



**Digoi v Seurei (Environment and Land Appeal E001 of 2024)
[2026] KEELC 1441 (KLR) (12 March 2026) (Ruling)**

Neutral citation: [2026] KEELC 1441 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E001 OF 2024**

CK YANO, J

MARCH 12, 2026

BETWEEN

ANDREW DIGOI APPELLANT

AND

AUGUSTINE KIMELI SEUREI RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of motion dated 27th October, 2025 seeking the following orders:-
 1. Spent.
 2. That this Honourable court be pleased to grant a temporary stay of execution of the judgment and decree delivered on 15th May, 2025 in ELC Land Appeal No. E001 of 2024 and all consequential orders pending the hearing and determination of the intended appeal.
 3. That this Honourable court be pleased to issue orders for the preservation of the subject matter pending the hearing and determination of the intended appeal.
 4. That the costs of this application be provided for.
2. The based is based on the 8 grounds thereon and supported by the affidavit of Augustine Kimeli Seurei, the applicant, sworn on 27.10.2025 and a supplementary affidavit sworn on 5.2.2026.
3. The Applicant deponed that he was aggrieved and dissatisfied by the judgment of this court delivered on 15th May, 2025 striking out the applicant's suit in the trial court with costs to the Appellant/ Respondent. That he has filed a notice of appeal as he intends to appeal against the said judgment, and has applied for copies of typed proceedings for lodging the appeal.



4. The Applicant contended that it is necessary that there be a stay of execution of execution of the judgment in the interim pending the hearing and determination of the intended appeal. That unless stay is granted, there is a real risk that the respondent will proceed with disposal of the suit property by way of sale to the great prejudice of the applicant. That the respondent shall suffer no prejudice if the orders sought herein are granted and that it is in the interest of justice that the application be allowed.
5. In response to the replying affidavit by the respondent, the applicant files a supplementary affidavit and relying on advise, deponed that the right to appeal to the Court of Appeal is absolute and cannot be taken away from any party desiring to pursue it. That under Section 95 of the *Civil Procedure Act*, the time set for doing certain things can be enlarged by the court on request which he stated he intended to fully utilize to validate his intended appeal.
6. The Applicant further deponed that at the centre of this dispute is the question of the ownership of L.R No. Uasin Gishu/Kipkabus Settlement Scheme/412 measuring 2.2 hectares which he intends to ask the court of Appeal to determine on merit. He denied that the suit land had changed ownership since as late as 24.11.2025 he did a search and the land was as it were at the commencement of the suit. That he has since demonstrated that the real issue in controversy is land property and it is important that the same is preserved by way of stay of execution pending appeal.
7. In opposing the application, the Appellant/Respondent filed a Replying Affidavit sworn on 28.11.2025 in which he deponed that the application is incompetent, an afterthought, misadvised, misconceived, bad in law, baseless, frivolous and scandalous and does not entitle the applicant to the reliefs sought. He further stated that the application is fatally defective given that the letter requesting for typed proceedings and notice of appeal were never served on the respondent's counsel at all whose direct consequence of that misstep is that the applicant cannot benefit from the proviso to Rule 82(1) of the Court of Appeal Rules, which follows that there is no appeal upon which the stay orders sought are anchored on for non-compliance with the timelines prescribed under the Court of Appeal Rules. The Respondent also averred that if the notice of appeal dated 22.9.2025 was ever filed, then it was filed outside the time frame of 14 days after judgment and there is no order obtained from the Court of Appeal extending the time frame for filing and lodging a notice of Appeal. That in a nutshell, there is no appeal filed by the applicant.
8. The Respondent further deponed that the judgment that the applicant is seeking stay is a negative order. The respondent also believes that there has been inordinate and inexcusable delay in bringing the instant application and which delay has not been explained by the applicant to sway the court into exercising its discretion in his favour.
9. The Respondent averred that the applicant has approached this court with unclean hands and is guilty of material non-disclosure thus undeserving of the discretionary orders sought since the application has been overtaken by events given that the suit land was already sold to one Moses Mwangi on 12th June, 2025 and court orders are not issued in vain. That the applicant has not substantiated the lose he stands to suffer should his application be disallowed given that the Respondent is not a man of straw incapable of reasonably compensating the applicant by way of damages. The Respondent stated that contrary to the applicant's allegations, he stands to suffer great prejudice.
10. It is also the Respondent's contention that the applicant has not met the threshold that govern the issuance of the orders sought as envisaged by Order 42 Rule 6 of the Civil Procedure Rules, and urged the court to disallow the application and dismiss it with costs.



11. Pursuant to directions given by the court, the application was canvassed by way of written submissions. The applicant filed submissions dated 5th February, 2026 while the Respondent filed his dated 28th January, 2026.

Applicant's submissions;

12. In his submissions, the applicant's counsel identified the issues to be whether substantial loss will occur if the orders are not granted and what order as to security should the court make.
13. The applicant's counsel gave a background of the dispute and submitted that it is intended to ask the Court of Appeal to determine whether effluxion of time sanitizes an otherwise defective title, and that striking out of the suit did not resolve the issue in controversy which is land in which both the applicant and the respondent claim to have bought from the late James Arusei at different times. That a retrial would have sufficed. That the applicant has clearly spelt out what danger exists if the court does not preserve the subject matter. That it is therefore logical and legally sound to grant the orders sought albeit conditionally. That the converse would point an awkward situation just in case the appeal succeeds.
14. The applicant's counsel relied on the case of Makicher General Construction Company Ltd –vs- Communication Graphics Ltd (2021) eKLR and R.W.W. –vs- E.K.W (2019) eKLR and submitted that the applicant is willing to provide security as and when called upon to do so.

Respondent's submissions;

15. On his part, counsel for the Respondent identified the issues for determination to be whether there exists a competent appeal to anchor the orders sought; whether the judgment sought to be stayed is a negative order; whether the applicant has satisfied the conditions under Order 42 Rule 6(2) of the Civil Procedure Rules; whether the application was filed without inordinate delay; whether the application has been overtaken by events, and whether the applicant merits the exercise of discretion in his favour.
16. It was submitted that the applicant did not serve the respondent with notice of appeal and letter requesting for typed proceedings as required under rule 42(1), 75, 82(1) and (2), 83 and 84 of the Court of Appeal Rules, 2022. The Respondent's counsel relied on the case of Mabel Kibore –Vs- National Oil Corporation of Kenya Ltd (2019) eKLR and submitted that in the absence of a valid Notice of Appeal, the applicant's application is anchored on nothing and is incompetent ab initio.
17. It was further submitted that the judgment by this court did not command the applicant to perform or refrain from any positive act, hence was a negative order. The respondent's counsel relied on the case of Jenniffer Akinyi Osodo –vs- Boniface Okumu Osodo & 3 others (2021) eKLR. The respondent's counsel also submitted that the applicant has not satisfied the conditions under Order 42 Rule 6(2) of the Civil Procedure Rules and relied on the case of Kenya Shell Ltd –Vs- Benjamin Karuga Kibiru & Another (1986) KLR 410 on substantial loss, adding that the applicant has neither offered nor expressed willingness to furnish security.
18. It was further submitted that the application was filed after inordinate and unexplained delay which disentitles the applicant the discretionary relief sought. It was also submitted that the application has been overtaken by events as the suit property was sold to a third party on 12th June, 2025. The respondent's counsel submitted that courts do not issue orders in vain. That the applicant has placed no material before court to justify the exercise of discretion in his favour, and the court was urged to dismiss the application with costs.



Analysis and Determination;

19. I have considered the application, the affidavits in support and against, the submissions filed and the authorities cited. The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules, and the same is discretionary but the discretion must be exercised judiciously and upon defined principles of law, not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the applicant.
20. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under Order 42 Rule 6. First, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the applicant unless stay of execution is granted; and thirdly, such security as the court orders for the due performance of the decree or order as may ultimately be binding on him has been given by the applicant.
21. From the record, the judgment appealed against was delivered on 12th May, 2025 and the application herein was filed on 27th October, 2025. This was after a period of over 5 months. In my view, the application was not made timeously, and I agree with the Respondent's submission that the delay is inordinate and unexplained.
22. Regarding the second pre-requisite in Order 42 Rule 6, that is substantial loss occurring to the applicant, I wish to refer to the case of Kenya Shell Limited –vs- Benjamin Karuga Kibiru & another (Supra) where the Court of Appeal stated:-

“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”
23. In the case of Absalom Dora –Vs- Turbo Transporters (2013) eKLR, it was stated that: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court, as such orders does not introduce any disadvantage but administers the justice that the case deserves. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospect that the appeal will not be rendered nugatory; and the decree-holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination”
24. In the present case, the applicant has stated that he will suffer substantial loss unless stay of execution is granted because there is a risk that the respondent will proceed to dispose off the suit land by way of sale. The respondent on his part has categorically stated that he has already sold the suit property to a third party, one Moses Mwangi on 12.06.2025 and has exhibited a sale agreement in support of that averment. As already stated, this application was made after about 5 months from the date the judgment herein was delivered on 15.05.2025. If indeed the respondent has already sold the suit property as alleged, then the application has been overtaken by events and I agree with the respondent's submission that court's do not issue orders in vain.
25. I have also perused the judgment delivered by this court on 15.05.2025. The same merely struck out the applicant's suit in the Magistrate's Court. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the court was in the nature of a negative order incapable of execution, save for costs, hence there is nothing to stay.



26. As a result, this court finds no merit in the Notice of Motion Application dated 27.10.2025. The same has failed to meet the threshold laid down under Order 42 Rule 6(2) of the Civil Procedure Rules and is hereby dismissed with costs to the respondent.

27. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 12TH DAY OF MARCH, 2026 VIDE MICROSOFT TEAMS.

HON. C. K. YANO

ELC, JUDGE

In the virtual presence of;

Mr. Lubanga holding brief for Mr. Kagunza for the Respondent.

Mr. Ngigi for the Applicant.

Court Assistant - Laban.

