



Mokaya v Ojijo (Suing as the Next Friend and Mother to Cedric Odhiambo Omondi) ((Suing as the Next Friend and Mother to Cedric Odhiambo Omondi)) (Civil Appeal E051 of 2024) [2025] KEHC 5706 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5706 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E051 OF 2024**

A MABEYA, J

MAY 8, 2025

BETWEEN

DENNIS ODHIAMBO MOKAYA APPELLANT

AND

LYNET JATIENO OJJO RESPONDENT

(SUING AS THE NEXT FRIEND AND MOTHER TO CEDRIC ODHIAMBO OMONDI)

RULING

1. Before Court is a Motion on Notice dated 16/10/2024 by appellant. It was brought under section 1A and 3A of the *Civil Procedure Act* and Orders 22(1) and 42 Rule 6 of the *Civil Procedure Rules*.
2. The appellant sought the extension of stay of execution orders and enlargement of time within which to comply with the conditions of stay made on 8/5/2024. Finally, that the sum of Kshs 684,881/= already deposited in a joint account in the names of both advocates on 22/8/2024, continue to be held as security for the due performance for the decree pending the determination of the appeal.
3. The grounds upon which the Motion was grounded upon were that; judgment was entered against the appellant in KSM SCCC No 386 of 2023 on 26/2/2024 for Kshs 605,000/= together with costs and a 30 day stay granted. Pursuant thereto, the appellant filed the present appeal on 18/3/2024.
4. The appellant applied for stay which was allowed on condition that he deposited the decretal sum within 45 days which he did, albeit out of time. That the delay was caused by the respondent's advocates who made errors in filing the bank forms, internal bank processes and the freezing order over the appellant's institution bank accounts.



5. The appellant applied for extension of time before the trial court which application was dismissed on 17/9/2024. Subsequently, the respondent applied to have the funds deposited in the joint account released to him. That the amount is substantial and unless stay is granted, the appellant stands to suffer substantial loss. That if the money is paid over, the respondent will not be able to refund the same were the appeal to succeed.
6. The Motion was opposed vide the Replying Affidavit of Maureen Akoth Okumu sworn on 29/11/2024. She narrated the sequence of events since the 23/8/2024 when the appellant applied for extension of time before the trial court. That the trial court dismissed the application for lack of merit. That the present application was *res-judicata* as the trial court had dismissed a similar application. That once the trial court dismissed the application for extension of time, what was open to the appellant was to appeal against that order and not to make a similar application before this Court.
7. It was therefore contended that the application was grounded on malice, ill faith and bad taste with the aim of frustrating the respondent. That the Court should dismiss the application and order for the release for the security held in the joint account.
8. The application was argued orally. It was submitted for the appellant that the Court had power to enlarge the time sought. That there was adequate security as the money was already held in a joint account. The cases of *ICDC & another v Hannah Moraa Bulama* (CA No 254 of 2007) and *Nicolas Kiptoo Salat v IEBC* were cited in support of those submissions.
9. On the other hand, it was submitted for the respondent that the application was bad in law as Order 42 Rule 6 of the *Civil Procedure Rules* envisages a situation of first application. That the powers of the High Court to grant a stay ended when the trial court declined to grant an extension of time. That the appellant should have filed an appeal against that decision. That the oxygen principles were not applicable in the present case. The case of *Handlers Trading Ltd v Elf Oil Ltd* (2010) eKLR was cited in support of that contention.
10. The Court has considered the rival contestations. This is an application for stay and extension of time within which to comply with the conditions set by the trial court for stay. This is not the usual application under Order 42 Rule 6 of the *Civil Procedure Rules*. I say so because, the appeal that is pending is as against the decree of 26/2/2024.
11. The prayers sought are in the following terms: -
 - “ 4. That the court be pleased to extend stay of execution orders and enlarge the time within which the Appellant can comply with this Honourable Court’s conditions on stay that was issued on 8th May, 2024.
 5. That the decretal amount of Kshs 684,881/= already deposited in the joint account in the names of both the advocates on 22nd August, 2024 continue to be held as proper security for due performance pending hearing of the appeal.”
12. The respondent raised an issue which is a kin to a preliminary objection. Ms. Akumu, Learned Counsel for the respondent submitted that the application was *res-judicata* as trial court had already heard and determined a similar application. She produced a copy of the ruling of Hon. Serem, RM dated 17/9/2024 in support of her contention.
13. The appellant did not deny that he had made a similar application and that the trial court dismissed it. That Court had exercised its discretion on the issue of whether or not it should extend the time within which the deposit had to be made. It saw no merit and dismissed the same.



14. While in applications for stay under Order 42 Rule 6 of the *Civil Procedure Rules* an applicant can make a second application for stay before this Court on appeal, I do not think there is jurisdiction on other applications. I say so because the principles applicable are different. In an application for stay the Court to which an appeal lies can entertain such an application even a similar application may have been declined by the court appealed from.
15. In the present case, the trial court having heard the application for extension of time and dismissed it, the appellant had one option to appeal against the same. The stay order sought herein was predicated upon that extension of time that had been declined. This Court cannot exercise that jurisdiction unless on appeal. There is no appeal against that order of refusal to extend time.
16. The doctrine for *res-judicata* is encapsulated under Section 7 of the *Civil Procedure Act* as follows: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
17. In my view, the trial Court having had the jurisdiction to hear and determine the application for extension of time and having heard and determined it, this Court cannot purport to exercise that jurisdiction in exercise of its original jurisdiction. It can only do so by way of an appeal. There is no appeal against the decision declining to extend the time.
18. That being the case, I find that the present application is *res judicata* and strike out the same with costs. Interim orders of stay are hereby discharged.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF MAY, 2025.

A. MABEYA, FCI Arb

JUDGE

