REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. E024 OF 2025

ANN GATWIRI NJAGI.....APPLICANT

VERSUS

AGNES GAUKU.....
RESPONDENT

RULING

1. The application before this court is the Notice of Motion application dated 18th February, 2025 brought pursuant to provisions of Section 1A, 1B, 3, 3A of the Civil Procedure Act, Order 42, Rule 6(1) and (2) and Order 51 rule 1 of the Civil Procedure Rules, and all other enabling provision of law. The applicant seeks for orders that;
    a. Spent
    b. Spent
    c. That pending the hearing and determination of the Appeal, this Honourable Court be pleased to grant an order of stay of execution of the judgement delivered

on 20th January,2025 and the decree thereof by Hon. H. Nyamweya in the small claims court at Meru.

d. That the costs of this Application abide the outcome of the Appeal.

2. The application is supported by the ground on the face of the said application and the supporting affidavit of Ann Gatwiri Njagi sworn on the even date.
3. She deponed that the claim was filed on 23rd December,2024 and was slated for mention on 9th January,2025.
4. That the Respondent filed her response to the claim dated 31st December,2024 on 7th January,2025.
5. She averred that on 20th January,2025 when the claim came up in court, the court entered default judgement for the claimant against the Respondent at a sum of Ksh.600,000/= plus disbursement at Ksh.3,000/=
6. She deposed that aggrieved by the said judgement, she has preferred an appeal against the same and it is in the interest of justice that orders sought be granted so as not to render the Appeal with high chances of success nugatory.

7. The Application is opposed. The respondent filed a Replying affidavit on 20th March,2025.
8. She averred that the applicant has not shown sufficient cause or any substantial loss if any that may result to her if the order of stay is not made.
9. She deposed that the Applicant has not offered any security for due performance and the Appeal is devoid of triable issues.
10. She averred that the Applicant ought to have applied for setting aside of the default judgement that was entered against her.
11. It was her deposition that though the Applicant claims to have filed her statement of defence the same was not served upon her and that despite the Applicant being served with the initial court summons, a mention and later a hearing notices, the Applicant never appeared in court when the matter was in court showing that she had no interest in defending the claim against her.
12. She deposed that the Appeal is a delaying tactic aimed at denying her the fruits of her successful litigation.

13. She prayed that the application be dismissed with costs to her.

14. The Application was canvassed through written submissions.

Applicant's Submissions

15. The Applicant submitted that when the default judghement was entered against her on 20th January,2025 she had already entered appearance and filed her response and as such the default judgement was unfair, irregular and denial of fair trial by the trial court.

16. Citing the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules and the case of **Njenga & 2 0thers V Kipngetich Civil Appeal No. 258 of 2023 [2024] kehc 3160(KLR) 926 MARCH 2024 RULING**, the Applicant submitted that she has demonstrated the Application is meritorious for grant of the orders sought.

Respondents Submissions

17. The Respondent submitted that the Applicant has not met the threshold for grant of stay of execution pending appeal save for the last condition on undue delay.

18. She thus urged this court to dismiss the application. In buttressing her submissions, reliance was placed on the case of **James Wangalwa & Another V Agnes Naliaka Cheseto Misc Application No. 42 of 2011[2012] eKLR**.

19. In the alternative, the respondent submitted that in the event this court will be inclined to grant stay of execution pending appeal then the Applicant should be ordered to deposit 50% of the decretal sum to her.

Analysis & Determination

20. I have carefully considered the Application, Supporting Affidavit, Replying Affidavit and submissions filed. The issues which arise for determination are;

a) Whether there is competent appeal before this court.

b) Whether the Applicant has met the threshold for grant of stay of execution**.**

21. Before I look at the application, I have to determine if there is a competent appeal before this court. If the answer

is in the negative, then I need not address the application itself.

22. The intended appeal seeks to overturn a default Judgment that was entered on 20th January,2025. The trial court appears to have been guided by section 27 of the Small Claims Court Act, which provides as follows;

> **27. Default judgment**
>
> **(1) If the respondent fails to respond to the claim within the prescribed period, the Court may, either on its own motion or on the claimant's application enter judgment for the claimant and order the relief sought in the statement of claim.**
>
> **(2) If a respondent fails to appear at the hearing in person or by a representative, the claimant may apply to the Court for an order to be made against the respondent.**
>
> **(3) Upon application made by the claimant under subsection (2), the Court shall grant the claimant the order if it is satisfied that the claimant is entitled thereto.**

(4) An order shall not be made against a respondent under this section unless the Court is satisfied that a copy of the written claim and the notice of hearing have been served on the respondent under section 25 of this Act.

23. Section 43 of the said Act then provides as follows;

43. Setting aside of orders

The Court may on the application of any party to the proceedings set aside any of its orders and make such further orders as it thinks just.

24. Therefore the course to be taken in case of a default judgment is to apply to the trial court to have it set aside. The trial court has the powers to deal with such an application and this court's jurisdiction is only invoked when the trial court has granted or refused to grant an application to set aside the default judgment.

25. In the case of **Willy Kipkoech Kirui (Suing as the Legal Representative of John K. Arap Rotich) V Perter**

<u>Kiplangat Rono & 2 others</u> (2020) eKLR the court stated:

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> **“However, the Appellant has opted for a totally unorthodox method of obtaining relief against an exparte Judgement. As far as this court is concerned, it is the trial court which in the first instance has jurisdiction to set aside such a Judgement. The appellant court can only handle an appeal against a refusal to set a side such an exparte Judgment by the trial court.”**

26. In my considered view, and in agreement with the cited case, the appellant has wrongly invoked this court’s jurisdiction and jumped the gun when she rushed to this court. She ought to have first moved the trial court as stated above.

27. In light of the above, I find the Appeal is incompetent and it is struck out with costs to the respondent.

28. Having struck out the appeal, I need not look at the application .

29. It is so ordered.

Dated, signed and delivered at Meru this 8th day of October 2025.

H. M. NYAGA,

JUDGE.