



**Rotich v Loibun (Civil Appeal E059 of 2024) [2025] KEHC 8354 (KLR) (12 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8354 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E059 OF 2024**

**E OMINDE, J**

**JUNE 12, 2025**

**BETWEEN**

**JOSEPH KIPLAGAT ROTICH ..... APPELLANT**

**AND**

**JOSEPH LOIBUN ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 28/03/2024 the Applicant seeks the following orders:
  1. Spent.
  2. Spent.
  3. That this Honourable Court be pleased to issue an order of stay of execution of the judgment/decree issued on 11/08/2023, pending the hearing and determination of the appeal herein.
  4. That costs of this Application be in the cause.
2. The application is premised on the grounds set out on the face of it and the contents of the supporting affidavit sworn by the Applicant on the same date.
3. The Applicant deposed that on 11/08/2023, auctioneers from Seventy-Seven visited his home to execute a judgment that was delivered in SCC No. E275 of 2023 where he was the Respondent, that the Court entered judgment in favour of the Claimant who is the Respondent herein to the effect that he was 100% liable to compensate the Respondent for injuries sustained in a road traffic accident involving the motor vehicle registration number KDB 281K wherein the Respondent was travelling as a fare paying passenger and motor vehicle registration number KCB 855D belonging to the appellant as follows; general damages of Kshs.220,000/=, special damages of Kshs.6,000/= plus costs and interests totalling Kshs.297,297.21



4. The Applicant contended that he was not aware of the proceedings and the eventual judgement and decree. That he only became aware that a suit had been instituted against him when the auctioneers visited his home. That he approached the Small Claims Court by way of an Application dated 8<sup>th</sup> January 2024 seeking that the said judgement be set aside for want of service but through its Ruling dated 28/03/2024, the Small Claims Court dismissed his application prompting him to file the appeal herein which seeking that this court reviews the said ruling and set aside the said judgment and decree set aside so that he can be allowed to defend the suit and the case be determined on merit.
5. The Applicant further deposed that the issues raised in the Memorandum of Appeal filed encompass the issue of a service and whether the same was properly undertaken. He further contends that if the orders sought herein are not allowed then he stands to suffer irreparable harm as the Appeal will be rendered nugatory and a mere academic exercise.
6. The Applicant maintained that having not been accorded the opportunity to file a response to the Statement of Claim, he was condemned unheard and that execution of the decree will prevent him from pursuing his right to be heard and thus occasioning substantial loss and further that the Appeal raises triable issues and that the Respondent will not be prejudice if this application is allowed.

### **Replying Affidavit**

7. The Respondent, Joseph Loibun opposed the application dated 8/03/2024 vide a Replying Affidavit dated 15/04/2024. He deposed that the instant application is misconceived, an abuse of Court's process and without merit to neither aid fairness nor judicial fair administration and that the instant application now before Court has been brought in bad faith, to arbitrarily defeat, frustrate and abuse the course of justice and the Court process.
8. The Respondent contended that from the record, the Applicant had previously sought for an order for setting aside of the judgment and leave be granted to defend the suit in the trial Court and that upon hearing the parties on the same, the Court vide its ruling delivered on 28/02/2024 found the application without merit and dismissed it thereby making this suit res judicata.
9. The Respondent further deposed that stay of execution pending appeal is a discretionary relief and that both parties have rights that need to be considered and/or protected and that when an issue of money decrees is involved, the Court should balance the interest of both parties and not to shut down a successful litigant from enjoying the fruits of its rightfully obtained judgment.
10. According to the Respondent the application herein is only aimed at frustrating him and denying him from enjoying the fruits of his judgment.
11. The Respondent contended that the Appellant herein has nothing to lose, suffer or be prejudiced about as this matter continues to be delayed and kept pending in Court to his advantage and interest.

### **Further Affidavit**

12. The Applicant also filed a Further Affidavit dated 17/06/2024 in which he deposed that his application has satisfied the conditions of stay set out in Order 42 Rule 6(2) of the Civil Procedure Rules. The Applicant contended that the Respondent has not issued any material as to his ability to repay the decretal sum in the event that the Appeal succeeds. The Applicant further deposed that there has been no inordinate delay in bringing the instant appeal as the judgment and decree being appealed against were delivered on 11/8/2023 and the Memorandum of Appeal filed on 28/03/2024.



13. The Application was canvassed vide written submissions. The Applicant filed submissions dated 17/06/2024 whereas the Respondent filed submissions dated 25/04/2024.

### **The Applicant's submissions**

14. Counsel for the Applicant cited Order 42 Rule 6(2) on the principles guiding the grant of stay of execution. Counsel observed that further to the above, stay may only be granted where there is sufficient cause and that the Court in deciding whether or not to grant stay is enjoined to give effect to the overriding objectives stipulated under Section 1A and 1B of the *Civil Procedure Act*.
15. Counsel submitted that an Applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the Applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the Court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. Counsel cited the case of Antoine Ndiaye v African Virtual University [2015] eKLR.
16. In regard to substantial loss, Counsel cited the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR and added that in the instant case, the Applicant averred that he stands to suffer substantial loss of over Kshs. 226,000/= as well as costs and interest if stay of execution is not granted, that the Respondent has not demonstrated that he is able to refund the sum if the appeal succeeds and that the Appellant is able to comply with any order as to security of costs.
17. In considering the purpose of stay of execution, Counsel cited the case of RWW v EKW [2019] eKLR, where the Court observed that;  
  
the purpose of stay pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory. Further the Court held in doing so, it has to weigh this right against the rights of a successful litigant who should not be deprived of the fruits of his judgment.
18. Counsel submitted that the Respondent has not given any material as to his ability to repay the decretal sum in case the appeal succeeds and in light of the deposition by the Applicant that he shall suffer substantial loss if stay is not granted. Counsel cited the case of G.N. Muema P/A(Sic)Mt View Maternity & Nursing Home v Miriam Bishar & Another [2018] eKLR, wherein the Court also considered the Respondent's ability to repay the decretal sum in case the appeal succeeded as there was no affidavit evidence by the Respondent on record on the means.
19. In regard to the issue of delay, Counsel submitted that there has been no inordinate delay in bringing the instant Application. That the Memorandum of Appeal filed on the 28/03/2024. Counsel also pointed out that the merits of the appeal is not a factor to consider when determining an application for stay of execution under Order 42 Rule 6 of the Civil Procedure Rules. In addition, Counsel submitted that this appeal is highly arguable and thus meritorious with a very high chance of succeeding.
20. As to the security of costs, Counsel submitted that this Court is not bound by the type of security offered by an Applicant. Counsel observed that the Court can make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.

### **The Respondent's submissions**

21. The Respondent's Counsel also cited Order 42 Rule 6 of the Civil Procedure Rules on the conditions to be satisfied before a Court can grant stay of execution as already herein summarised.



22. Counsel urged that the duty of the Court is, as far as possible, is to balance the interests of the parties. He submitted that this would require safeguarding the interests of the decree holder to the decretal sum, but also ensuring that should the appeal succeed, it will not have been rendered nugatory by earlier payment to a party who is unable to repay the decretal sum upon the success of the appeal.
23. On the issue of substantial loss, Counsel cited the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR (Supra). Counsel (Supra) and submitted that the Applicant has not shown that the Respondent has no means and, therefore will not be in a position to refund the money should the appeal succeeds and submits that the Respondent's financial means are known and that the Respondent has stated in his Replying Affidavit that he has the ability to refund the money should the appeal succeed.
24. He has also submitted that the Applicant has not shown that he has the means to pay the decretal amount if the appeal is dismissed. Counsel also cited the following cases in that regard; *Equity Bank Ltd v Taiga Adams Company Ltd* [2006] eKLR and the case of *Machira T/A Machira & Co Advocates v East African Standard* (No 2[2002] 2 KLR 63.
25. Counsel submitted that the Applicant has a statutory right of appeal that he seeks to exercise but faces the real possibility of execution and thereby paying the decretal sum of Kshs. 148,800/=before his appeal is heard and determined. On the other hand, Counsel pointed out that the Respondent has a decree in his favour that he wishes to execute, but he is also faced with the possibility that the appellant's appeal may succeed and he may be required to refund the decretal sum already paid. Counsel added that this requires balancing of the two rights.
26. Counsel contended that he has a duty to satisfy the Court that he will indeed suffer something special that cannot be undone should execution be allowed to proceed that he did not state that the Respondent is an impecunious person who would not be able to refund the decretal sum if paid.
27. On the issue of security, Counsel submitted the security offered by the Applicant is not appropriate and submits that the Applicant should deposit the decretal sum into a joint interest earning account in the names of the two advocates for the parties.
28. On whether the instant application is res judicata, Counsel cited Section 7 of the *Civil Procedure Act*. Counsel added that a person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions.
29. Counsel submitted that in order therefore to decide as to whether an issue in a subsequent Application is res judicata, a Court of law should always look at the decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain; what issues were really determined in the previous Application; whether they are the same in the subsequent Application and were covered by the decision and whether the parties are the same or are litigating under the same title and that the previous Application was determined by a Court of competent jurisdiction. Counsel cited Kuloba J in the case of *Niangu v Wambugu and another Nairobi HCCC No.2340 o 1991* (unreported).
30. Counsel urged that a decision of the Court must be respected as fundamental to any civilised and just judicial system. Counsel maintained that judicial determinations must be final, binding and conclusive and that there is injustice if a party is required to litigate afresh matters which have already been determined by the Court.



31. Counsel submitted that a decision of the Court, unless set aside or quashed in a manner provided for by the law, must be accepted as incontrovertibly correct. Counsel added that these principles would be 'substantially undermined' if the Court were to revisit them every time a party is dissatisfied with an Order and goes back to the same Court particularly when there is a change of a judicial officer in the Court station.

### **Determination**

32. From the Memorandum of Appeal filed, the pleadings with regard to the Application and the submissions made, it is my considered opinion that the Applicant's main contention is that he was not served with the pleadings in the lower court and so the case was heard and determined ex parte and he was therefore condemned unheard. That further his Application seeking to set aside the proceedings for this reason of want of service was dismissed. In this regard then, the issues for determination then is
- a. whether the Applicant has an arguable appeal for reasons that he was not served
  - b. Whether a stay of execution should issue

33. But before delving into the two issues, I will briefly touch on the issue raised regarding res judicata as follows; Section 7 of the [Civil Procedure Act](#) Cap 21 Laws of Kenya defines the doctrine of res judicata in the following terms:

“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.”

34. In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction. Briefly, it is my finding that because in the instant case, this is an appeal against the decision of the Small Claims Court whose jurisdiction is not similar to this court's jurisdiction and the issue of res judicata does not arise.

35. And now to the issue at hand, Order 42 (6)(1) on when a court can may order for a stay of execution provides as follows;

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.

36. In light of the provisions of sub rule (1) then, the court will firstly proceed to determine the issue as drawn in a) and if its finding is in the affirmative, it will then proceed to the issue as drawn in b). This is because in my very well considered opinion, it is important that the court considers as provided under this sub rule whether there is an appeal that is arguable and worthy of the courts consideration before it can proceed to grant orders of stay in order to ensure that the said appeal then is not rendered nugatory.



37. As provided, the court must be satisfied that there is sufficient cause to warrant the order of stay. Thereafter as provided under sub rule (2) the court will then proceed to set conditions to the grant of the orders of stay so as to ensure that the interest of the Applicant as well as those of the successful party are secured. In this regard whether or not the appeal is arguable as can be established prima facie from the Grounds as set out in the Memorandum of Appeal are relevant in assisting the court make a determination on whether there is sufficient cause to grant a stay.
38. Order 42 Rule 6(2) of the Civil Procedure Rules that much emphasis has been placed upon by both Counsel for the Applicant and the Respondent then provides for the conditions upon which an order for stay is to be granted if the court is satisfied under sub rule (1) that sufficient cause has been shown if merited shall issue as follows:
- 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
39. The Court herein is guided by the decision in the case of Athuman Nusura Juma v Afwa Mohamed Ramadhan [2016] eKLR wherein the Court held as follows this issue:
- “whether the intended appeal has merits or not is not an issue to be determined by a Court when dealing with an Application of this nature but by the Court dealing with the merits of the appeal, that is why the requirement that the intended appeal be arguable is preferred with the word “possibly”.
40. Counsel for the Applicant submitted that the Applicant’s Appeal is highly arguable and thus meritorious with a very high chance of succeeding. Based on the issues as drawn, the success or otherwise of this Application hinges mainly on the issue of service. In this regard, I have perused the pleadings and proceedings in the lower court file as well as the impugned judgement and Ruling.
41. Without going into the merits and/or demerits of the issue of service, I note from the said proceedings that in all the Returns of Service filed, the process server was consistent that he served the Respondent through Mobile Phone Number 0721XXXX. I have also noted that the Police Abstract filed has indicated under the name and address of the phone number of the owner of motor vehicle KCB 855D as 0721XXXX.
42. It is this motor vehicle was averred in the statement of claim to belong to the Defendant therein who is the Applicant in this case. The name of the owner of the said phone Number is indicated in the Police Abstract as Joseph Kiplagat Rotich who was the Defendant in the small Claims Court and is the Applicant herein.
43. But more significantly is that upon my perusal of the pleadings by the Applicant in support of his Application seeking to set aside the ex parte judgement, he has not at all made any reference to the averments by the process server that he was served through this phone number, did not at all refer to the said phone number and did not also deny that the number belonged to him.
44. In these circumstances, the only reasonable inference that the court can draw from the conduct of the Applicant with respect to the very primary issued upon which his Appeal is premised is that service was effected upon him as deposed by the Respondent and he simply ignored the same.



45. For this reason, it is my further finding that no sufficient cause has been shown by the Applicant to demonstrate that he has an arguable Appeal to warrant the orders of stay of execution of the Decree of the Small Claims Court that he now seeks. In light of this finding then, the issue raised as drawn in b) does not warrant any consideration by the court. The upshot therefore is that the Applicant's Application lacks merit and the same is now hereby dismissed in its entirety with costs to the Respondents

**READ DATED AND SIGNED AT ELDORET ON 12<sup>TH</sup> JUNE 2025.**

**E. OMINDE**

**JUDGE**

