



REPUBLIC OF KENYA



**Kioo (Suing as the Legal Representative of the Estate of Paul Muli Kamoja - Deceased) v Mwaniki & another (Civil Case E032 of 2021) [2025] KEMC 231 (KLR) (16 September 2025) (Ruling)**

Neutral citation: [2025] KEMC 231 (KLR)

**REPUBLIC OF KENYA  
IN THE MAKINDU LAW COURTS  
CIVIL CASE E032 OF 2021  
YA SHIKANDA, SPM  
SEPTEMBER 16, 2025**

**BETWEEN**

**CAROLINE NGINA KIOO (SUING AS THE LEGAL REPRESENTATIVE OF  
THE ESTATE OF PAUL MULI KAMOJA - DECEASED) ..... PLAINTIFF**

**AND**

**DAVID MAKALI MWANIKI ..... 1<sup>ST</sup> DEFENDANT**

**S.A & ALLIED CO. LTD ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**The Application**

1. On 18/3/2025 David Makali Mwaniki (hereinafter referred to as the applicant) filed an application dated 18/3/2025 pursuant to the provisions of Order 12 rule 7 and Order 9 rule 9 of the Civil Procedure Rules and sections 1A, 1B and 3A of the *Civil Procedure Act*. Some of the prayers in the plaint are already spent save for the following, which fall for the court's determination:
  1. That the firm of Kitindio Musembi & Company Advocates be granted leave to come on record for the defendant, instead of the firm of Kimondo Gachoka & Company Advocates;
  2. That this Honourable court be pleased to lift and/or set aside the warrant of arrest issued on 27/1/2025 against the defendant/applicant herein;
  3. That this Honourable court be pleased to issue an order of stay of execution of the judgment delivered on 25/10/2021, the decree issued on 24/7/2024 together with all consequential orders arising thereof pending the hearing and determination of Petition No. E019 of 2024 filed at Machakos High court.
2. The application is supported by an affidavit sworn by the applicant and is premised on the following general grounds:



- a. Pursuant to the warrant arrest, the applicant's right to liberty is at stake as he can be arrested any time;
  - b. The applicant upon being served with court summons and plaint forwarded the same to his Insurance company (Directline Assurance Co. ltd);
  - c. The applicant is among the members of the Petitioners in Machakos Constitution and Human Rights Division Petition No. E019 of 2024;
  - d. The High court has already issued a conservatory order by way of injunction, prohibiting the execution of all processes levied against the applicant and other petitioners who are policy holders of Directline Assurance Co. ltd;
  - e. Pursuant to the said conservatory order, it is only fair that the court stays the execution of the warrant of arrest issued on 27/1/2025 and judgment, decree and all consequential orders issued in this case pending the hearing and determination of the High court petition;
  - f. Unless the court stays the execution of the warrant of arrest and the decree herein, the applicant can be arrested any time and shall be ousted from the seat of justice;
  - g. It is in the best interest of justice and all fairness that the court does allow the application.
3. In the affidavit in support of the application, the applicant reiterated the grounds on the face of the application and attached a copies of documents in support of the application.

### **The Respondent's Response**

4. The Plaintiff/respondent filed a replying affidavit in response to the application. The respondent opposed the application and averred that the same was frivolous, an abuse of the process of court and a delaying tactic meant to deny the respondents the fruits of litigation. The respondent deposed that the warrant of arrest was lawfully issued after the defendant failed to attend court. That the applicant has neither purged himself on the notice to show cause nor showed sufficient case to warrant the lifting of the warrant of arrest. It was further deposed that the applicant had assets capable of satisfying the decree herein but instituted another case where he obtained illegal orders. That the applicant is on a fishing expedition and the application was an afterthought.
5. The plaintiff contended that the alleged conservatory orders are not a bar to lawful execution of a valid decree as the orders did not set aside the judgment and decree issued herein. That the membership letter annexed to the applicant's affidavit was recently obtained yet the petition was filed in 2024. The plaintiff argued that the applicant had not demonstrated how the High court petition directly affects or sets aside the decree issued in this matter. That no orders of stay of execution have been granted by the High court nor this court. The applicant deposed that the warrant of arrest was issued after the defendant failed to satisfy the balance of the decretal sum and that the applicant has not made any meaningful efforts to satisfy the decretal sum.
6. That the application is calculated to delay justice and to frustrate the plaintiff's efforts in executing the decree herein. That the mere membership of the applicant to a party in the High court matter cannot be a basis for halting execution in an unrelated suit where judgment has already been delivered. The plaintiff contended that he stands to suffer irreparable harm if the stay is granted as the applicant has a history of evading court orders and that the applicant is disposing of assets and registering them in the name of proxies. That the applicant has come to court with unclean hands and is guilty of laches as the application was brought too late in the day. The plaintiff deposed that in the unlikely event that the application is allowed, then the applicant should be ordered to deposit the decretal sum in court.



## MAIN ISSUES FOR DETERMINATION

7. In my opinion, the main issues for determination are as follows:
  - i. Whether the 1<sup>st</sup> defendant/applicant has advanced sufficient grounds to warrant a stay of execution of the decree herein;
  - ii. Whether the court should stay the execution of the decree herein pending the hearing and determination of Machakos HC Petition No. E019 of 2024;
  - iii. What other orders should the court make with respect to the application?
  - iv. Who should bear the costs of this application?

### The 1<sup>st</sup> Defendant/applicant's Submissions

8. The parties agreed to dispose of the application by way of written submissions which were duly filed. In his submissions, the applicant reiterated the grounds relied upon in his application and argued that if execution is allowed to proceed, it would violate the orders of the High court and the execution process would expose the applicant to arrest and irreparable harm, despite a pending constitutional matter. That the balance of convenience tilts in favour of preserving the applicant's liberty and the status quo pending the determination of the petition before the High court. The applicant relied on authorities whose copies were not annexed and urged the court to allow the application.

### The Plaintiff/respondent's Submissions

9. The plaintiff gave a background of the matter and submitted that the applicant was duly served with the notice to show cause. That the warrant of arrest was lawfully issued after the applicant failed to comply with the notice to show cause. The plaintiff further submitted that the applicant had filed another suit and obtained orders staying execution of the decree herein. As such, the instant application is an abuse of the court process and calculated to defeat the ends of justice and avoid compliance with a lawful decree. The plaintiff argued that the applicant had not demonstrated that the conservatory orders issued in the High court petition expressly bar the plaintiff herein from executing the decree against the defendant.

The plaintiff argued that:

- a. No certified copy of the order from the High court was exhibited;
  - b. The plaintiff is not a party to the High court petition;
  - c. The alleged membership to MATCO Sacco is not proof of indemnity, nor is it a bar to individual execution.
10. The plaintiff further argued that the applicant had not demonstrated that the conservatory orders were directed to or served upon the plaintiff. That the applicant has not offered any security for the due performance of the decree nor indicated any intention to satisfy the decree in future. The plaintiff urged the court to dismiss the application with costs to him.

### Analysis And Determination

11. I have carefully considered the application and given due regard to the submissions made by the parties. It appears that there is no objection to the current firm being allowed to come on record for the applicant. By this ruling, that particular prayer is allowed. The gist of the application is that



the applicant seeks stay of execution of the decree herein pending the hearing and determination of Machakos High court petition No. E019 of 2024. The applicant alleges that the High court made conservatory orders staying all forms of execution against, inter alia, members of MATCO Sacco. The applicant claims to be a member of MATCO Sacco and therefore a beneficiary of the alleged conservatory orders.

12. I have perused the copy of the orders annexed by the applicant. The first copy of the order appears to be incomplete. The applicant alleges that the accident motor vehicle herein was insured by Directline Assurance Company limited. The title of the case as per the copy of the order exhibited by the applicant does not show that Directline Assurance Company is a party to the petition before the High court. The order begins on the 2<sup>nd</sup> page with No. 2. It is doubtful whether the second page is connected to the first page. There is no indication of which Judge made the orders. Important information is missing from the order and that is why the link between the first and second page is doubtful.
13. Paragraph 2 of the order refers to a schedule of claims which were to be affected by the order and any other claims arising. The orders were allegedly made on 31/1/2024. This was long after this case had been filed and judgment entered. In my view, for the applicant to seek cover under the order, the applicant ought to have annexed the schedule of claims referred to in the order showing that this case was part of the claims in issue. My understanding of the order is that it referred to specific existing claims and not claims against policy holders of Directline Assurance Company Limited generally. It is strange that the orders were allegedly made on 31/1/2024 in respect of an application dated 23/9/2024. Were the orders futuristic?
14. There is a second order made on 6/3/2025 that refers to an application dated 13/12/2025 and extension of interim orders made on 30/9/2024. From the record, it is not clear what orders were made on 30/9/2024. The applicant has not established the nexus between the two orders relied upon. In his further affidavit, the applicant deposed that the conservatory orders had been extended to 29/10/2025. The affidavit indicates that the applicant had annexed a copy of the orders of extension but no such orders were annexed. The initial order annexed to the supporting affidavit is not certified as a true copy of the original. As already indicated, there is missing information from the order that was annexed by the applicant. The applicant appears to have taken different orders from the same petition and attached them together. That is why the form of the order is wanting and there exists difficulties in reconciling the orders annexed.
15. It is not enough for the applicant to show that he is a member of MATCO Sacco, a party to the alleged High court petition. The applicant ought to have shown that this matter was affected by the alleged conservatory orders made by the High court. In my view, the applicant has failed in this endeavour. I say so because the applicant failed, either by default or design, to annex the schedule of claims which were specifically affected by the conservatory orders. It is not for the court to make assumptions or guess. The applicant was duty bound to prove that he was/is a beneficiary of any conservatory orders, stopping execution of the decree herein. On that ground alone, the application must of necessity fail. This is not the kind of application governed by the provisions of Order 42 rule 6 of the Civil Procedure Rules. The provision deals specifically with stay of execution pending appeal. That is not the position in this case.
16. I do not think it would be proper for this court to grant a stay of execution pending hearing and determination of a constitutional petition. My view is that this court lacks jurisdiction to do so. The petition does not arise from a decision of this court or from the proceedings herein. If anything, a stay of proceedings or execution ought to be granted by the High court hearing the petition. It has not been demonstrated that there is a nexus between these proceedings and the alleged petition before the High court. This court cannot, through judicial craft, purport to create a connection. If indeed there were



conservatory orders affecting these proceedings, all that the applicant would have done was to attend court on the notice to show cause and explain the position with evidence. Filing the instant application was ill-advised, in my view.

**Disposition**

17 In view of the foregoing, I proceed to make the following orders:

- a. The application dated 18/3/2025 is devoid of merit and is hereby dismissed;
- b. Costs of this application shall be borne by the 1<sup>st</sup> defendant/applicant.

**DATED, SIGNED AND DELIVERED VIA CTS THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**Y.A SHIKANDA**

**SENIOR PRINCIPAL MAGISTRATE.**

