

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ELC CASE NO. E005 OF 2022(OS)

ROSE NALIKA KITAYI-----
PLAINTIFF/RESPONDENT

VERSUS

LOIS CHESIRKEN PSENJEN
(Sued as the personal representative of
ENOCK M. PSENJEN (Deceased)-----1ST
DEFENDANT/APPLICANT

STEPHEN KIPLAGAT PSENJEN
(Sued as the personal representative of
ENOCK M. PSENJEN (Deceased)-----2ND
DEFENDANT/APPLICANT

VICTORIA KAMULE MASINDE-----3RD
DEFENDANT

RULING

1. The applicants moved this court by an application dated **5/2/2026**, brought pursuant to **Sections 3A** and **95** of the Civil Procedure Act, **Order 50** of the Civil Procedure Rules, seeking to stay execution of the judgment delivered on **5/11/2025**, and enlargement of the time for the applicants to file an appeal.
2. The grounds in the supporting affidavit, sworn on **5/2/2026** by Stephen Kiplangat, are that there was

miscommunication, where the applicants thought that their counsel had filed a Notice of Appeal, only to learn later that none had been filed.

3. The applicants depose that there is a stay of execution in **Kitale ELC No. 136 of 2006**, preserving the subject matter, and therefore, no prejudice shall be occasioned to the respondent.
4. The copies of the stay order and the draft Notice of Appeal are attached as annexures marked **SKP-1 & 2**.
5. Opposing the application, the respondent filed a replying affidavit sworn on **13/2/2026** by Roce Naliaka Kitayi. She deposes that material facts have not been disclosed or substantiated; the application has not met the threshold to warrant stay orders, and that she is not a party to **Kitale ELC No. 136 of 2006**, where existing stay orders were granted. Further, the respondent deposes that this court dismissed the applicants' application for stay of these proceedings by a ruling dated **9/6/2025** and marked as **RNK-1**, which the applicants did not challenge.
6. The respondent says that the applicants have been indolent and have failed to explain an inordinate delay in filing this application, for this court to

enlarge the time; they have not shown that the intended appeal is arguable and likely to succeed.

7. The respondent deposes that she bought a portion of the land decreed to the 3rd defendant in **Kitale ELC No. 136 of 2006**, to which the applicants have failed to demonstrate the prejudice they stand to suffer if the orders sought are not granted.
8. The respondent terms the application as an afterthought, mischievous, and made in bad faith, after the Notice of Appeal by the 3rd defendant dated **4/2/2026** and without leave, contrary to **Rule 79(1)** of the Court of Appeal Rules. The said notice is attached as annexure marked **RNK-2**.
9. Further, the respondent depones that she is entitled to enjoy the fruits of her judgment; that the sword of justice cuts both ways; litigation should come to an end, and the court should prevent an abuse of its process.
10. The 3rd defendant did not oppose the application.
11. Through written submissions dated **13/2/2026**, the applicants submit on two issues for determination. On whether this court should grant a stay pending appeal, the applicants submit that **Section 3A** of the Civil Procedure Act confers upon the court inherent

powers to make such orders as may be necessary to meet the ends of justice.

- 12.** The applicants also submit that **Section 95** of the Civil Procedure Act empowers the court to enlarge time prescribed or fixed by any order of the court or by the Civil Procedure Rules, while **Order 50 Rule 6** of the Civil Procedure Rules governs applications for extension of time. Reliance is placed on **Butt -vs- Rent Restriction Tribunal [1982] KLR 417, Stanley Kang'ethe Kinyanjui -vs- Tony Keter & 5 Others [2013] eKLR, and James Gitonga -vs- Trustees of the Agricultural Society of Kenya [2015] KEELRC 638 (KLR)** to submit that the intended appeal is arguable, it will be rendered nugatory without a stay, and that the respondent shall not suffer any prejudice.
- 13.** On extension of time to file a notice of appeal, the applicants submit that the overriding consideration is whether an extension shall serve the ends of justice, the length and reasons for the delay, which the applicants attribute to miscommunication. The applicants rely on **Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi [1999] 2 EA 231, Fakir Mohamed -vs- Joseph Mugambi & 2 others**

[2005] KECA 340 (KLR), Shah -vs- Mbogo & Another [1967] EA 116, Ngatuny & 2 others -vs- Mosoiko & 2 others [2024] KECA 1656 (KLR), Article 159(2)(d) of the Constitution and Obado - vs- Oyugi & 2 others [2014] KESC 25 (KLR).

- 14.** In written submissions dated **13/2/2026**, the respondent submits that the applicants have not demonstrated substantial loss, offered any security, or filed the application without unreasonable delay; the delay is not explained, contrary to **Order 42 Rule 6(2)(a) & (b)** of the Civil Procedure Rules.
- 15.** Further, the respondent submits that this court is *functus officio* and therefore lacks the jurisdiction to grant the prayers sought. The application has been brought after an unreasonable delay, which is not explained. The respondent submits that the application is an afterthought, made in bad faith, is mischievous, and an abuse of the court process.
- 16.** The principles governing the grant of stay of execution pending appeal are well settled under **Order 42 Rule 6(2)** of the Civil Procedure Rules.
- 17.** An applicant has to satisfy the court that:
 - i. Substantial loss may result unless the order is made.*

- ii. The application has been made without unreasonable delay.*
 - iii. Security for the due performance of the decree has been given.*
- 18.** On delay, the judgment was delivered on **5/11/2025**, while the present application was filed on **6/2/2026**. In this court's view, this delay, which is unreasonable and inordinate, has not been sufficiently explained.
- 19.** The Court of Appeal in **Kenya Shell Ltd -vs- Kibiru & Another [1986] KLR 410 [1986] KECA 94 (KLR)** held that substantial loss is what has to be prevented by preserving the status quo since such loss would render the appeal nugatory. There is no material evidence placed before this court to show that the applicants would suffer prejudice of such a magnitude as would render the appeal nugatory if execution proceeds.
- 20.** Security for the due performance of the decree is a mandatory requirement under **Order 42 Rule 6(2) (b)** of the Civil Procedure Rules. In **Arun C. Sharma -vs- Ashana Raikundalia t/a Raikundalia & Co. Advocates [2014] eKLR**, the court held that the security needed under **Order 42** of the Civil Procedure Rules guarantees the due performance of

such decree or order as may ultimately be binding on the applicant.

- 21.** The applicants have not made any concrete offer of security. The requirement is not merely procedural, but rather goes to the heart of judicial discretion under **Order 42 Rule 6(2)(b)** of the Civil Procedure Rules.
- 22.** The guiding principle is for a court to strike a balance between the successful party's right to enjoy the fruits of judgment and the appellant's right to pursue an appeal without undue hardship. See **Butt -vs- Rent Restriction Tribunal** (*supra*) and **Stanley Kang'ethe Kinyanjui -vs- Tony Keter** (*supra*). The applicants have not attached a draft memorandum of the appeal for the court to determine if the intended appeal is arguable or not.
- 23.** **Section 7** of the Appellate Jurisdiction Act provides that the High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court, or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.

- 24.** The court in **Mwangi -vs- Kenya Airways Ltd [2003] KLR**, held that matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal, succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted.
- 25.** The applicants in their notice of motion are seeking an extension of time within which to file an appeal alleging miscommunication and the failure of the advocate to file a notice of appeal. The two are distinct.
- 26.** A case belongs to a party and not their advocate. The applicants have not stated why they had to wait for **2** months to follow up on their case.
- 27.** There is already a notice of appeal dated **10/11/2025** by the 3rd defendant. The applicants are at liberty to seek leave at the appellate court for joinder in the said appeal.
- 28.** The upshot is that the application dated **5/2/2026** is found to be devoid of merit and is dismissed with costs.

29. Orders accordingly.

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

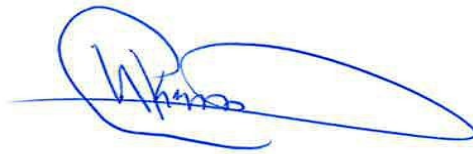
In the presence of:

Court Assistant - Dennis

Miss Lichuma for the 1st and 2nd defendans/applicants present

Bikundo for the plaintiff present

Nabwile for Kidiavai for the 3rd defendant present

A handwritten signature in blue ink, appearing to read 'W. Nzili', is written over a horizontal line.

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