arap Salat Korir (supra), that Article 159 2(2) of the Constitution cannot be invoked to cure the failure to adhere to the provisions of the law.
20. In Kabiru & Another -vs- Ambosho [2024] KEHC 13287 [KLR], the court, citing Julieta Marigu Njagi (supra), held that a counsel not properly on record lacks the capacity to file an application post judgment.
21. In this application, the applicant did not formally seek leave of the court to endorse the notice of change of advocates before applying for a stay. As indicated above, other than uploading the letter for typed proceedings, notice of appeal, and the signed consent, no formal request was made for the Deputy Registrar to place the file before the court for the endorsement of the notice of change.
22. Similarly, there was no filed application seeking leave to change representation before the consent was uploaded, for the applicant to be said to have attempted to seek the court's leave to file a notice of change of advocates. Leave of court is not to be assumed. There is a good reason why the drafters of the law put it. Had the drafters thought otherwise, as submitted by the applicant, they would have expressly stated so. To interpret the law otherwise would make it absurd and not cure the intended mischief. To



- make the application to seek leave to operate retrospectively by way of a second application herein is what the applicant has done, which the 1st respondent terms as an abuse of the court process.
23. In my view, the easiest thing would have been for the applicant to seek an amendment of the current application to include the prayers for leave and for the notice of change to be deemed as duly filed and served on time, or to withdraw this application and start afresh, instead of filing the application.
 24. It has been submitted that the notice of appeal is also incompetent. In *Tobia M. Wafula -vs- Ben Butali* [2017] eKLR, the court held that parties have the right to choose whether to remain with the same counsel, or to engage other counsel on an appeal without being required to file a notice of change of advocates or to obtain leave of court. Therefore, my finding is that Order 9 Rule 9 of the Civil Procedure Rules applies only in terms of filing a post-judgment application, as observed in the *Pascal Wafula* (supra).
 25. The rule envisages that a new law firm shall seek and obtain leave of court before coming on record. Leave in this matter was never sought, either formally or informally, and granted through an order of the court.
 26. Any other attempts to maneuver the court's jurisdiction by a second application to cure the defect as submitted by the respondent, in a manner incompatible with the ends of justice, as held in *Rutongot Farm Ltd -vs- Kenya Forest Service & Others* [2018] KESC 27 [KLR] (19th September 2019) (Ruling), would amount to abuse of the process of the court. Nothing prevented the applicant from seeking leave in this application or seeking an amendment of, or withdrawal of the same, once it was brought to his attention that there was a defect.
 27. Regarding the merits of the application, a party seeking a stay has to file the application timeously, demonstrate substratum loss, and offer security for the due performance of the decree.
 28. The law does not define what minimum or maximum delay is. It all depends on the circumstances of each case. In *Jonathan Kiprotich Barsulai* (supra), 45 days' notice had been issued to vacate the land. The application for stay was filed 3 days before the notice could expire. The court termed the delay inordinate.
 29. In *Jaber Mohsen Ali & another -vs- Priscillah Boit & another* [2014] KEELC 132 (KLR), a delay of 35 days was held to be inordinate and unexplained.
 30. In this suit, the judgment was delivered on 17/9/2025. The applicant sought the typed proceedings, judgment, and decree on 23/9/2025. The court record shows that Miss. Irene for KMT Advocates collected the same on 8/10/2025.
 31. This application was filed on 21/10/2025, which was over a month after the judgment was delivered. The decree holder terms the delay inordinate and unexplained. The applicant has not attempted to explain it or give the reasons one way or the other.
 32. Substantial loss is the cornerstone of stay, as held in *Kenya Shell Ltd -vs- Kibiru* [1986] eKLR. The applicant, to buttress substantial loss, says he has arguable grounds of appeal. It is not within the jurisdiction of this court after a judgment to assess if the grounds of appeal are arguable or not. Order 42 of the Civil Procedure Rules is clear on the grounds to consider in an application of this nature.
 33. The eviction notice to move out of the suit premises was one of the reliefs made in the judgment as prayer (d). The same was included in the extracted decree. The applicant knew of the same and did not have to wait until a formal notice was served upon him. Therefore, it cannot be true that the notice of eviction issued and dated 21/10/2025 was news to the applicant.



34. The applicant knew that the same was due and time was running out from 17/9/2025. As held in James Wangalwa (supra), execution per se does not amount to substantial loss. The notice was in line with the law on eviction. A party seeking a stay must show other vitiating factors that will negate the very essential core of the substratum of the appeal. Substantial loss is what is supposed to be prevented from happening by preservation orders.
35. The applicant, as held in Kenya Shell Ltd (supra), has to show what the status quo is, the nature or particulars of loss or damage he risks to suffer, should the status not remain as it was before the judgment. The power to grant a stay is discretionary in nature. It is to be exercised judicially and not whimsically. Tangible and cogent evidence must be availed to sway the discretion of the court in favour of the applicant. See Butt -vs- Rent Restriction Tribunal [1979] eKLR.
36. Security for the due realization of the decree, should the appeal fail, has to be offered as held in Arun C. Sharma -vs- Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others [2014] eKLR and in Focin Motorcycle Co. Ltd -vs- Ann Wambui Wangui & Another [2018] eKLR.
37. It is a mark of good faith that the application for stay is not just made to deny the respondent enjoyment of the fruits of his judgment. In this application, the applicant has not demonstrated what sort of security to offer, the nature of his occupation, possession, developments, and their nature, value, and status on the suit land. It is not enough, as held in Gethi -vs- Gethi [2008] eKLR, to say that the applicant lives or resides on the suit land and that they will suffer substantial loss.
38. In Samvir Trustee Ltd -vs- Guardian Bank Ltd [2007] KEHC 2438 [KLR], the court held that it was not enough to merely put forward an allegation or assertion of substantial loss, without empirical or documentary evidence in support of such contention.
39. Adequate and appropriate evidence is not before me to weigh the present circumstance of the suit land and how the execution will destroy the very substratum of the appeal. Equally, the applicant has not offered a copy of the records to show the status of the entries to the title. More importantly, the applicant has not offered to surrender the original title documents to the suit land as a show of good faith that he does not intend to delay the judgment.
40. The respondent has undertaken not to interfere with the subject land or title if she obtains possession. The respondent has also expressed the prejudice suffered and likely to continue, if the stay orders are granted, for she has been kept out of the land for 53 years due to fraudulent transfers effected by a title holder who had no good title to offer.
41. On the other hand, the applicant says that he has an arguable appeal which stands to be rendered nugatory if stay orders are granted and that he will suffer irreparable loss if the title register changes.
42. In Dodha -vs- Wafula [2025] KECA 2172 [KLR] (10th December 2025), the court observed that nugatory, as per Kinyanjui -vs- Tony Keter & Others [2013] eKLR, means worthless, futile, or invalid. The court observed that since the respondent had expressed the intention not to dispose of the suit property, there was going to be no substantial loss.
43. The court said that in exercising discretionary jurisdiction on whether to grant a stay, it had to preserve the ends of justice, which includes letting a deservedly winning party enjoy the fruits of their judgment.
44. Applying the foregoing binding caselaw and weighing the scales of justice, I think the applicant has failed to meet the conditions of stay. The application dated 2/10/2025, even if it had been filed by a competent law firm, could have been due for dismissal. I so dismiss it with costs to the plaintiff/respondent.



45. Orders accordingly.

**RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT
KITALE ON THIS 28TH DAY OF JANUARY 2026.**

In the presence of:

Court Assistant – Dennis

Mr. Ndarwa for Kiarie for the respondent-present

Mr. Tirop for KMT for the applicant-present

HON. C.K. NZILI

JUDGE, ELC KITALE.

