



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC CIVIL SUIT NO. E068 OF 2022

MUANZA DWIKO (*as administrator of the estate of the late Peter Ndolo Ndwiko*)

.....**PLAINTIFF**

VERSUS

SHADRACK MUTISYA KAVATHA.....1ST

DEFENDANT

DANIEL MASAKU KAVATHA.....2ND

DEFENDANT

JOSIAH KEEN3RD

DEFENDANT

GRACE MUMBUA.....4TH

DEFENDANT

IRENE NGIMA MUREITHI5TH

DEFENDANT

LAND REGISTRAR, MACHAKOS.....6TH

DEFENDANT

RULING

1. Dissatisfied with the judgment delivered by this court on 19 March 2025, the defendants lodged a notice of appeal dated 4 April 2025, filed on 7 April 2025. Subsequently, they filed the motion dated 27 June 2025, which is the subject of this ruling, and it is stated to have been brought within the provisions of **Sections 1A, 1B, 3A, and 66** of the **Civil Procedure Act, Orders 9 Rule 9, 42 Rule 6, 51 Rule 1** of the **Civil Procedure Rules**, and all other enabling provisions of the law. The following orders are sought in the motion: -

a. Spent.

b. THAT leave be granted to the firm of B.M Mung'ata & Company Advocates to come on record for the 1st to 4th defendants herein.

c. Spent.

d. THAT there be a stay of execution of the judgment delivered by this honourable court on 19 March 2025, pending the hearing of the intended appeal.

e. THAT the costs of this application be in cause.

2. The motion is supported by the grounds therein as well as the affidavit sworn on the instant date by the 1st defendant. Principally, he states that the court entered judgment in favour of the plaintiff against the defendants. The 1st to 4th defendants, dissatisfied with the decision, have filed an appeal against the entire judgment. He expresses concern that, since no stay of execution was granted, the plaintiff may execute the judgment imminently, which could result in the 1st to 4th defendants losing possession and use of the disputed property, a property they have occupied since 1988.
3. The 1st to 4th defendants argue that if execution proceeds, their intended appeal could become futile, especially if the plaintiff disposes of the property or collects the awarded damages for trespass (Kshs. 500,000). The 1st to 4th defendants assert that granting a stay of execution is necessary to preserve the property and avoid irreparable harm while the appeal is pending. They are willing to provide reasonable security and claim that the application for a stay has been made promptly. The 1st to 4th defendants further argue that the plaintiff will not suffer prejudice if the stay is granted and that the appeal has strong grounds for success. He presented copies of the judgment, notice of appeal and notice to vacate.
4. The plaintiff only opposed prayers (c) and (d) of the motion in his replying affidavit, sworn on 30/09/2025. In brief, he asserts

that he is the registered owner of **L.R. No. MAVOKO TOWN BLOCK 3/2840 (“suit property”)**, and was appointed administrator of the estate of the late Peter Ndolo Ndwiko by the Superior Court of California, with the Grant resealed in Kenya.

5. Despite court orders issued on 14 September 2022 (and confirmed on January 25 2023) prohibiting the 1st to 4th defendants from trespassing or taking possession, they defied these orders and trespassed on the land. The 1st to 4th defendants' efforts to prevent their eviction stem from actions deemed illegal and in contempt of court. As such, they are considered undeserving of equitable relief, having approached the court with unclean hands. Additionally, they have not satisfied the requirements under **Order 42 Rule 6** of the **Civil Procedure Rules**. Further, he has the means to repay the Kshs. 500,000 in damages if the appeal succeeds.
6. Accordingly, when the parties appeared before this court, they were directed to submit their arguments through written submissions. The law firm of **Ms. B.M. Mung'ata & Co. Advocates**, representing the 1st to 4th defendants, filed their written submissions dated 20 October 2025, while **Ms. Maingi Musyimi & Associates**, representing the plaintiff, filed theirs on 31 October 2025. Both counsel contested whether the criteria for a stay of execution had been satisfied, with the

plaintiff asserting that the 1st to 4th defendants had not met such criteria, and the defendants contending that they had. Furthermore, the counsel for the 1st to 4th defendants submitted that granting leave for them to come on record ensures orderly legal representation, protects the litigants' right to choose counsel, and prevents multiplicity of representation.

7. Having carefully considered the motion, its grounds, affidavits, rival written submissions, relevant legal provisions, and judicial precedents cited, the two issues for determination are **(a) whether this court has jurisdiction to entertain the instant motion if the notice of appeal was filed out of time without leave** and **(b) whether the criteria for a stay of execution pending appeal have been satisfied by the 1st to 4th defendants.** Since the outcome of the first issue directly affects the second, this court proposes addressing the first issue first. There is also the preliminary issue of granting leave for **Ms. B.M. Mung'ata & Co. Advocates** to come on record for the 1st to 4th defendants, which is unopposed; this prayer is anchored in **Order 9 Rule 9** of the **Civil Procedure Rules**, and this court has no reason to decline it and finds it merited. We proceed.

a. Whether this court has jurisdiction to entertain the instant motion if the notice of appeal was filed out of time without leave

8. Concerning this matter, it is regrettable that none of the parties' documents addressed this issue; however, as correctly argued by both counsel, the legal basis for filing a motion for a stay of execution pending appeal is unquestionably grounded in **Order 42 Rule 6(1)** of the **Civil Procedure Rules**, along with the guiding principles outlined under **Rule 6(2)** thereof. They state:

“(1)No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may

apply to the appellate court to have such order set aside.

(2)No order for stay of execution shall be made under subrule (1) unless—

(a)the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b)such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

9. With respect to the Court of Appeal, the equivalent of **Order 42 Rule 6(1)** of the **Civil Procedure Rules**, which regulates this court in dealing with applications of this nature, is located in **Order 5(2)(b)** of the **Court of Appeal Rules**.
10. Reverting to the applicable legal provisions that govern this Court, **Order 42 Rule 6(4)** of the **Civil Procedure Rules** provides that a motion for a stay of execution shall only be entertained if an application for such a stay has been filed in compliance with the Rules of the Court of Appeal. This proviso states:

“For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”

11. In this case, it is undisputed that a notice of appeal was filed on 7 April 2025, which exceeds the statutory timeframe stipulated in **Rule 77(2)** of the **Court of Appeal Rules**. This **Rule** requires a party intending to appeal a superior court decision to file a notice within 14 days of the decision. In this particular case, judgment was delivered on 19 March 2025, a Wednesday, rendering the last permissible date for lodging the notice of appeal as Wednesday, 2 April 2025. However, the 1st to 4th defendants filed their notices five days after this deadline.
12. Due to their delay, it was anticipated that the Court of Appeal would be moved by the 1st and 4th defendants pursuant to **Rule 4** of the **Court of Appeal Rules** to rectify the default; however, it is evident that this has not occurred, as no court order extending such time has been submitted to this court. This provision explicitly states that:

“The Court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

13. In instances where a notice of appeal has been filed out of time without leave, and an applicant seeks a stay of execution, does a superior court possess jurisdiction? The answer is in the negative. This court concurs with and aligns itself with the binding decisions of higher courts that have addressed similar circumstances. In **Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR)**, the Supreme Court of Kenya affirmed the California Supreme Court decision of **Silverbrand v County of Los Angeles [2009] 46 Cal 4th 106, 113**, which stated *inter alia*:-

“As noted by the Court of Appeal, the filing of a timely notice of appeal is a jurisdictional prerequisite. “Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction

to determine the merits of the appeal and must dismiss the appeal.” (Sic) The purpose of this requirement is to promote the finality of judgements by forcing the losing party to take an appeal expeditiously or not at all.”

14. A similar position was adopted by **M’inoti, JA**, in **Kisyan Investments**, as articulated in the Court of Appeal decision of **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] KECA 346 (KLR)**, thus: -

“The fact of the matter is that the Court of Appeal cannot assume or exercise jurisdiction in an application under rule 5(2) (b) unless a competent notice of appeal has been filed. The filing of a Notice of Appeal from the decision of the High Court is a condition precedent before the powers under Rule 5(2) (b) can be invoked. This position is reiterated in Order 42 Rule 6(4) of the Civil Appeal Rules, 2010 which provides that an appeal to the Court of Appeal is deemed to have been filed when a notice of Appeal has been given under the Court of Appeal Rules.”

15. Imperatively, the existence of a valid notice of appeal is a mandatory condition precedent for this court to assume

jurisdiction over applications filed pursuant to **Order 42 Rule 6(1)** of the **Civil Procedure Rules**. In the absence of leave to file an out-of-time appeal from the Court of Appeal, this court determines that it lacks jurisdiction to grant the orders sought by the 1st to 4th defendants. It finds that determining the second issue is unnecessary.

16. The conclusion of the foregoing is that this court is inclined to disallow the relief for stay of execution pending appeal, with costs to the plaintiff, as the other defendants did not oppose the motion. Accordingly, the following orders are hereby issued.

a. THAT leave is hereby granted to the firm of B.M Mung'ata & Company Advocates to come on record for the 1st to 4th defendants.

b. The 1st to 4th defendants shall bear the plaintiff's costs of the motion.

c. This file is hereby effectively marked as closed.

Orders accordingly.

Delivered and Dated at Machakos this 14th day of April, 2026.

**HON. A. Y. KOROSS
JUDGE
14.04.2026**

**Ruling delivered virtually through Microsoft Teams Video
Conferencing Platform**

In the presence of;

Ms. Kanja Court Assistant

Mr. Mutava holding brief for Miss Mutuku for applicant.

Mr. Maingi for plaintiff/respondent.