

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

MISCELLANEOUS CIVIL APPLICATION NO. E185 OF 2025

**HARUN KARANJA
GITUNGO.....APPLICANT**

VERSUS

**SUSAN WANJIRU MAINA.....
RESPONDENT**

R U L I N G

Brief facts

1. This application dated 23rd September 2025 seeks for orders of stay of execution in respect of judgment in Ruiru SCCCOMM No. E702 of 2024 delivered on 5th December 2024 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 1st October 2025.

Applicant's Case

3. The applicant states that he and the respondent lived together as husband and wife from 2016 until 3/10/2024. The respondent instituted a suit vide statement of claim dated 30th October 2024 in Ruiru SCCCOMM No. E702 of 2024. The applicant argues that the matter was heard

and default judgment entered on 5th December 2024 in favour of the respondent. The applicant states that he was

not personally aware of the court's proceedings and thus he did not defend the suit.

4. The applicant states that he had a response to the statement of claim which raises triable issues including the fact that he did not owe the respondent any money as was claimed in the suit. The applicant further states that he applied for stay of execution in the trial court but the application was dismissed on 4th April 2025.
5. The applicant avers that orders of warrants of arrest were issued on 14/7/2025. Further, the applicant states that he was condemned unheard and he will suffer irreparably if the orders sought are not granted.
6. The applicant states that on 22/9/2025 the orders issued on 14/7/2025 were imposed against him in disregard of the appeal being Civil Appeal No. 214 of 2025. The applicant argues that his intended appeal raises weighty issues and thus has high chances of success.

The Respondent's Case

7. The respondent states that the application is fatally defective and incompetent as it has been drawn and filed by an advocate who has not filed a Notice of Appointment of Advocates and/or Notice of Change of Advocates as required under **Order 9 Rule 7 of the Civil Procedure**

Rules. The applicant was initially represented in the trial court by Nam Festus & Company Advocates but currently is represented by Gachungi & Co. Advocates.

8. The respondent argues that there is no valid appeal on record capable of sustaining the instant application as there is pending a miscellaneous application seeking leave to appeal out of time, which has not been determined. Until such leave is granted, there exists no appeal in law. In any event, it is trite law that the filing of an appeal does not operate as an automatic stay of execution and the applicant has not demonstrated any exceptional circumstances to warrant exercise of discretion in his favour.
9. The respondent avers that the judgment in the trial court was lawfully obtained after the applicant failed to file any response despite being duly and properly served. Further, the applicant was at all times aware of the proceedings having engaged the process server through WhatsApp and reported the same to the police station. The respondent argues that the applicant unequivocally admitted to having been served with the statement of claim and the first mention via WhatsApp but did not know that he was supposed to reply. The respondent states that ignorance of the law is no defence and that this court ought not to consider this plea.
10. The respondent argues that the applicant is absurd to allege that he was condemned unheard whereas he

admitted in the proceedings that he was served. Further, the applicant has not come to this court with clean hands as he has always been aware of the ruling made on 4th April 2025 but he has been filing myriads of affidavits in the trial court in a bid to set aside the default judgment which is unprocedural.

11. The respondent states that the applicant has not demonstrated any arguable defence or triable issue in the intended appeal, the draft response being a mere denial and sham intended to buy time.

12. The respondent states that he stands to suffer grave prejudice if the orders sought are granted while the applicant being the author of his own misfortune will suffer none as he is lawfully obligated to settle the decretal sum.

13. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

14. The applicant submits that there exists a valid appeal being Civil Appeal No. E214 of 2025 and the same came up for mention on 18th November 2025. Further, the orders by the court on the instant application confirm the existence of an appeal.

15. The applicant refers to the case of **Dova vs Tarbo Transporters [2013] eKLR** and submits that he did not

get justice as he was condemned unheard. The applicant further submits that the payment of any amount of money in the decretal sum will render the appeal nugatory thus defeating the ends of justice.

The Respondent's Submissions

16. The respondent submits that although the applicant purports to rely on a pending Civil Appeal No. E214 of 2025 as the basis for his application for stay the said file is a miscellaneous application seeking leave to appeal out of time against the ruling delivered on

4th April 2025. Relying on the decision in **Equity Bank Ltd vs West Link MBO Ltd [2013] eKLR**, the respondent argues that an application for stay pending appeal is premature and incompetent when there is no appeal filed.

17. The respondent submits that the instant application is drawn and filed by a firm of advocates who have not filed any notice of appointment or notice of change of advocates as required by **Order 9 Rule 7 of the Civil Procedure Rules**, thus the application ought to be struck out. To support her contentions, the respondent relies on the case of **Lalchand Fulchand Shah vs Investments & Mortgages Bank Ltd [2018] eKLR**.

18. The respondent argues that the applicant has not met the threshold for stay of execution under **Order 42 Rule 6(2) of the Civil Procedure Rules**. The applicant

has not demonstrated any substantial loss he is likely to suffer if execution proceeds and neither has he offered any security or shown willingness to deposit the decretal amount in court. Further, the applicant admits in his pleadings that he was served with the statement of claim and the mention notice via WhatsApp but he did not know that he was supposed to reply. Thus the applicant's conduct of ignoring lawful service, failing to defend the suit and only acting upon execution clearly disentitles him to any equitable relief from the court.

19. Relying on the case of **Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR**, the respondent argues that the instant application is an abuse of the court process as the applicant has previously filed an application for stay of execution in the lower court which was heard and dismissed on 4th April 2025. He further attempted to reopen the issue in a replying affidavit to the Notice to show cause which was similarly dismissed. The instant application re-litigates issues that have already been conclusively determined.

The Law

Whether the application has merit.

20. On perusal of the instant application, the Certificate of Urgency has been drawn by Gachungi & Associates

Advocates whereas the notice of motion, affidavit and submissions have been drawn by the applicant himself. It is not clear whether the applicant is acting in person or he has appointed advocates to represent him. On perusal of the record, there is no Notice of Appointment of Advocates or Notice of Change of Advocates on record, which seems to suggest that the applicant is acting in person.

21. I have further perused the record in Civil Appeal No. E214 of 2025 and noted that the same is a miscellaneous application seeking leave to file an appeal out of time against the ruling dated 4th April 2025 in Ruiru SCCCOMM No. E702 of 2024. The said matter is scheduled for mention for a date of ruling on 4th December 2025. Therefore as it stands there is no appeal and the instant application

is premature and cannot stand. That notwithstanding the impugned ruling which is the subject of appeal dismissed the applicant's application for stay of execution, which is in effective a negative order. Notably, the court should not grant stay of the impugned ruling as it was a dismissal order in respect of the application dated 6th February 2025 which in essence is a negative order and incapable of execution. This principle was enunciated by the Court of Appeal in **Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya) [2015] eKLR** where the court held as follows:-

An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay - called a positive order - either an order that has not been complied with or has partly been complied with.

22. Similarly in **Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others [2016] eKLR** the Court of Appeal expounded on stay of execution stating:-

In Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows:-

The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a

negative order which is incapable of execution save in respect of costs only.

The same reasoning was applied in the case of Raymond M. Omboga vs Austine Pyan Maranga (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:-

The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order....The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....

23. In light of the above, the order being a negative order which did not order any of the parties to do anything or restrain from doing anything is incapable of

execution and thus the court cannot order stay of execution of that negative order.

24. This court notes that this matter is at execution stage since a warrant of arrest has been issued by the lower court in respect of its ruling delivered on 4th April 2025 which is more than eight (8) months ago. At the time this application was filed, the said ruling had been delivered six (6) months back. These were some of the reasons why this court could not grant interim orders on 24/09/2025. Execution is a lawful process which should be allowed to continue in a case where the decree has not been satisfied.

25. Similarly, the applicant has not made a case for setting aside the magistrate's orders made on 14/07/2025.

26. Due to the foregoing reasons, I hereby find this application not merited and hereby dismiss it with costs to the respondent.

27. It is hereby so ordered.

***RULING DELIVERED VIRTUALLY, DATED AND SIGNED
AT THIKA THIS 11TH DAY OF DECEMBER 2025.***

F. MUCHEMI
JUDGE