



REPUBLIC OF KENYA



KENYA LAW
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**Maiyo & another v Koech (Miscellaneous Application E002 of 2025)
[2025] KEHC 14177 (KLR) (9 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14177 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS APPLICATION E002 OF 2025**

E OMINDE, J

OCTOBER 9, 2025

BETWEEN

SHADRACK MAIYO APPELLANT

AND

MESHACK BETT APPLICANT

AND

DAVID KOECH RESPONDENT

RULING

1. The Applicant approached this court vide a Notice of Motion Application dated 24th March 2025 seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That this honourable court be pleased to stay execution of the judgement/decree pending hearing and determination of the appeal.
 - d. That costs of this application be provided for.
2. The Application is expressed to be brought under Articles 50 and 159 [1] [d] of *the Constitution* of Kenya 2010, Section 1A, IB and 3A of the *Civil Procedure Act*, Orders 42 Rule 6 and 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the Law.
3. The Application is premised on the grounds on the face of it and the averments in the affidavit in support of the application by the 1st Applicant. In his affidavit, he stated that Hon. T. Mbugua entered an ex-parte judgement on 4th June 2024 against him and his co-applicant. He instructed his advocates on record to file an application to set aside the said judgment which application was allowed on



condition that the response be filed within 5 days of the delivery of the ruling and Kshs. 15,000/- be paid to the claimant as throw away costs within the same period of time. He further deponed that the said response was filed but his advocate inadvertently failed to inform him that he was required to pay Kshs. 15,000/- as thrown away costs within 5 days.

4. He annexed a copy of the response as SM-1 and urged that on 3rd December 2024, the orders setting aside ex-parte judgement were vacated due to non-payment of throw away costs. He once again instructed his advocates to file an application to set aside the said orders but the same was dismissed on 21st March 2025 and he annexed a copy of the application and ruling marked as SM2[a] and 2[b]. He stated that he has appealed the entire ruling, annexing and marking as SM3 a copy of the Memorandum of Appeal, and further, that the Respondents have obtained warrants of arrest that they are in the process of executing. He annexed and marked as SM4 a copy of the warrants and stated that he is willing to abide by any reasonable conditions of stay that may be imposed. Urging that the application was made without delay, he asked that the court allow the application as prayed.
5. In response to the Application, the Respondent filed a Replying Affidavit dated 2nd April 2025. He deponed that the trial court, in Eldoret SCCOMM E498 of 2024, delivered a ruling on 15th November 2024, requiring the applicants to pay throw away costs of Kshs. 15,000 within 5 days failure to which the order setting aside the interlocutory and ex parte judgement would be vacated and the matter was fixed for 3rd December 2024, to confirm compliance. On the said date, the Applicants had not complied and the court vacated the orders. On 4th February 2025, the court issued warrants of arrest and the Applicant obtained temporary stay orders on the same date. He urged that vide a ruling dated 21st March 2025, the trial court dismissed the application for stay of execution. He further deponed that the instant application was an abuse of the court process and prayed the court dismiss the same with costs.

Applicants' Submissions

6. Counsel for the applicant set out the background leading up to the application then proceeded to submit on the issues for determination. He cited Order 42 Rule 6 of the Civil Procedure Rules on conditions that should be fulfilled for stay of execution to issue.
7. On the issue of substantial loss, counsel submitted that the applicants stands to suffer substantial loss should the court not order stay of execution for reasons that the respondent has begun execution of the ex-parte judgement without according the applicant their right to be heard in accordance with Article 50 of *the constitution* of Kenya 2010. He cited the case of Tropical Commodities Suppliers Ltd & others v International Credit Bank Ltd [2004]2 EA and urged that failure to accord the applicants the right to be heard constitutes a breach of natural justice and may result to substantial loss especially since the judgement/decree sought to be stayed was obtained ex-parte. Counsel additionally sought to rely on the case of Mumo Matemu v Trusted Society of Kenya Human Rights Alliance & 5 others [2013] eKLR.
8. On undue delay, counsel urged that the application has been made without delay. That the ruling that is being appealed from was delivered on 21st March 2025 and the appeal and the application was filed simultaneously on 25th March 2025.
9. On the issue of security, Counsel submitted that the applicant is ready and willing to abide by conditions as may be imposed by this honourable court. He urged the court to allow the application as prayed.



Respondent's Submissions

10. Learned counsel for the respondent submitted that the application is mischievous, frivolous or vexatious and or an abuse of the court process and ought to be dismissed with costs. He urged that the Applicants did not give any reasonable excuse for failing to comply with the orders issued by the court. Counsel submitted that the Applicant did not meet any of the conditions for granting stay of execution, pointing out that they blatantly disobeyed and disregarded the orders issued by the Small Claims Court.
11. Counsel cited the cases of *Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 others* [2017] eKLR and *Moses PN Njoroge & Others v. Reverend Musa Njuguna & Another on disobedience of court orders*, urging that the Application be dismissed with costs as it arises out of disobedience of the orders of the Small Claims Court. He further submitted that the principle of finality which is hinged on the public interest policy states that litigation must come to an end. In this regard, he cited the holding of Bosire, J.A in *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* [2007] eKLR. Counsel urged the court to dismiss the application with costs.

Analysis & Determination

12. Having considered the pleadings and the submissions, it is my considered opinion that two issues arise for determination as follows;
 1. Whether stay of execution orders should issue
13. The principles guiding the grant of a stay of execution are provided for under Order 42 rule 6[2] of the Civil Procedure Rules which provides:

“No order for stay of execution shall be made under sub rule [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.”
14. Before delving into the issue of whether or not the Applicant has satisfied the conditions set out in order 42 above, it is important to note that this matter having originated from the Small Claims Court and that Section 34 of the *Small Claims Court Act* provides for the expeditious disposal of cases filed before these courts. The said provision also provides for the manner in which these courts are mandated to handle all case that are filed before it in order that the mandate that is placed upon these courts is realized and it is against this background that I make the following observations. The said provision is a mandatory one and it is as hereunder;

All proceedings before the Court on any particular day so far as is practicable shall be heard and determined on the same day or on a day to day basis until final determination of the matter which shall be within sixty days from the date of filing the claim.
15. The above being the case, it also follows therefore that any interlocutory matters handled by the Small Claims Court must also be dealt with expeditiously by the parties to whom any such orders are directed and it is incumbent on them to be vigilant. The court in this regard takes note of the fact that being



alive to this mandate, the Trial Court in setting aside the ex-parte judgement gave the Applicants herein 5 days to comply.

16. On the issue of substantial loss, the court is guided by the decision of the Court of Appeal in the case of Tropical Commodities Supplies Ltd & others v International Credit Bank Limited [in Liquidation] [2004] EALR 331, where the court rendered itself thus;

“...substantial loss does not represent any particular mathematical formula, rather, it is a quantitative concept. It refers to any loss, great or small, that is of real worth or value and as distinguished from a loss without value or loss that is merely nominal...”

17. In the instant case, the Applicant has deposed that he risks being committed to Civil Jail without his case being heard on its merits and further that if the stay orders are not granted his appeal will be rendered nugatory. He also states that he is ready to abide by any conditions that the court may impose.
18. In my considered opinion, it is necessary that the court considers the reasons why this Applicant’s matter proceeded ex- part in the Trial Court and a final judgement given. The reason is because the court in setting aside an initial ex-parte judgement entered against the Applicants gave conditions which the Applicant did not comply with in full as already herein summarised.
19. Even as the Applicants say that this was due to the fault of their Advocate the court notes there is nothing filed by the said Advocate to corroborate and confirm these assertions. Consequently, the Ruling in their favour setting aside the initial ex-parte judgement was itself set aside and the court then entered judgement in favour of the Respondent. It is this judgement that they are aggrieved by on the ground that their case was not heard on its merits and so their right to a fair hearing was violated.
20. In addressing my mind to these reasons as advanced by the Applicant’s, it is my very well considered opinion that the Applicants were indeed given a second chance to be heard. Instead of complying fully with the directions of the court so as to realize that right, they opted to choose which direction to comply with and which one not to.
21. I say this because I take cognizance of the fact that in setting aside ex-parte judgements, it is almost always the norm that the court will make an order for thrown away costs. It is therefore highly improbable in my considered view that the Applicants Counsel could have informed them of the order of setting aside of the judgement and failed to advise on the order for thrown away costs.
22. In this regard, I am very well satisfied that they are indeed the authors of their own misfortune and cannot now turn around when execution is imminent and claim that they were condemned unheard. They were given a second bite of the cherry but they blew it up. I therefore find no merit in their Application and the same is accordingly dismissed in its entirety with costs to the Respondents and the interim orders herein issued in favour of the Applicant are now hereby vacated.

READ DATED AND SIGNED AT ELDORET ON 9TH OCTOBER 2025

E. OMINDE

JUDGE

