



**Ngendu & another v Kithika & another (Environment and Land Appeal
E004 of 2025) [2026] KEELC 2727 (KLR) (5 May 2026) (Ruling)**

Neutral citation: [2026] KEELC 2727 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL E004 OF 2025**

EC CHERONO, J

MAY 5, 2026

BETWEEN

MICHAEL NYAGA NGENDU 1ST APPELLANT

PETER GAKUYA MBOGO 2ND APPELLANT

AND

DAVID KITHIKA 1ST RESPONDENT

COUNTY GOVERNMENT OF EMBU 2ND RESPONDENT

RULING

1. Before this Court is a Notice of Motion Application under certificate of urgency dated 5th February 2026 in which the Appellants/Applicants, who now act in person, seek the following substantive orders: (a) leave to withdraw instructions from M/S Muriuki & Company Advocates and to act in person; (b) leave to lodge a Notice of Appeal out of time; (c) stay of execution of the judgment and/or Decree delivered on 20th November 2025, including but not limited to the certificate of costs, pending appeal to the Court of Appeal; and (d) costs of the application.
2. The application is supported by the affidavit of the 2nd Applicant, Peter Gakuya Mbogo, sworn in February 2026, and a supplementary affidavit sworn on 4th March 2026. The 1st Respondent filed grounds of opposition through M/S Mogusu & Co. Advocates. The 2nd Respondent, County Government of Embu, filed a replying affidavit through its advocate Prof. Tom Ojienda. All parties filed written submissions, which this Court has considered.

Background

3. Judgment in the main suit was delivered on 20th November 2025. The Applicants contend that they only came to learn of the judgment in January 2026 when they visited the ELC Registry. They attribute the delay to their former advocate, M/S Muriuki & Co. Advocates, who they say failed to communicate



the outcome to them. They further state that the delay was compounded by a go-slow by the Embu Bar Association against the former ELC Judge, Hon. Kossy Bor, and that the judgment had not been uploaded onto the e-filing system as of the time of filing this application. They filed the present application on 5th February 2026, approximately two and a half months after delivery of judgment.

4. The Respondents oppose the application in its entirety. They contend that the Applicants were at all material times represented by counsel on record and that notice to counsel constitutes notice to the client. They argue that the delay is inordinate and inadequately explained, that the intended appeal is frivolous, and that the Applicants have not met the threshold for stay of execution under Order 42 Rule 6 of the Civil Procedure Rules, 2010.

Issues For Determination

5. The Court distils the following issues for determination:
 - i. Whether the Applicants should be granted leave to act in person;
 - ii. Whether the Applicants should be granted leave to file a Notice of Appeal out of time; and
 - iii. Whether stay of execution pending appeal should issue.

Analysis And Determination

6. Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides that a party who wishes to change or discharge their advocate or to act in person must serve the advocate on record with the relevant application. The Applicants aver that they served the firm of M/S Muriuki & Co. Advocates with the present application and have received no objection or response.
7. The right of a litigant to represent themselves in proceedings is a fundamental right rooted in the overriding objective of the *Civil Procedure Act* and *the Constitution* of Kenya, 2010. There is no basis to deny a party the right to act in person where the procedural requirement of service on the former advocate has been satisfied. This Court is satisfied that the Applicants have complied with the requisite procedure. Leave to act in person is accordingly granted.
8. Section 75 of the *Civil Procedure Act* and Rule 75 of the Court of Appeal Rules, 2022 require that a Notice of Appeal be lodged within 14 days of the date of the decision appealed against. In this case, judgment was delivered on 20th November 2025. The Applicants filed the present application on 5th February 2026 — a delay of approximately 77 days beyond the stipulated period.
9. The grant of extension of time to file a Notice of Appeal is a discretionary remedy. As the Court of Appeal held in *Nicholas Kiptoo Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, the court must consider the period of delay, the reason for the delay, the degree of prejudice to the respondent, and whether the matter raises issues of public importance. Similarly, in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, the court affirmed that an applicant must demonstrate sufficient cause for the delay and that the intended appeal is arguable.
10. The Applicants principally attribute the delay to their former advocate's failure to communicate the delivery of judgment. The legal position on this is well settled: notice to an advocate on record constitutes notice to the client. A litigant cannot, without more, shift the consequences of counsel's inaction onto the court or the opposing party. As the Court of Appeal observed in *Hussein & Another v Kenya Revenue Authority & Another* [2023] KECA 468 (KLR), a party is not absolved of their obligation to diligently follow up on their own matter merely because they have engaged counsel.



11. That said, this Court is alive to the contextual circumstances surrounding the delivery of this judgment. The Applicants have averred on affidavit — and this Court notes the matter is within public knowledge — that the Embu Bar Association conducted a go-slow against the presiding judge at the material time. The Applicants have further stated, and this has not been contradicted, that the judgment has not been uploaded on the e-filing system. These are material factors that could reasonably have inhibited timely access to information about the judgment.
12. Furthermore, the Applicants aver in their supplementary affidavit that upon obtaining a copy of the judgment from the registry and perusing it, they acted promptly in filing the present application. This Court accepts that the delay, while substantial, is not the product of deliberate indolence but of a confluence of factors including the peculiar circumstances prevailing in Embu at the time, the Applicants' reliance on counsel, and their status as lay persons unfamiliar with court processes.
13. On the arguability of the intended appeal, the Applicants have not annexed a draft Memorandum of Appeal, which would ordinarily be required to demonstrate that the appeal raises legitimate grounds. However, they have referred to the judgment as a basis for grievance and have indicated the general nature of their challenge. While this falls short of the ideal, the absence of a formal draft Memorandum of Appeal is not by itself fatal at this interlocutory stage, particularly where the Applicants are lay litigants who have just begun to navigate the appellate process.
14. Balancing the competing considerations — the length of the delay, the explanations offered, the lay status of the Applicants, the peculiar circumstances of the Embu Bar boycott and non-upload of the judgment, the Applicants' readiness to abide by conditions, and the constitutional imperative that justice shall not be denied on account of technicalities — this Court finds that sufficient cause has been shown to warrant the exercise of its discretion in favour of the Applicants. Leave to file a Notice of Appeal out of time is accordingly granted, subject to conditions set out below.
15. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, 2010 set out the conditions that must be satisfied before a court may grant stay of execution. The Applicant must demonstrate: (a) that substantial loss may result if stay is not granted; (b) that the application has been made without unreasonable delay; and (c) that such security as the court orders for the due performance of the decree has been given by the Applicant. These requirements are conjunctive and mandatory.
16. On substantial loss, the Applicants contend that they risk losing the suit property and are exposed to execution for costs. The Court in *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] KLR held that substantial loss is the cornerstone of an application for stay and that mere apprehension of execution is insufficient. However, where the subject matter of the intended appeal is land — as appears to be the case here — the threat of losing the suit premises upon execution is a matter of real and material consequence that can constitute substantial loss.
17. On the question of delay, as discussed above, this Court has found that the delay, while significant, is adequately explained. The application was filed promptly once the Applicants became aware of the judgment.
18. On security, the Applicants in their supplementary affidavit expressed readiness to abide by such conditions as the Court may impose. They have not, however, proposed or tendered any specific security. The third limb under Order 42 Rule 6 remains unfulfilled. This Court has a duty to balance the Applicants' right to access justice and pursue a legitimate appeal against the Respondents' right to enjoy the fruits of their judgment. This balance is best achieved by granting conditional stay of execution.



19. In *Butt v Rent Restriction Tribunal* [1982] KLR 417, the Court of Appeal held that a court in exercising its discretion whether to grant stay of execution should consider whether if the stay is not granted, the appeal if successful would be rendered nugatory. Having granted leave to appeal, this Court is satisfied that absent a stay, the execution of the judgment — particularly in relation to the suit property — risks rendering any successful appeal a nullity, thereby occasioning irreversible prejudice to the Applicants.

Orders

20. In the premises and for the reasons set out above, this Court makes the following orders:

- i. Leave be and is hereby granted to the Applicants to act in person in these proceedings.
- ii. Leave is hereby granted to the Applicants to file and serve a Notice of Appeal out of time. The Notice of Appeal shall be filed and served within fourteen (14) days from the date of this Ruling.
- iii. There shall be a stay of execution of the judgment and/or Decree delivered on 20th November 2025, including any certificate of costs issued pursuant thereto, pending the lodging of the appeal at the Court of Appeal, subject to the following conditions:
 - a. The Applicants shall deposit into Court the sum of Kshs. 100,000/= (Kenya Shillings One Hundred Thousand) as security for costs of the intended appeal, within thirty (30) days from the date of this Ruling. In default of compliance, the stay of execution shall lapse automatically.
 - b. The Applicants shall file and serve the Record of Appeal within thirty (30) days from the date of filing the Notice of Appeal, failing which the stay of execution shall lapse.
- iv. Costs of this application shall be Costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT EMBU THIS 5TH DAY OF May, 2026.

HON. E.C CHERONO

ELC JUDGE, EMBU

In the presence of;

Ojil H/B for Prof. Tom Ojienda for 2nd Respondent

Appellant-present

Mr. Mogusu for 1st Respondent

M/S Diana Kemboi C/A

