



Bedom Engineering Ltd v BOM Laboret Boys High School (Miscellaneous Civil Application E010 of 2025) [2025] KEHC 13239 (KLR) (25 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13239 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CIVIL APPLICATION E010 OF 2025
RN NYAKUNDI, J
SEPTEMBER 25, 2025**

BETWEEN

BEDOM ENGINEERING LTD RESPONDENT

AND

BOM LABORET BOYS HIGH SCHOOL APPLICANT

RULING

1. What is pending before this court is a Notice of Motion Application dated 12th August 2025 brought pursuant to sections 1A, 1B, 3A, 80(c) of the [Civil Procedure Act](#); Order 45, Order 51, rule 1 of the Civil Procedure Rules 2010 where the Applicant is seeking the following orders: -
 - a. Spent
 - b. That this Honourable Court be pleased to vacate/set aside/review the leave granted to the Judgment-Debtor to file an Appeal out of time for non-compliance.
 - c. That any stay of execution granted alongside the said leave be lifted and/or declared lapsed.
 - d. That execution do proceed forthwith for the decretal sum together with interest and costs or per the decree issued in the lower court in Eldoret Small Claims Case No. E312 of 2024
 - e. That the costs of this application be in the cause.
2. The Application is made on the following grounds on the face of it among others;
 - a. That this matter proceeded in the Small Claims Court and a Judgment was delivered.
 - b. That the judgement debtor being aggrieved with the decision filed an application in this Honourable Court to be allowed to file an appeal out of time.
 - c. That the court granted leave but the judgement-debtor has never filed the intended appeal.



- d. That the continued delay has caused and continues to cause undue hardship to the Decree-Holder loan is accruing interest daily, thus denying them the fruits of their judgement.
 - e. It is in the interest of justice and fairness that the orders sought be granted.
3. The Application is supported by the annexed affidavit dated 12th August 2025 sworn by Dominic Kipruto Kosgei who deponed as follows;
- a. That I am representing Bedom Engineering Ltd in this matter.
 - b. That the suit was filed on the 12th day of August 2024 which is almost one year since it was filed where the law dictates that Small Claims matters should be dispersed with within 60 days.
 - c. That the Judgement-debtor/Respondent herein sought leave to file an appeal out of time vide Misc. Civil Appeal No. E010 of 2025 where before the court granted them the prayer via a ruling delivered on the 15th day of July 2025.
 - d. That the trial court has entered judgement in my favour of interest and costs.
 - e. That I had borrowed a bank loan to the said work and due to the undue frustration and delay form the judgement-debtor, the loan interest is accruing daily and I am not enjoying the fruits of the judgement.
 - f. That the judgement-debtor in action and delay obstructs justice and it's an abuse of the court process and deliberate to frustrate execution.
 - g. That I stand to suffer great prejudice and my loan continues to accrue interest daily unless the court varies/reviews/set aside the ruling delivered on 15th July 2025.
 - h. That no prejudice will be suffered by the judgement debtor if the prayers sought are granted.

Response to the Application

4. The Application is opposed by the Respondent herein BOM Laboret Boys High School vide Grounds of Opposition dated 26th August 2025 which can be summarized as follows: -
- a. That the application is misconceived, incompetent and legally untenable as the Honourable Court in its ruling delivered on 4th July 2025 already granted the Judgement Debtor leave to appeal out of time, deemed the draft Memorandum of Appeal as duly filed under section 79 G of the *Civil Procedure Act* and ordered stay of execution pending appeal.
 - b. That in light of the said ruling, there is already a competent memorandum of appeal on record. The present application therefore seeks orders that have already been granted, rendering it superfluous, unnecessary and an abuse of the court process.
 - c. That the cornerstone of the application is alleged delay in filing the appeal is legally moot. The court expressly deemed the draft Memorandum of Appeal as duly filed pursuant to section 79G. That deeming order regularized any lateness and anchored the appeal on the record.
 - d. That having judicially validated the filing, there is no subsisting default to cure; the alleged cannot be retrofitted to unwind leave that has already crystallized by order of the Court.
 - e. That the doctrine of functus officio precludes this Honourable Court from revisiting issues conclusively determined in its ruling of 4th July 2025 as the Court has already pronounced itself on leave, deemed filing and stay of execution.



- f. That the motion amounts to a collateral attack on a subsisting ruling of this Court. Rather than pursue the proper appellate route if aggrieved, the Applicant seeks to re-open and neutralize final interlocutory orders through repetitive applications before this Honourable Court.
 - g. That the recent application for review does not meet the strict threshold under Order 45 Rule 1 of the Civil Procedure Rules, 2010 as the Applicant has not demonstrated discovery of new and important evidence, an error apparent on the face of the record, or any sufficient cause to warrant review.
 - h. That entertaining this application would undermine the principle of finality in litigation contrary to section 7 of the Civil Procedure Act, and is inconsistent with Article 159(2)(b) of the Constitution which requires that justice be administered without undue delay.
 - i. That the application being duplicative of reliefs granted, is an abuse of process calculated only to delay the fair determination of the appeal and prejudice the Respondent, a public institution of learning.
 - j. That no irremediable prejudice befalls the Applicant by allowing the appeal to proceed; any delay concern is compensable by costs and case-management directions. By contrast, vacating leave would summarily defeat the respondent /Judgement debtor's right of appeal already sanctioned by court order, occasioning disproportionate prejudice and potential injustice. The balance of convenience therefore lies in dismissing the motion and preserving the status quo pending the appeal's determination.
 - k. That the prayers sought would unjustly curtail the Respondent's constitutional right of appeal under Article 50 of the Constitution and defeat the principle of access to justice under Article 48.
 - l. That in the alternative and without prejudice, the issues now pressed being time enlargement and consequences of delay were raised and were determined in the ruling of 4th July 2025. To that extent the application is caught by res judicata or at minimum issue estoppel and is therefore barred.
5. The application was canvassed by way of written submissions.

Applicant's Written Submissions

- 6. The Applicant filed its written submissions through representation of Dominic Kipruto Kosgei who listed 3 issues for determination as follows;
 - a. Whether the Applicant has satisfied the threshold for review, variation or setting aside of leave granted to the Judgement Debtor.
 - b. Whether the delay occasioned by the Judgement Debtor amounts to abuse of court process and contravenes the principle of finality in litigation.
 - c. Whether the orders sought should be granted in the interests of justice, considering the prejudice suffered by the Applicant.
- 7. The learned counsel submitted that the Judgement debtor was granted leave to file an appeal out of time on 15th July 2025 but failed to act and that failure constitutes indolence and abuse of the court process stating that courts have consistently held that orders granted conditionally must be complied with diligently, failing which the benefit of the orders lapses.



8. The learned counsel also submitted that the applicant has suffered undue hardship as loan interest continues to accrue and the delay defeats the very purpose of the *Small Claims Court Act* which mandates disposal within 60 days and this Honourable Court is urged to safeguard the statutory purpose of efficiency in small claims matters.
9. Moreover, learned counsel stated that the Judgement Debtor's conduct offends the principle in *Utalii Transport Co. Ltd Vs NIC Bank & Another* [2014] eKLR where the court held that litigation must come to an end and courts should not condone dilatory tactics and further that the *Constitution* under Article 48 guarantees access to justice, justice cannot be one-sided; it must be fair to both parties and continued delay denies the decree-holder the right to access the fruits of their judgement. The Counsel furthermore made reference to the following cases *Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR; *Rajesh Rughani Vs Fifty Investments Ltd & Another* [2005] eKLR and *Rose Kaiza Vs Angelo Mpanju Kaiza* [2009] eKLR.

Analysis and Determination

10. Before I delve into the substantive merits of this application I would wish to give a brief litigation history of this matter at hand. This matter was before the Small Claims Court Case No. E1312 of 2024 where the trial court vide its ruling dated 9th May 2025 stated as follows: -

“ 4. The respondent annexed a copy of the Memorandum of appeal but there was no evidence that an appeal had been filed. There was no evidence that if the claimant/Respondent was paid, it would not be able to refund the applicant in the event the appeal was to succeed.

5. The decretal sum was kshs. 656,153.77. The application is allowed and stay of proceedings to issue herein pending the determination of the appeal on condition that the applicant pays the claimant Kshs. 356,153.77 within ten days. Costs of the application to abide the outcome of the appeal.”

11. In the same vein, the Respondents herein BOM Laboret Boys High School filed a Notice of Motion Application dated 22nd May 2025 to this High Court seeking the following orders; That this honorable court be pleased to grant leave to the Applicant to file an appeal out of time against the judgment delivered on 28th March 2025 in Eldoret small claims court civil case no. E1312 of 2025; that the annexed Notice of appeal and memorandum of appeal be deemed as duly filed upon payment of the requisite court fees; that this honorable court be pleased to issue interim orders of stay execution of the judgment and decree issued on 28th March 2025 pending the hearing and determination of this application and the intended appeal and that costs of this application be provided for.
12. After considering the substantive merits of this application, this Court vide its ruling dated 15th July 2025 granted the following orders as follows: -

“ 15. Consequently, the application is granted as follows:

- a. I hereby grant leave for extension of time to the applicant to file its appeal out of time.
- b. That the draft memorandum of appeal be deemed as duly filed within time under section 79 (g) of the *Civil Procedure Act*.
- c. That there shall be stay of further proceedings on execution and enforcement of the decree in SCC COMM Case No. E1312



of 2024 pending the hearing and determination of the appeal against the judgment of that court dated 25th day of February 2025.

- d. That the Deputy Registrar of the High Court shall cause the typed proceedings to be supplied to the applicant within 21 days from today's ruling.
 - e. The costs of this application shall abide the outcome of the appeal.”
13. Having considered the application, the affidavit in support, submissions and the rival grounds of opposition, the following two (2) issues arise for determination;
- a. Whether the doctrine of res judicata was applicable in the Notice of Motion Application dated 22nd May 2025?
 - b. Whether this Court may in the circumstances disclosed, exercise its powers to review, vary or set aside the earlier interlocutory ruling that granted leave to file an appeal out of time and ordered a stay;

Whether the doctrine of res judicata was applicable in the Notice of Motion Application dated 22nd May 2025?

14. The doctrine of res judicata bars courts from re-opening issues already litigated and conclusively determined. Its aim is to protect the principle of finality in litigation, prevent abuse of court process and safeguard judicial time. This principle is provided for in section 7 of the Civil Procedure Act which provides 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.”

15. The Civil Procedure Act has further expounded on the principle setting out under explanations 1-6 thus:

“Explanation (1) —The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation (2) —For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation (3) —The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation (4) — Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation (5) — Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.



Explanation (6) — Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

16. In the case of John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015) [2021] KESC 39 (KLR), the Supreme Court delved into an in-depth discussion of the concept of res judicata thus:

“This court in the case of Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another Motion No 42 of 2014 [2016] eKLR (Muiri Coffee case) held as follows regarding the doctrine of res judicata:

“Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights...The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

It emerges that, contrary to the respondent’s argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of Article 159 of the *Constitution*, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.⁵⁶ The learned authors of Mulla, Code of Civil Procedure, 18th Ed 2012 have observed that the principle of res judicata, as a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293): The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”

...Whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa Vs James Nderitu Githae & 2 others, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision...”



17. Thus applying the legal provisions discussed above and case law, in SCC Case No. E1312 of 2024, the judgment-debtor (BOM Laboret Boys High School) sought stay of execution of the decree pending appeal. The Small Claims Court, in its ruling dated 9th May 2025 considered the issue of stay and imposed conditional orders; that the decretal sum of Kshs. 356,153.77 be paid within ten (10) days. Therefore, the matter of whether stay should issue and under what terms was directly and substantially in issue, argued by both parties and determined by a court of competent jurisdiction.
18. Subsequently, the same party filed a Notice of Motion dated 22nd May 2025 before the High Court again seeking: leave to appeal out of time, that the memorandum of appeal be deemed duly filed and stay of execution of the same decree. This brings into focus whether the High Court was being invited to revisit a matter already canvassed and determined by the Small Claims Court. I take cognizant note that the subject matter is substantially the same: execution of the decree arising from SCC E1312 of 2024. The issue of stay had already been dealt with by the Small Claims Court, which made a reasoned ruling. The competence of the Small Claims Court is not in dispute since it had jurisdiction under Section 38 of the [Small Claims Court Act](#) to grant conditional stay. The ruling of 9th May 2025 therefore operates as a final determination on the question of stay of execution at the trial level.
19. It is my considered view from above that there was an error of law in the part of this court. The subsequent motion before the High Court, in so far as it sought a stay of execution afresh, was caught by the doctrine of res judicata. The High Court being an appellate forum should only have entertained an appeal against that ruling not a duplicative application raising the same issue. By re-opening the issue, the applicant engaged in collateral attack on the Small Claims Court's decision rather than pursuing the proper appellate path. Applying the doctrine to the present case, the High Court was functus officio in re-hearing the stay question because: The Small Claims Court had already heard and determined that very issue in its ruling of 9th May 2025; the matter was between the same parties over the same decree and the proper procedure if dissatisfied was to appeal against the ruling of the trial court and not to re-litigate through a fresh application.

Whether this Court may in the circumstances disclosed, exercise its powers to review, vary or set aside the earlier interlocutory ruling that granted leave to file an appeal out of time and ordered a stay?

20. The powers of the court to review its orders is provided for in section 80 of the [Civil Procedure Act](#) as read with Order 45 rule of the Civil Procedure Rules 2010. Section 80 of the [Civil Procedure Act](#) provides follows;

Review

“ Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

21. Further, Order 45 Rule 1 of the Civil Procedure Rules provides as follows;

Application for review of decree or order.

1. 3Any person considering himself aggrieved—



- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
2. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”
22. A clear reading of the above provisions limits the review to the following grounds;
- a. Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
 - b. On account of some mistake or error apparent on the face of the record,
 - c. For any other sufficient reason desires to obtain a review of the decree or order may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
23. In the case of Republic Vs Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abulahi Said Salad [2019] eKLR the Court cited National Bank of Kenya Ltd Vs Ndungu Njau, {1996} KLR 469 (CAK) at Page 381 wherein it was held as follows:
- “A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”
24. Further, in the case of Multichoice (Kenya) Ltd Vs Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR the Court of Appeal held that:
- “It bears emphasizing that the phrase "mistake or error apparent" by its very connotation conveys the fact that the error envisaged is one which is evident per se from the record and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. It is prima-facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at record. An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal adopting with approval commentaries by Mulla, Indian Civil Procedure Code, 14th Edition Pg. 2335-36...”



25. Applying the facts of this case, before the Small Claims Court BOM Laboret Boys High School (the judgment-debtor) sought stay of execution of the decree. On 9th May 2025 the Small Claims Court granted stay but on express conditions: payment of Kshs. 356,153.77 to the decree-holder within 10 days. This was a final determination of the issue of stay, rendered by a court with jurisdiction and binding on the parties. Before the High Court barely two weeks later, the same party filed a fresh Notice of Motion dated 22nd May 2025 again seeking leave to appeal out of time and stay of execution. To my mind effectively, the High Court was being invited to revisit an issue of stay of execution already determined by the Small Claims Court.
26. A clear reading of the court record thus shows non-Compliance with the Small Claims Court's orders in that the stay granted on 9th May 2025 was conditional that the judgment-debtor was to deposit Kshs. 356,153.77 within 10 days. From the Applicant's affidavit, this condition was never complied with. The law is very clear. A party whom a court order is directed to by a competent court has no choice other than to first comply with the order even if to the party the order is irregular or before taking any step, if not sure of the import of the court order, the party is supposed to rush back to court and explain its difficulties in complying with the particular court order but not to disregard the order. In *Trusted Society of Human Rights Alliance Vs Cabinet Secretary for Devolution and Planning & 3 others* [2017] eKLR the court held as follows:
- “The Court does not, and ought not to be seen to make orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people. A Court order is binding on the party against whom it is addressed and until set aside remains valid and is to be complied with”
27. Thus, the judgment-debtor BOM Laboret Boys High School approached the High Court with unclean hands, having disobeyed valid court orders which goes against the principle of equity which states that He who comes to Equity must come with clean hands. Taking into context the provisions of setting aside/ reviewing the orders of the High Court as provided for in Order 45 Rule 1 of the Civil Procedure Rules, the following factors emanate from the facts of this case which form the basis of the review/setting aside the orders granted by this Court;
- a. Error of law apparent- The High Court granted stay afresh despite the fact that the issue had already been determined by the trial court, contrary to Section 7 of the *Civil Procedure Act* which provides for the doctrine of (res judicata).
 - b. Sufficient cause- The Respondent failed to comply with the trial court's conditional stay, meaning there was no valid subsisting stay. The High Court orders effectively rewarded disobedience and undermined judicial authority.
 - c. Abuse of process- Filing a parallel motion before the High Court instead of appealing against the Small Claims Court ruling amounts to collateral attack and misuse of the court process.
28. I wish to invoke the provisions of section 1A as read with section 3A of the *Civil Procedure Act*. Section 1A of the *Civil Procedure Act* provides for the overriding objective of the *Civil Procedure Act* and the rules made thereunder and provides as follows:
- 1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.



- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.
29. Section 3A of the *Civil Procedure Act* is on the inherent powers of the court and provides; - Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.
30. I take cognizance that the issue of stay of execution was already decided by the Small Claims Court on 9th May 2025 hence the subsequent motion before the High Court was res judicata. Further, the Respondent's non-compliance with the conditional stay rendered the benefit of that stay extinguished. These two factors being res judicata and non-compliance provide a solid basis for this High Court to review and set aside its own ruling of 15th July 2025 under Order 45 rule 1 Civil Procedure Rules as read with section 3A of the *Civil Procedure Act*.
31. The orders of the court must be adhered to strictly and if hardship or inconvenience is thereby caused it will be that easier to seek an extension of the orders to the particular decision. It will be wrong to regard the orders of the court as no substance. This also applies to the rules of practice however technical it may appear but parties must bear in mind that it is based on legal principles and its neglect may easily lead to disregard to the principles involved.
32. The trial court in this matter has also discussed elsewhere in this ruling and this is just a matter of emphasis had considered the application, the affidavits on record and submissions by counsel to arrive at the following findings and decision:
- a. Section 38 of the *small claims court Act* No 2 of 2016 herein after referred to as "the act" allows appeals from the court to the High Court on matters of law. Rule 28 of small claims court rules 2019 clothes the court with powers to stay execution of orders and decree. Section 36(4) of the act gives the court powers to make any order or give any directions it thinks necessary for the achievement of the purpose of the act
 - b. The respondent annexed a copy of the memorandum of appeal but there was no evidence that an appeal had been filed. There was no evidence that if the claimant/respondent was paid it would not be able to refund the applicant in the event the appeal was to succeed.
 - c. The decretal sum was Kshs 656, 153,77. The application is allowed and stay of proceedings to issue herein pending the determination of the appeal on condition that the applicant pays the claimant Kshs 356. 153.77 within ten days of the application to abide the outcome of the appeal.
33. From the above decision, there is a glaring omission on the part of the Respondent -BOM Laborate Boys High School and all his legal counsel on record when this court was moved once again on 22.5.2025 seeking various orders including leave to extend time under Section 79(G) of the C.P.A to file the purported appeal out of time. The trial court having exercised its jurisdiction on the same line of procedural substantive law on appeals the doctrine of estoppel applied Mutatis Mutandis against the Respondent to move the appeals court on the same cause for action. From the facts and circumstances of this matter the issue the court was called upon to determine was more of than an academic benefit only because the Respondent's application on stay and condition precedent to file an appeal had already been conclusively dealt with by the trial court under the powers conferred under Art. 50 (1)



of the Constitution. In a matter such as the one before court, where the Respondent had not made any attempt to satisfy the main requirements set out in the ruling of the trial court either as reflected on the body of the application or the final decision an appeal's court would not have before it any material upon which its discretion will be exercised in favor of the applicant as it deed in the ruling dated 15.7.2025.

34. This court when considering an application such as this one before me brought under rule 4 of this courts Rules exercises unfettered discretionary jurisdiction like all such discretionary powers, it must be exercised judiciously. It must not be exercised capriciously nor upon the whims of the court. In doing so, there are finding principles which because of long usage, have gained the status of law. The list of these principles is not and cannot be exhaustive, as that would militate against the exercise of discretion.
35. In the fresh application litigated before this court, I liken it to what the house of Lords said in the decision: In *Virgin Atlantic* case, Lord Sumption had considered the House of Lord's decision in *Arnold v National Westminster Bank P/C (1991) e AC 93* In that case Lord Keith had drawn a distinction between cause of action estoppel and issue estoppel at p 104 Lord Keith had described cause of action estopped in this way: " Cause of action estoppel arises where the cause of action in the late proceedings is identical to that in the earlier proceedings, the latter having been between the same parties of their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all point decided unless fraud or collusion is alleged such as to justify setting aside the earlier judgement. In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstances that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings.
36. In the instant case although only the operating part of the impugned decision is capable of producing legal effects, the fact remains that the assessments made in the grounds of a decision can be subject to judicial review by the court to the extend that as grounds of a measure adverse affecting the interests of those concerned like the Applicant and the respondent they constitute the essential basis for the operative part of that measure or if those grounds are likely to alter the substance of what was decided in the operative part. A broad merits based approach of the entire proceedings of this case which takes account of the interests of justice involved between the two parties and also taking account of all the facts of the case focusing attention on the crucial questions answered by the trial court and subsequent in litigation to this court one can not miss to conclude that in all the circumstances the applicant is misusing or abusing the process of the court by seeking to raise before it the issue which was substantially dealt with and any other incidental to could have been raised before that court. What is even more worrying is outright bridge of the condition precedent of depositing 356, 153. 77 within 10 days. The countdown for the 10 days was from the 9.5.2025. As of 24.9.2025 there is a continuum violation of that court order with impunity.
37. For those reasons in my view and with the above analysis , I find merit in the Notice of Motion dated 12th August 2025 and grant the following orders;
 - a. That the ruling of this Court delivered on 15th July 2025, to the extent that it's tainted with a patent error of law and the orders so issued for the benefit of the Respondent are voidable and as such reviewed and set aside as of right.
 - b. That the decree-holder, Bedom Engineering Ltd is at liberty to proceed with execution of the decretal sums as ordered in the decree in Eldoret Small Claims Court Case No. E1312 of 2024.
 - c. Costs of this application shall be in cause.
 - d. It is so ordered.



DATED, SIGNED AND DELIVERED AT ELDORET VIA EMAIL AND CTS THIS 25TH DAY OF SEPTEMBER 2025

.....

R. NYAKUNDI

JUDGE

