

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**  
**ELC CASE NO.51 OF 2018**

**THOMAS RUTTO KANDA-----**  
**PLAINTIFF/APPLICANT**

**VERSUS**

**WALTER TOROITICH KILIMO-----1<sup>ST</sup>**  
**DEFENDANT/RESPONDENT**

**MOSES KIPLAGAT KILIMO-----2<sup>ND</sup>**  
**DEFENDANT/RESPONDENT**

**RULING**

- 1.** Through an application dated **8/1/2026**, the applicant is seeking orders that;
  - a) ... spent.**
  - b) Leave be granted to R.M. Ayora & Company Advocates to come on record for the applicant in place of M/S Cheruiyot Melly & Associate Advocates under Order 9 Rule 9 of the Civil Procedure Rules.**
  - c) The notice of change of advocates dated 7/1/2026 be deemed as duly filed.**
  - d) A stay of execution of the judgment delivered on 10/12/2025 and all the consequential orders, pending the intended appeal.**

2. The application is based on the grounds on its face and those in the supporting affidavit, sworn on **8/1/2026**.
3. The applicant deposes that he has lodged a notice of appeal; the appeal is arguable, raises serious points of law, has high chances of success, and unless the orders sought are granted, the respondent shall execute and dispossess him, rendering the intended appeal nugatory.
4. The applicant deposes that he is the registered proprietor of parcel number **Trans-Nzioa/Suwerwa/1164**, the suit property, which he acquired through a succession process, and that this property constitutes a valuable immovable asset, whose loss cannot be compensated by way of damages.
5. Further, the applicant deposes that the leave is required for the firm of R.M. Ayora & Company Advocates to conduct post-judgment applications and the intended appeal. It is deposed that the respondent shall not be prejudiced by the change of advocates. He also deposes that he is ready to abide by the conditions on security that this court may impose.

6. The applicant has attached as annexures marked **TRK1 - TRK5**, copies of the judgment, notice of appeal, instruction to the firm of R.M. Ayora & Company Advocates, notice of change of advocate, and the title deed.
7. The application is opposed by the respondents on the grounds of the opposition dated **13/2/2026**. The respondents claim that the application is incompetent and bad in law, for the reason that it offends the mandatory provisions of **Order 9 Rule 9** of the Civil Procedure Rules, as the firm of R.M Ayora & Company Advocates has not obtained leave of court to come on record post-judgment.
8. The respondents state that the purported Notice of Change of Advocates filed simultaneously with the application is premature, irregular, null, and void for want of prior leave of Court as required under **Order 9 Rule 9** of the Civil Procedure Rules.
9. Further, the respondents claim that the application was filed during the court vacation and did not comply with the applicable Vacation Rules, rendering it procedurally irregular and incompetent, and therefore, there is no competent application for stay of execution.

- 10.** The respondents term the application as not only an afterthought, but also an abuse of the court process intended to delay execution of the lawful judgment.
- 11.** Through written submissions dated **26/1/2026**, the applicant submits that the court should grant leave to the for the firm of R.M. Ayora & Company Advocates to come on record for the applicant, in line with **Order 9 Rule 9** of the Civil Procedure Rules, as a denial would amount to a violation of the right to legal representation of choice under **Article 50** of the Constitution. Reliance is placed on **S.K. Tarwadi -vs- Veronica Muehlmann [2019] eKLR.**
- 12.** On the threshold to warrant a stay pending appeal, the applicant submits that he moved the court without unreasonable delay, and he stands to suffer substantial loss since he is the one in occupation of the suit property with developments thereon.
- 13.** Given the foregoing, the applicant submits that the execution shall result in an eviction and permanent dispossession. Reliance is placed under **Article 40** of the Constitution, **Kenya Shell Ltd -vs- Benjamin Karuga Kibiru [1986] eKLR, Mukuma -vs- Abuoga [1988], Stanley Kangethe -vs- Tony Keter & 5 Others [2013] eKLR, and Reliance**

**Bank -vs- Norlake Investments Ltd [2002] eKLR.**

- 14.** The respondents, on their part, rely on written submissions dated **13/2/2026**. They submit that provisions of **Order 9 Rule 9** of the Civil Procedure Rules are in mandatory terms and failure to comply renders any subsequent proceedings incompetent.
- 15.** Further, the respondents submit that an advocate who comes on record post-judgment without leave of court or consent of parties has no *locus standi*. Reliance is placed on **Lalji Bhimji Sanghani Builders & Contractors -vs- City Council of Nairobi [2012] eKLR, Kenya Commercial Bank Ltd -vs- Specialised Engineering Co. Ltd [1982] KLR 485,** and **John Langat -vs- Kipkemoi Terer & 2 others. [2013] eKLR.**
- 16.** The respondents further submit that filing the notice of change simultaneously is procedurally fatal and thus null and void and cannot be cured by **Article 159** of the Constitution. Reliance is placed on **S.K. Tarwadi -vs- Veronica Muehlmann (supra), Francis Karioko Muruatetu & Another -vs- Republic [2017] eKLR, Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and**

**Boundaries Commission & 7 others [2015]**  
**eKLR.**

- 17.** The respondents submit that the application was filed during the court vacation period and did not adhere to the vacation rules.
- 18. Order 9 Rule 9** of the Civil Procedure Rules provides that a change of advocates post judgment must be effected by order of the court or by consent of the parties, with leave of court. It is not in dispute that the firm of R.M. Ayora & Company Advocates is coming on record for the applicant after the judgment was delivered; hence, the provisions are applicable. Leave of court is sought where there is no consent from both the incoming and outgoing advocates. I have not seen any such consent before me.
- 19.** Regarding stay of execution, it is trite law that the filing of an appeal does not operate or amount to an automatic stay of execution. The prerequisite conditions that a party must establish for the court to order a stay of execution are provided under **Order 42 Rule 6(2)** Civil Procedure Rules. An applicant must demonstrate and satisfy the court that substantial loss may result unless the order is

granted, show that the application has been made without unreasonable delay, and provide such security for the due performance of such decree or order as may ultimately be binding on him.

- 20.** In **James Wangalwa & Another -vs- Agnes Naliaka Cheseto [2012] eKLR**, the court held that execution does not amount to substantial loss since execution is a lawful process. The applicant must establish other factors showing that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. Substantial loss, therefore, means what has to be prevented by preserving the status quo, because such loss would render the appeal nugatory.
- 21.** In the instant application, the judgment was delivered on **10/12/2025**, while this application was filed on **9/1/2026**; this is a delay of about a month, which the applicant has not explained. The law has not defined what constitutes an inordinate delay, for even a one-day delay could be inordinate.
- 22.** The applicant has alleged that the suit land constitutes valuable and unique immovable assets whose loss cannot be adequately compensated by

damages. There is no demonstration of substantial loss likely to be occasioned if stay orders are denied. Written submissions do not amount to evidence. Tangible and cogent evidence is what must be availed to show what developments the applicant has on the suit property and which, if a stay is not granted, will make him suffer loss or damage.

23. Execution of a decree is lawful and does not per se amount to substantial loss. Indeed, as held in **Dodhia -vs- Wafula [2025] eKLR**, it is in the interest of justice for a successful party to enjoy the fruits of his judgment.
24. Again, no security has been offered for the due realisation of the decree. In **Arun C. Sharma -vs- Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR**, the court held that the purpose of security needed under **Order 42** of the Civil Procedure Rules is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.
25. A right of appeal must be balanced against an equally weighty right of the plaintiff to enjoy the fruits of a judgment delivered in his favour. In

**Samvir Trustee Limited -vs- Guardian Bank Limited [2007] eKLR**, the court held that in considering whether to grant or refuse an application for stay, a court is empowered to see whether there exist any special circumstances that can sway the court's discretion. The yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory, while at the same time, ensuring that a successful party is not impeded from enjoying the fruits of his judgment.

- 26.** The respondents have stated that the application is incompetent for violating court vacation rules. The Judicature Act and the High Court Practice and Procedure Rules entitle a party to move the court during the vacation in the event the matter is one of urgency. Be that as it may, the court exercised its discretion and, in the interest of justice, made directions on the application on **13/1/2026**.
- 27.** From the foregoing, it is evident that the applicant has not met the threshold to warrant the orders sought for a stay of execution; the prayer is declined. The firm of R.M. Ayora & Company Advocates is allowed to come on record for the applicant. The

notice of change of advocates is deemed as duly filed.

**28.** Costs to the respondents.

**29.** Orders accordingly.

**Ruling dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 22<sup>nd</sup> day of April 2026.**

**In the presence of:**

Court Assistant - Dennis

Ayora for the applicants present

Ndarwa for Kiarie for respondents present



**HON. C.K. NZILI  
JUDGE, ELC KITALE.**