



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC CIVIL CASE NO. E028 OF 2022

**MARTIN MUTISYA MAKAU, ANNE MUTHUE MAKAU, and
DIANA MUMBUA MAKAU (*Suing as the administrators of
the
Estate of the late Thomas Makau Musyoki (deceased)*)
.....PLAINTIFFS**

VERSUS

**SYOKIMAU FARM LIMITED.....1ST
DEFENDANT**
**THE ADMINISTRATOR SYOKIMAU FARM LTD.....2ND
DEFENDANT**
**THE CHIEF LAND REGISTRAR, MINISTRY OF LANDS
AND PHYSICAL PLANNING.....3RD
DEFENDANT**

RULING

1. Being dissatisfied with the judgment delivered by this court on 29/04/2024, the 1st and 2nd defendants promptly lodged a notice of appeal, thus paving the way for this court to entertain their instant motion dated 24/06/2024 that is now the subject of this ruling, which sought the following reliefs: -

a. Spent.

b. Spent.

c. Pending the hearing and determination of the appeal, there be a stay of execution of the judgment dated 29/04/2024 and all other consequential orders.

d. Costs of the motion be provided for.

2. The motion is supported by the grounds therein as well as the affidavit sworn on the instant date by Paul Masila Kimeu. In a nutshell, it is stated that the 1st and 2nd defendants, having appealed a judgment delivered against them on 29/04/2024 for trespass, seek a stay of execution. They argue that enforcing the judgment, which includes a permanent injunction and punitive damages, before the appeal is heard would cause them substantial loss and could render their appeal ineffective.

They stated that they remain in possession of the suit property and have filed their application without delay.

3. The motion is opposed by a reply affidavit sworn by Martin Mutisya Makau for the plaintiff on 20/12/2025. In it, he asserts that the motion contravenes the provisions of Order 9 Rule 9 of the Civil Procedure Rules (CPR) and should be struck out. He further states that the 1st and 2nd defendants will not suffer substantial loss, as they have only erected a perimeter wall, there is no imminent eviction, and they do not intend to demolish this wall until the appeal is heard and determined. He argues that no damages were awarded in the judgment, hence the 1st and 2nd defendants are misleading the court.
4. The motion was canvassed through the oral submissions of **SC Dr. Khaminwa** for the 1st to 2nd defendants and **Mr. Onguti** for the plaintiff, made on 6/11/2025. **Dr. Khaminwa** relied on the grounds in support of the motion and the supporting affidavit, and argued that the court should exercise its discretion in favour of the 1st to 2nd defendants, whereas **Mr. Onguti** relied on the replying affidavit. Upon hearing counsel, the motion was reserved for ruling today.
5. This court has carefully considered the motion, its grounds, affidavits, and oral submissions, and the 2 issues that fall for determination are: -

a. Whether the law firm of Khaminwa & Khaminwa Advocates is properly on record for the 1st and 2nd defendants.

b. Whether the 1st to 4th defendants have met the legal threshold to warrant a stay of execution pending appeal.

6. These 2 issues shall be handled consecutively.

a. Whether the law firm of Khaminwa & Khaminwa Advocates is properly on record for the 1st and 2nd defendants.

7. On matters of law, **Order 9 Rule 9** of the **Civil Procedure Rules** governs the post-judgment process by which an advocate or party seeks to come on record in place of an advocate previously on record. This provision provides as follows:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

8. This proviso does not hinder a litigant from selecting an advocate of their choice. The purpose of this legal provision is to address instances where a litigant attempts to evade paying the legal fees of an advocate who was previously engaged, as well as to inform the court and involved parties of such a change.
9. However, it outlines procedures to be adhered to and if a party seeks to change Advocates, post-judgment, the first scenario is that the incoming advocate or litigant who now wants to act in person must make a formal application to the court with notice to all parties who participated in the suit for grant of leave to come on record or act in person.
10. In the alternate scenario, the incoming advocate or litigant in person has to obtain the written consent of the previous

advocate on record, file the consent in court, and then seek leave to come on record.

11. In this case, the 1st and 4th defendants have not followed the laid down legal procedure as the law firm of **Ms. Panam & Co. Advocates**, which has been on record for these parties from the date it filed a memorandum of appearance dated 8/02/2021 to the time of entry of judgment is not aware of any change of advocates as there is no consent from it allowing it to excused from the proceedings and for Ms. Khaminwa & Khaminwa Advocates to take over the conduct of the matter. Further, no leave to come on record has been sought by the incoming counsel.

12. In the circumstances, this court agrees with the plaintiff's counsel and finds the motion is incompetent as it offends the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules**. It also finds that the purported notice to act alongside Ms. Khaminwa & Khaminwa Advocates by the law firm of Ms. Sila & Company Advocates, dated 4/06/2024, is incompetent. This notice by Ms. Sila & Company Advocates is hereby struck out from the record. This finding renders a determination of the 2nd issue unnecessary.

13. In the end, this court hereby strikes out the notice of motion dated 8/04/2024, with each party bearing their respective costs.

Orders accordingly.

Delivered and Dated at Machakos this 3rd day of March, 2026.

**HON. A. Y. KOROSS
JUDGE
3.03.2026**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms Kanja Court Assistant

Mr. Onguti for plaintiff

Mr. Nyambuti holding brief for Dr. Khaminwa for 2nd defendant