

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT VOI
CIVIL APPEAL NO. 26 OF 2018

JOTHAM MWARIRI NJAMI

BEN DAVID MAHUI T/A BEMWA STATIONERS

CHANIA COOL BUS SERVICE.....

.....APPELLANT

=VERSUS=

ANDREW KIMUTAI KANDIE.....

RESPONDENT

RULING

1. The application coming for consideration in this Ruling is the one dated 16th July 2025. The Respondent filed a Notice of Preliminary Objection (NOPO) dated 22nd July 2025 and the court directed that the NOPO be heard simultaneously with the application dated 16th July 2025.
2. The application dated 16th July 2025 is brought under Sections 1A, 1B, 3A, 63, 80 of Civil Procedure Act, Order 42, 45, 50, 51 Civil Procedure Rules and all other enabling provisions of the Law seeking the following prayers:-

(i) This application be certified as urgent and service be dispensed with in the first instance.

- (ii) There be a stay of execution of the decree issued in CMCC 270 of 2016 - Chief Magistrates Court at Voi and any consequential execution process pending hearing and determination of this application.**
- (iii) There be a stay of any intended attachment arising from the execution of the decree issued in CMCC 270 of 2016 - Chief Magistrates Court at Voi pending the hearing and determination of this application.**
- (iv) The orders issued on 12/5/2021 withdrawing the appeal issued by Justice Njoki Mwangi be set aside, vacated and reviewed and the appeal be reinstated for hearing and determination on merit.**
- (v) An injunction do issue barring the Respondent either by himself, agents, servants, assigns and or assigns or persons acting under his authority, direction or supervision from selling by way of public auction or private treaty any attached movable properties of the Defendants jointly and severally pending the hearing and determination of this application.**
- (vi) Costs of this application be provided for.**

3. The 1st Applicant filed a Supporting Affidavit as follows:-

- (i) I am a male adult of sound mind the applicant duly authorized and competent to swear this affidavit.**

- (ii) The Respondent commenced a suit in the Principal Magistrates court at Voi in CMCC 270 of 2016 which was heard and determined on 12.11.2018 in his favour.
- (iii) After delivery of the judgment our former advocates on record by then Wilfred & Ngugi Advocates “hereafter referred to as the former advocates” whereby we were represented by the Managing Partner Mr. Wilfred Wachira were instructed to prefer and take conduct of this appeal.
- (iv) Firstly it is said that my former advocates, Managing Partner Mr. Wachira passed on around 17.5.2023 and was buried on 26.5.2023. it is said he had a short illness.
- (v) His death was a blow to us, we had to firstly await the funeral plans and settling of the family to follow up on our case. It is when we noted that the deceased advocate had not filed an appeal in time.
- (vi) It is sad that he is no more and after frantically following up we also found his office closed and a notice posted on the door. It read that the firm would resume operating on 20.6.2023.
- (vii) Since the former advocate had represented me in other cases after persistence and follow up we were able to have someone from the former advocates office access some of

the files he was acting for us and they were handed over to us on 21.6.2023.

(viii) This was followed up by our present advocates filing a notice of appointment and also taking up the other cases. There was/has been no inordinate delay on our part upon existence of this appeal that was being handled by our former advocates.

(ix) I desire to maintain the appeal having instructed the present advocates on record. Though I have noted that this appeal was withdraw on 12.5.2021 arising from a notice of withdrawal filed by the former advocates. I had not instructed the former advocates to withdraw the appeal and it appears that they acted on their own volition. I seek that this court exercises discretion and allows this application and reinstates this appeal for hearing and determination on merit.

(x) The court, once the appeal is reinstated, will be called upon to evaluate the judgment and the memorandum of appeal which raises an arguable appeal. It is requested in the interest of justice to allow this application. The appeal shall be heard expeditiously now that all the requisite documents for making ready the Record of Appeal are available.

- (xi) The decretal sum presently stands at Kshs. 16,292,029.60 since the insurers paid Kshs. 3,000,000 and left me to handle the appeal on my own hence the instruction of the former advocates. There have been execution proceedings commenced by the Respondent by way of attachment and sale of the Appellants' movable goods. They have taken out warrants of attachment and sale through Makini Auctioneers and they expire on 8.8.2025.
- (xii) Having been unaware of the withdrawal of the appeal this only got to my knowledge after proclamation was served on 30.6.2025 by Makini Auctioneers Agencies detailing various motor vehicles and other office items the Respondent sought for Kshs. 16,292,029. The proclamation gave me 7 days to pay the decretal sum failure to which then would be attachment.
- (xiii) I also got to know that the Respondent had through the said auctioneers obtained warrants of attachment and sale of the Defendant's movable goods. They had been issued on 9.5.2025.
- (xiv) As it stands there is imminent intention to attach the proclaimed goods which are buses that are the tools of trade of Bemwa Stationers which operates buses plying the Thika -Nairobi-Mombasa route as public service vehicles.

Notably the buses as proclaimed are valued at between Kshs. 750,000 - Kshs. 2,500,000. This is not plausible noting that their value outstrips the amount estimated by the auctioneers.

- (xv) I wish to point on that the buses/motor vehicles do not belong to the Appellants jointly and severally but rather they are all registered under Bemwa Stationers who is not a party to this suit.
- (xvi) The intended attachment of movable properties owned by a different party, who is not the Defendants herein is irregular, unprocedural, legally untenable and can only be lifted by the court to pave way for having the proper persons be the subject of execution proceedings, if the Respondent so desires to proceed.
- (xvii) It is only fair that auctioneers be barred and or be enjoined from any intended attachment of the movable properties registered in the name of Bemwa Stationers which is not a party to this suit.
- (xviii) Since the former advocates had represented me in this case after persistence and follow up we were unable and had challenges to have someone from the former advocates office access some of the files he was acting for me.

- (xix) The Respondent is desirous of executing to realize the decretal sum. A formal decree has been extracted there is need for the court to say execution processes during the pendency of this application to avoid rendering it nugatory.
- (xx) The Respondent having extracted the decree can commence execution process and having communicated such intention the Appellant stands exposed that the appeal may be rendered academic despite having come to court at the earliest instance.
- (xxi) The withdrawal of the appeal which was filed within time is not to be blamed on me. However with the demise of my former advocate it is a sad and unfortunate happening and we just wish his soul to rest in peace. I would not want to fault him but plead for the court consideration of the special circumstances and allow this application.
- (xxii) The Respondent does not stand to be prejudiced in any way since the death and sudden ailment of counsel was unforeseen and not with the liking of any party. In the end this court would render justice by allowing this application and give direction on the urgent disposal of the appeal upon reinstatement.

4. The Respondent filed a Notice of Preliminary Objection to the application dated 16th July 2025 in the following terms:-

- (i) THAT the application is misconceived, frivolous, vexatious and an abuse of court process and ought to be struck out in limine.
- (ii) THAT the appeal herein was withdrawn by the Appellants on 28th April 2021 whereof the appeal ceased to exist and hence there is nothing pending before the court for the court to act upon.
- (iii) THAT the adoption by the court of the withdrawal of the Appeal on 12.05.2021 rendered the court functus officio.
- (iv) THAT by virtue of the withdrawal of the appeal, the court lacks jurisdiction to hear and determine the application as filed as there is no appeal and no order can be made on that which does not exist.
- (v) THAT the belated application for reinstatement is a manifest that the Applicant is playing lottery with the court process.
- (vi) THAT the Applicant's remedy if any, is against their previous Counsel and not seek an order for reinstatement.
- (vii) THAT the prayers sought in the application for orders of stay of execution are Res Judicata.
- (viii) THAT in the application ought to be struck out with costs to the Plaintiff/Respondent.

5. The parties filed written submissions as follows:- The appellants submitted that they seek the reinstatement of a previously withdrawn appeal and a stay of execution pending the outcome of that appeal.
6. They argued that their former advocate withdrew the appeal in May 2021 without their knowledge or consent, a fact they only discovered later when seeking a stay of execution.
7. This withdrawal, they contend, was procedurally improper and has created a significant injustice, as it prevents a merits-based hearing for a case involving a substantial decretal sum.
8. The appellants invoke the court's inherent powers under Section 3A of the Civil Procedure Act and the principles for review under Order 45, arguing that the lack of instructions from them and the subsequent death of their advocate constitute "sufficient reason" and exceptional circumstances justifying the appeal's reinstatement.
9. Concerning the stay of execution, the appellants asserted they will suffer substantial loss if execution proceeds, as the respondent has already attached two of their commercial vehicles and threatens to sell them.
10. They argued this would cripple their business and render any successful appeal meaningless. They maintain their

application was filed without unreasonable delay, prompted by the respondent's recent revival of execution efforts.

11. On the provision of security, the appellants note that a portion of the decretal sum has already been paid and point to the attached vehicles as ample security for the remainder.
12. They submitted that a joint valuation be done to determine the vehicles' accurate value and propose that these assets be held as security during the appeal's pendency.
13. Finally, the appellants asked that the costs of this application be determined by the final outcome of the appeal.
14. The Plaintiff/Respondent vigorously opposed the Appellants/Applicants' motion seeking to reinstate a withdrawn appeal and stay execution.
15. The plaintiff/Respondent submitted that the application is fundamentally flawed and an abuse of the court process.
16. The Respondent's position is that the appeal was definitively terminated when the Appellants filed a Notice of Withdrawal, which was subsequently adopted by the court.
17. This withdrawal, effected with the Respondent's consent, rendered the court functus officio, meaning there is no longer a live appeal before the court to act upon.
18. Consequently, the application to reinstate it is being made in a legal vacuum. The Respondent argued there is no statutory

provision under Kenyan civil procedure that permits the reinstatement of a wholly withdrawn appeal, comparing the act of withdrawal to the extinguishment of a light that cannot be relit.

19. Furthermore, the Respondent contends that the application is an impermissible "omnibus" application that jumbles distinct legal remedies—stay of execution, stay of attachment, reinstatement of an appeal, and an injunction—each governed by different legal principles and thresholds.
20. The Respondent urged the court to dismiss such a muddled request.
21. On the merits, the Respondent asserted that the Appellants have failed to demonstrate that their previous lawyers acted without authority in withdrawing the appeal.
22. The law presumes that a duly instructed advocate has the implied authority to compromise a case, and the Appellants have provided no evidence of any limitation on that authority communicated to the Respondent.
23. The Respondent submitted that the Appellants as coming to court with "unclean hands," highlighting a history of obtaining stay orders, failing to comply with the attendant conditions (such as depositing security), and only reappearing when faced with fresh execution efforts.

24. This pattern, Respondent argued, shows a strategy to frustrate the Respondent from enjoying the fruits of a judgment obtained in 2018.
25. Finally, the Respondent submitted that even if the court were inclined to consider the application, the Appellants have failed to meet the strict legal criteria for a stay of execution pending appeal.
26. That they have not demonstrated that they will suffer substantial loss, have not offered any security for the performance of the decree, and have been guilty of inordinate and unexplained delay in bringing the application years after the appeal was withdrawn.
27. In conclusion, the Respondent prays for the application to be dismissed with costs.
28. In the alternative, the Respondent submitted that should the court be minded to grant the application, that the same be conditional upon the Appellants depositing the entire decretal sum, which with interest and costs now exceeds Kshs. 16 million, into court.
29. **The issues for determination in the application dated 16th July 2025 are as follows;**
- (i) Whether this court is functus officio or it retains the power to review its order that adopted the withdrawal of the appeal.**

- (ii) Whether the withdrawn appeal should be reinstated and;**
- (iii) Whether an order for stay of execution of the decree should be granted.**

30. The resolution of these issues is contingent upon the court's jurisdiction to entertain the application after the withdrawal of the appeal and whether the Applicant has satisfied the legal prerequisites for the grant of the orders sought.

31. On the first issue, the court finds that it is not functus officio and retains the power to review its order that adopted the withdrawal of the appeal.

32. The central question is whether the appeal, which was withdrawn by a Notice of Withdrawal dated 28th April 2021 and adopted by the court on 12th May 2021, can be reinstated.

33. The Respondent's contention that the court became functus officio upon adopting the withdrawal is a weighty one.

34. However, the jurisdiction of a court is not so easily extinguished where an allegation is made that its process was abused or that a party was denied a hearing due to the unauthorized actions of their counsel.

35. It is trite law that the withdrawal of a suit by an advocate without the client's authority is a nullity. Similarly, an advocate's act of

compromising a suit without express authority is not binding on the client.

36. The Applicant has sworn that he did not instruct his former advocate to withdraw the appeal.

37. The untimely demise of the said advocate, Mr. Wilfred Wachira, presents a unique and unfortunate circumstance that lends credence to the Applicant's claim of being unaware and unable to promptly address the situation.

38. While there is no specific statutory provision for the "reinstatement" of a withdrawn appeal, the court's inherent power under Section 3A of the Civil Procedure Act, Cap. 21, and its review jurisdiction under Order 45 of the Civil Procedure Rules, 2010, are broad enough to cater for such an eventuality to prevent an abuse of the court process and to secure the ends of justice.

39. The reason given for the failure to act sooner—the death of counsel and the subsequent difficulty in accessing files—constitutes a "sufficient reason" for the purposes of review.

40. Consequently, the prayer to set aside the order of 12th May 2021 and reinstate the appeal is merited.

41. Regarding the second issue, the application for stay of execution, the court must be guided by the principles set out in Order 42, Rule 6(2) of the Civil Procedure Rules.

42. The Applicant must demonstrate that substantial loss may result unless the order is made, that the application has been made without unreasonable delay, and that such security as the court orders for the due performance of the decree has been given.
43. The decretal sum is substantial, standing at Kshs. 16,292,029.60. The Applicant avers that execution will involve the attachment and sale of motor vehicles, which are the tools of his trade.
44. The loss of such assets, which are used in a public service vehicle business, would constitute substantial loss as it would cripple the Applicant's business and render a successful appeal nugatory. Substantial loss is the cornerstone of a stay of execution.
45. The Applicant has also raised a legitimate concern that some of the properties targeted for attachment are registered to Bemwa Stationers, an entity that is not a party to the suit.
46. This raises a triable issue regarding the propriety of the execution process itself.
47. The application was filed promptly upon the Applicant's discovery of the withdrawal and the imminent execution through a proclamation made on 30th June 2025.
48. This cannot be said to be an unreasonable delay in the context of these peculiar circumstances.

49. On the provision of security, the Applicant notes that Kshs. 3,000,000 was previously paid by insurers and proposes that the attached vehicles, whose value he claims outstrips the decretal sum, be held as security.
50. In the interest of justice, a conditional stay is appropriate. The Applicant must provide security for the due performance of the decree.
51. The most prudent form of security in this case would be a bank guarantee for half of the outstanding decretal sum, coupled with an undertaking not to alienate or otherwise encumber the proclaimed vehicles.
52. The Respondent's Preliminary Objection, while raising important procedural points, ultimately fails.
53. The application is not res judicata, as the previous applications for stay were considered in the context of a live appeal, a circumstance that was fundamentally altered by the unauthorized withdrawal.
54. The application, though combining several prayers, is necessitated by the interconnected nature of the remedies sought to prevent an injustice.
55. It is not an abuse of court process but a bona fide attempt to reclaim a right to a hearing.

56. In the final analysis, the scales of justice tilt in favour of granting the Applicant an opportunity to prosecute his appeal on its merits.
57. The failure to do so would visit upon him a grave injustice arising from the actions of his deceased counsel, over which he had no control.
58. The Respondent's rightful claim to the fruits of his judgment can be adequately protected by the imposition of strict conditions.
59. Consequently, the Notice of Preliminary Objection dated 22nd July 2025 is hereby overruled.
60. The application dated 16th July 2025 is hereby allowed in the following terms;
- (i) THAT the order of this court issued on 12th May 2021, which adopted the withdrawal of the appeal, is hereby set aside and vacated.
 - (ii) THAT Civil Appeal No. 26 of 2018 is hereby reinstated.
 - (iii) THAT there shall be a stay of execution of the decree issued in CMCC No. 270 of 2016 pending the hearing and determination of the reinstated appeal, on condition that the Appellant shall, within sixty (60) days from the date of this Ruling, furnish a bank guarantee from a reputable commercial bank for the sum of Kshs. 6,500,000 in favour of the Respondent.

(iv) THAT the Appellant shall file and serve the Record of Appeal within sixty (60) days from today.

(v) THAT the Appellant shall not sell, transfer, or in any way encumber the motor vehicles proclaimed by Makini Auctioneers on or about 30th June

(vi) THAT the Appellant pays Kshs. 20,000 as thrown away costs.

61. In default of compliance with any of the conditions above, the stay of execution shall automatically lapse and the Respondent shall be at liberty to proceed with execution.

62. The costs of this application shall abide the reinstated appeal.

63. **ORDERS TO ISSUE ACCORDINGLY.**

**Dated, signed and delivered this 14th day of November 2025
in open court at Voi High Court.**

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent/Mabishi

..... **for the Appellants**

..... **for the Respondent**

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