

3) That this Honourable Court does order a stay of proceedings after judgment in Eldoret Magistrate's Civil Case Number E342 of 2023 Zephaniah Kipchumba Koech vs. Veronicah Chepsat Sum & others, pending hearing and determination of this Appeal.

4) That costs of this application be provided for.

2. The application is supported by the grounds on the face of the said application and the Supporting affidavit of **Zephaniah Kipchumba Koech**, dated 5th May 2025.
3. He deposed that a Ruling was delivered on 7th April 2025 in favor of the 2nd Respondent against the Applicant/Appellant herein to effect that the Appellant/Applicant was in contempt of a Court Order issued by a different Court, and the Respondent(*sic*) did not know of the existence of the said Court Order- copy of Ruling annexed as ZKK1
4. That the said Court orders revoking a sale by Public Auction are ambiguous, unclear, and uncertain - Copy of Court order annexed as ZKK2-and that the instant Appeal, being **Eldoret High Court Civil Appeal No. E.087 of 2025** is arguable, raises triable and legal weighty issues for determination and has overwhelming chances of success. That he has since requested for typed proceedings to expedite the filing of a Record of Appeal.
5. He urged that the post-judgment proceedings in the Trial Court are frivolous, vexatious, and groundless, hence requiring a stay of proceedings pending the

instant Appeal since there is no cause of action known to law in the post-judgment proceedings because the Trial Court became *functus officio* after delivery of its judgment and post-judgment proceedings are irregular.

6. He contended that a Trial Court cannot reopen and rehear a matter that has an active pending Appeal, and can also not reopen and admit a party to a suit pending active Appeal and that such reopening and rehearing of a matter pending active Appeal for this is an excess of jurisdiction.
7. He deponed further that this Honourable Court wields the discretion to issue the orders of stay of proceedings sought herein and that he shall suffer irreparably if he is committed to civil jail, for ambiguous orders and orders that he did not know of. In addition, he deposed that this Application has been brought promptly, in good faith and without unreasonable delay. He thus urged the Court to exercise its discretion and grant the orders sought herein.

Replying Affidavit

8. The Application is opposed by the 1st Respondent vide the Replying Affidavit sworn by **Veronica Chepsat Sum** on 9th may 2025, who describes herself as the Guardian Ad Litem to the 1st Respondent.
9. She deposed that the Applicant's Affidavit is replete with half-truths and blatant falsehoods. That the property in question is the subject of **ELD ELC NO. 4 OF 2022 (OS)-The Catholic Diocese of Eldoret (Registered Trustees) v Veronica Sum** and that the Plaintiff in the said matter (**The Catholic Diocese of Eldoret**) obtained orders restraining any dealings with the suit property as issued on 9th May 2024. That the said orders were duly served

upon the Registrar of Lands, who accordingly entered an inhibition under the encumbrance section of the title, in compliance with the Court orders.

10. It is her contention that it is false and misleading for the Applicant/Appellant to claim ignorance of the existence of the said suit because the same was known even during the pendency of this Respondent's appeal in **Eldoret Civil Appeal No. E077 of 2024 -Veronica Sum v Zephaniah Kipchumba Koech** and that the alleged sale was conducted on or about August 2024, well after the Environment and Land Court's orders had been entered in the encumbrance section of the title.

11. She deposed further that where execution proceedings are challenged under the provisions of **Order 22 Rule 75** and **Order 22 Rule 76** of the **Civil Procedure Rules** as was the case herein, a Court does not become *functus officio* until the rights of all parties in the execution proceedings are determined.

12. She urged that the trial Court having declared the Auction conducted on **2nd August 2024** to be irregular, the stated Appeal between the Plaintiff and the **2nd** Respondent shall not be rendered nugatory should the court issue orders that the **2nd** Respondent money should be refunded.

13. Additionally, she deposed that because the impugned auction of that parcel of land known as **Title No. Pioneer/Racecourse Block 2 (Kapmalel)/9** conducted on **2nd August 2024** was subsequently declared irregular and set aside by the Trial Court there is no legal basis to stay, vary and or set aside this honorable Court's Orders made in respect to orders issued on **7th April 2024** and this Honourable Court should order a refund of the **2nd** Respondent's money

14. That the property therefore reverts to the original owner until the matter in **ELD ELC NO. 4 OF 2022 (OS)-The Catholic Diocese of Eldoret (Registered Trustees) v Veronica Sum** is heard and determined. She deponed further that it would therefore be prudent to have the summary judgment entered in **Eldoret MCCC E342/2023** by Hon. Areri on 23rd April 2024 striking out the Defendant's defence be reviewed and that this honorable Court has the original jurisdiction to order a review and carry out a full trial on the initial claim of the Plaintiff.

15. She contended that that the Applicant/Appellant has not approached the Court with clean hands, contrary to the equitable maxim "*He who comes to equity must come with clean hands*" and that the Applicant acted in contempt by issuing instructions to sell the land despite being fully aware of the Environment and Land Court's orders.

16. The 2nd Respondent equally opposed the Application vide his Replying Affidavit sworn 9th May 2025. He deposed that the Application is an afterthought, frivolous, bad in law and the same ought to be struck out at the first instance as it is only meant to delay the ends of justice from being met.

17. He confirmed that it is indeed true that an order was issued on 7th April 2025 to the effect that the Appellant/Applicant and the 3rd Respondent were in contempt of the Court orders issued on 14th November 2024 ordering for the refund of the money he had paid and that up to date he has not received any documents in relation to the said money and equally he has not been given possession of the said parcel and that to that end it is an infringement of his

right to property as guaranteed under **Article 40** of the **Constitution** given that the Appellant and the 3rd Respondent have not refunded his money.

18.He reiterated the 1st Respondent's deposition on a challenge to execution proceedings as provided under **Order 22 Rule 75 and Order 22 Rule 76** of the **Civil Procedure Rules and** added that the first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal.

19.He deposed further that the trial Court having declared the Auction conducted on 2nd August 2024 as irregular, he no longer has any interest in the subject parcel known as **Title No. Pioneer/Racecourse Block 2 (Kapmalel)/9** hence the stated Appeal between the Plaintiff and the Defendant shall not be rendered nugatory should the Honourable Court issue orders that his money should be refunded. Further, that in this regard, there is no legal basis to stay orders issued on 7th April 2024 and this Honourable Court should order a refund of his money.

20.He deposed that there was no order staying the proceedings in **Eldoret Magistrate's Civil Case Number E342 of 2023 Zephaniah Kipchumba Koech vs. Veronica Chepsat Sum & Others** at the time of filing the application dated 29th November 2024 and the law allows applications post judgment which applications are well envisaged in the provisions of the law.

21.He urged that he is only interested in recovering the money he paid pursuant to the now declared irregular auction conducted by the Appellant and his agent Eshikoni Auctioneers who is the 3rd Respondent herein and as such, no substantial loss shall be suffered by the Appellant/Applicant or the 3rd

Respondent should this court order that the money paid due to an irregular Auction be refunded.

22. That he is an innocent party herein caught up in a nasty web of dishonest transactions and misrepresentations undertaken and made by the Appellant/Applicant and the Auctioneer who knew or ought to have known that the subject parcel of land known as **Title No. Pioneer/Racecourse Block 2 (Kapmalel)/9** was not available for sale due to the inhibitions/restrictions earlier placed by the Superior Court in **Eldoret ELC No. E004 of 2022** on **9/05/2024**.

23. He deponed further, that the Appellant/Applicant had indicated in **Civil Appeal Number E077 of 2024** that he is requesting for an alternative security due to the restriction that had been placed in the property.

24. He contended that the allegations by the Appellant/Applicant that the orders revoking a sale by public auction as ambiguous are made in bad faith as the Appellant/Applicant has failed to refund the principal sum of Kes. 6,750,000/= paid by him after the irregular Auction despite there being specific orders that the same be refunded, that as a matter of logic and reason, it is the Appellant/Applicant and his Agent Eshikoni Auctioneers the 3rd Respondent herein who were the ultimate recipient of the money he paid and no one has disputed that he paid money and equally they have all confirmed that he has not been in occupation of the said property.

25. That to that end it is unfair and illegal to continue holding his money and he therefore urged that it is the recipient who is supposed to refund the money he paid and he cannot therefore be heard to claim that the order was ambiguous

for failing to state who was to refund the said amount given that his advocate vide her letter dated 7th August 2024 ignored a request not to release the money pending resolution of the issues that arose after the auction but instead released the said funds despite being requested not to do so-copy of letter annexed as SKC1

26. Further to the above, he deposed that there was a clear communication from Counsel Chesoo to the Counsels indicating that there was an order of injunction that had been issued in relation to the suit property-extract of email annexed as SKC2

27. He maintained that the Application does not meet the threshold for grant of Orders of stay of execution and that the Applicant has not approached this court with clean hands and does not deserve grant of the orders sought. He thus urged that the Application be dismissed with costs and that he be refunded his money being Kshs.6,750,000/= and interest at Court rates.

Preliminary Objection

28. In response to the 1st Respondent's Replying Affidavit dated 9th May 2025, the Applicant filed a Notice of Preliminary dated 9th May 2025 premised on the following grounds:

- a) That the 1st Respondent's Replying Affidavit dated 9th May 2025 herein offends the mandatory provisions of Sections 5 and 8 of the Oaths and Statutory Declarations Act, Cap 15, Laws of Kenya.**

b) That the 1st Respondent's Replying Affidavit dated 9th May 2025 is not commissioned, hence is fatally defective, irregular, and as such is not an Affidavit in Law.

c) That the 1st Respondent exhibits annexed to the Replying Affidavit dated 9/5/2025 offends the mandatory provisions of Rule 9 of the Oaths and Statutory Declarations Rules.

Submissions

29.Both the Preliminary Objection and the Application were canvassed vide written Submissions. Pursuant thereto the Applicant filed Submissions dated 9th June 2025 on both the Preliminary Objection and the Application. The 1st Respondent filed Submission dated 3rd June 2025 on the Preliminary Objection whereas the 2nd Respondent filed Submissions on the Application dated 9th May 2025 and Submissions on the Preliminary Objection dated 9th June 2025.

The Applicant's Submissions

30.In regard to Preliminary Objection, Counsel for the Applicant submitted that the 1st Respondent's Replying Affidavit dated 9th may 25 is incurably defective/ fatally defective for having been filed and placed on both Court records without being commissioned, and as observed by the Honourable Judges of the Supreme Court in the case **Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018]eKLR**. Counsel further cited the provisions of **Section 5 and 8 of the Oaths and Statutory Declaration Act, Cap 15 Laws of Kenya** in support and submitted that all the 1st Respondents' exhibits

attached to the Replying Affidavit are of no legal value because they are pegged on a fatally defective affidavit.

31.Regarding the value of the 1st Respondent's submission to the Applicant's Application dated 7th April 2025, Counsel submitted that the same have no value and as such the Applicant Application is therefore unopposed by the 1st Respondent as aptly put by the supreme Court again in the **Gideon Sitelu Konchellah** (Supra).

32.In view of the proviso of **Article 159 of the Constitution**, Counsel submitted the E-Filing System is the Court's Electronic File, and once a party has filed a document in the Electronic File, it is deemed filed and it is a similar copy that should then be filed the physical court file, and thereafter, a party cannot come to Court and allege mistake where the adverse party has already relied on information in the Electronic Court File and has raised issues of competency of the documents/information in the Court Electronic File. That the sister document in the physical court file cannot be changed on the basis of a mistake without the leave of the court for both are now part of the court record.

33.Counsel urged that failure to commission an Affidavit is not a mere technicality or a mistake on the part of the Advocate, it's a breach of an Act of Parliament, is fatal and cannot be cured by **Article 159** of the **Constitution** as observed in the case of **Caltex Oil (Kenya) Ltd vs. New Stadium Service Station Ltd & another [2002] eKLR** where an Affidavit did not comply with the **Oaths and Statutory Declarations Act, Cap 15, Laws of Kenya**.

34. Based on the aforementioned reasons, law, and the cited case law, Counsel urged that the Applicant's Preliminary Objection dated 9th May 2025 should be allowed in its entirety.

35. On whether stay of execution should be issued, Counsel submitted that this Honourable Court wields the judicial discretion and inherent jurisdiction to issue an order of stay of execution of Rulings, Judgments and orders once an Applicant has established and satisfied the elements as enumerated by Mogeni J in the case of **Mbutti & another v Njeri & 2 others (Environment & Land Case 42 of 2020) [2022] KEELC 3016 (KLR)**. Counsel cited **Order 42 Rule 1** of the **Civil Procedure Rule 2010** with regard to the issue of stay of execution.

36. In regard to undue delay, Counsel submitted that the Application has been filed without undue delay, as the Ruling was delivered on 7th April 2025, the Memorandum of Appeal was filed on 5th May 2025, simultaneously with this Application, all of which have been done within one (1) month.

37. On substantial loss, Counsel cited **Ogola, J in Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation) [2004] 2 EA 331** and submitted that the Trial Court, after its Ruling fixed 15th April 2025 for the Applicant to show cause why he should not be committed to civil jail.

38. Counsel urged therefore that it is apparent that he was likely to be committed to civil jail and or sent to prison for all that time the appeal would be pending determination, and it is this that necessitated the Applicant to file the instant Application in this Court. Counsel further pointed out that if the interim orders

dated 5th May 25 had not been issued, the Appellant would have been committed to civil jail, and in the event his appeal succeeds, he would have suffered substantially which suffering cannot be compensated by way of monetary compensation, as observed in the case of **Nation Media Group v Child Welfare Society of Kenya [2021] eKLR**.

39.Regarding security, Counsel submitted contempt of Court proceedings are quasi criminal in nature and contempt of Court orders arising therefrom are not money decrees and no such security should be offered, but a party allegedly found to be in contempt should be allowed to contest the said orders and especially where the contemnor has not exhibited that he will not purge the alleged contempt in the event his appeal is dismissed and thus the Court should not limit is right to appeal and audience before a Court by ordering him to deposit security as observed in the case of **Nation Media Group v Child Welfare Society of Kenya [2021] eKLR**, supra.

40.On whether the appeal will be rendered nugatory, Counsel cited the case **Lavington Housing & Investments Limited v Yurub Investments Limited & 5 others (Civil Application E051 of 2022) [2023] KECA 286 (KLR)** and submitted that the Applicant has stated that he was found in contempt of ambiguous Court orders and orders which he did not know of and if the proceeding in the lower Court proceeds, he might be committed to civil jail and his Appeal shall be rendered nugatory and or mere academic exercise and if he later succeeds in the appeal, his appeal shall have been rendered as he has already been committed to jail.

41.On the issue of stay of proceedings, Counsel submitted that this Honourable Court, being a Superior Court, wields the judicial discretion and inherent

jurisdiction under **Section 3A** of the **Civil Procedure Act**, to order a stay of proceedings in a lower Court as stated in the case of **Jadva Karsan Vs Harma Singh Bhogal 1953 202**.

42. Counsel thus observed that the Court, therefore, in exercising its discretion and Jurisdiction shall issue an order of stay of the proceeding once the Applicant satisfies the requirements as set out in **William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others**.

43. In the instant case, Counsel submitted that the Respondent being aggrieved by the Ruling dated 7th April 2025, lodged the instant Appeal vide a Memorandum of Appeal dated 5th May 25 and the instant Application seeking for stay of proceedings. Counsel urged that the limb of existence of an Appeal has undoubtedly been satisfied by the Applicant.

44. On whether the appeal is arguable, Counsel cited the case of **Dennis Mogambi Mang'are v Attorney General & 3 Others [2012] eKLR**, and submitted that the Applicant through his Memorandum of Appeal has demonstrated that he has an *arguable case* deserving this Honourable Court consideration and with *overwhelming chances of success* as he stated that he has been found in contempt of an order that was ambiguous and that did not require him to act, and further that the order he was found in contempt was an order from different suit that he was not party and different Court.

45. On whether the appeal will be rendered nugatory, Counsel relied on the holding in the case of **Lavington Housing & Investments Limited v Yurub Investments Limited & 5 others (Civil Application E051 of 2022) [2023]**

KECA 286 (KLR). He also cited the case of **Abdiaziz Sheikh Maad & 3 others vs Governor Mandera County & 2 others [2002] eKLR**, where a party sought contempt proceedings in face of a stay of proceedings pending hearing and determination of a Court of Appeal and submitted that the scenario sought to be avoided in the above case law, by issuing a stay of proceedings may likely be witnessed if stay of proceedings is not issued in our instance, hence the reason this Honourable Court should order a stay of proceeding in the Trial Court of the post judgment and contempt proceedings in the lower Court pending hearing and determination of instant Appeal.

46. In regard to exceptional circumstances, Counsel submitted that the post-judgment and post execution proceedings in the lower Court are frivolous, vexatious, groundless, and devoid of cause of action, as the execution, the subject of the contempt proceedings, were done pursuant to an order of the court and as such there could be no contempt.

47. Further, Counsel observed that the High Court had already determined the contempt Application in regard to the subject matter in the case and found that there was no contempt of Court orders in the case of **Veronica Chepsat Sum vs Zephaniah Kipchumba Koech, Civil Appeal No E.077/2024.**

48. Counsel also cited the **Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332** on the issue of stay of proceedings.

49. Counsel urged that upon delivery and perfection of the judgment, the Trial Court was rendered *functus officio* and no longer had jurisdiction in reopening and admitting parties to a matter pending Appeal and to which execution had

been levied and judgment perfected, as is stated in the case of **Telkom Kenya Limited vs. John Ochanda** [2014] eKLR.

1st Respondent's Submissions

50. Regarding the Preliminary Objection, Counsel for the 1st Respondent submitted that the Appellant/Applicant herein filed the Replying Affidavit dated 9th May 2025, the subject of the said Preliminary Objection and that indeed it lacked the requisite Commissioning as required in law. Counsel urged that this error was not deliberate and/or intended.
51. Counsel explained that initially, when the Advocate's office's staff was trying to file the said Replying Affidavit, they experienced technical difficulties in uploading the soft copy of the same to the judiciary e-filing portal, that at the time, it was imperative that said Replying Affidavit be filed urgently, it was decided that one of the staff rushes to the High Court to file the hard copy of the same in the registry, to have the same stamped and filed and/or entered in the Court file. Counsel maintained that it was only after it had been filed that it was subsequently noticed that the said Replying Affidavit had not been commissioned as required by law.
52. Counsel further submitted that subsequently, and in a bid to correct this error and anomaly, they then filed a proper Replying Affidavit which has been commissioned as required by law, and which was done at the earliest opportunity and without undue delay.

53. Counsel urged that that the failure to commission the said Replying Affidavit was inadvertent and completely unintentional, and that an innocent litigant should be made to suffer for the inadvertent mistakes of counsel.

54. On whether an innocent litigant should be penalized for the inadvertent mistake on part of Counsel, Counsel submitted that there was a need to quickly file the Replying Affidavit and in the rush to do so, there was an unintended failure to commission the same. Counsel urged that therefore this mistake was inadvertent and justice demands that the same ought not to be dismissed and/or struck out. He cited the case of **Itute Ingu & another v Isumael Mwakavi Mwendwa [1994] eKLR**, where the Court observed that the mistake of an advocate should not be visited upon a litigant. He also cited the case of **Edney Adaka Ismail vs Equity Bank Limited [2014] eKLR**, in that regard.

55. Counsel further submitted that Respondent's Advocate on record did take concrete steps to remedy the failure to commission the said Affidavit, such as promptly and swiftly preparing and filing a proper one. Counsel urged that should the said Replying Affidavit be dismissed on account of an innocent error, then it would infringe on the 1st Respondent's Constitutional Right to Access to Justice as enshrined in **Article 48** of the **Constitution**, and her Right to a Fair Trial as enshrined in **Article 50** of the Constitution.

56. On whether the failure to Commission the Replying Affidavit is fatal error, Counsel cited **Article 159 (2)(d)** of the Constitution and submitted that this Honourable Court is duty bound to put substantive justice as a priority, and to be unfettered by procedural technicalities, as enshrined in **Article 159(2)(d)** of the **Constitution**. Counsel cited the case **Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 others [2013] eKLR-Election Petition 12 of 2013**,

where the Court discussed the objective of **Article 159(2)(d)** of the **Constitution of Kenya, 2010**.

57. Counsel further submitted the **making** of affidavits is governed by the **Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya**. He cited **Section 5 and 8** of the **Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya**.

58. Counsel submitted that there have been numerous authorities whereby the Courts have found that errors that do not go to subject-matter of the suit could be remedied. He cited the case of **Microsoft Corporation vs. Mitsumi Computer Garage Ltd & a Another [2001] KLR 470** and the case of **Raila Odinga and Others vs. Independence Electoral and Boundaries Commission and 3 Others [2013] eKLR** in that regard to the issue that technical errors that do not go to subject-matter of the suit could be remedied. Counsel also cited several other cases on the same issue.

The 2nd Respondent's Submissions

59. In regard to the Preliminary Objection, Counsel for the 2nd Respondent cited the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969) EA 696, Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others and Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR**.

60. Counsel submitted that the Appellant/Applicant herein is using this Objection as a sword and not to resolve the matter and to save the precious judicial time. Counsel pointed out that the Appellant/Applicant confirmed on 3/06/2025 that indeed the copy that was filed by the 1st Respondent was indeed executed and

that is an admission to the fact that the Preliminary Objection does not serve any purpose.

61.Regarding stay, Counsel cited **Order 42 Rule 6** of the **Civil Procedure Rules** and submitted that for stay of execution as provided for under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**, an Applicant should satisfy the Court that: Substantial loss may result to him unless the order is made; that the application has been made without unreasonable delay; and the applicant has given such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.

62.Counsel submitted that for a Court to grant stay of execution all the three conditions must be satisfied. However, Counsel contended that the Appellant/Applicant has not satisfied any of them. Further, Counsel submitted that the Applicant has confirmed that indeed it is true they received Kshs. 6,750,000/= from the 2nd Respondent and that this alone is evidence that the only person who will have been suffering loss is the 2nd Respondent.

63.Counsel urged that the Applicant has not met any of the above conditions. Counsel submitted that judgment having been delivered on 2nd August 2022 and the decree having been executed the orders sought cannot be granted. Counsel urged that the order sought by the Appellant cannot be issued because the Court cannot issue orders in vain. He cited the case of **Antoine Ndiaye VS African Virtual University (2015) eKLR** in regard to conditions that an Applicant must satisfy in order to be granted stay of execution.

64. Counsel for the 2nd Respondent also submitted on the issue of the refund of Kshs.6,750,000/= which I however note that is not an issue for determination at this interim stage.

Determination

65. The issue for determination in this matter is “**whether the Court should issue orders of stay of execution and stay of proceedings**”. Before dealing with that issue however, the court must first satisfy itself that the challenge raised herein meets the threshold of what should constitute a Preliminary Objection.

66. The Supreme Court in [Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others \(Supra\)](#) cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969) EA 696*, where the Court held as follows:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

67. The Supreme Court in **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others** [2015] eKLR (Supra) made the following observation as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

68. It must be noted that the preliminary objection if allowed may dispose of the entire suit at the very onset without giving parties the opportunity to be heard. For this reason, a Preliminary Objection must be considered very carefully to ensure that it is in strict compliance with the guidelines issued in the **Mukhisa Biscuit Case** in a bid to ensure that the cardinal and primary duty of any court to hear and determine any matter before it on its merits is adhered to at all times.

69. **Section 4** of the said Act provides thus;

(1) A commissioner for oaths *may*, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any Court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an

Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate Court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.

(2) A commissioner for oaths shall, in the exercise of any of the powers mentioned in subsection (1), be entitled to charge and be paid such fees as may be authorized by any rules of Court for the time being.

70.It should be noted that except for **Subsection 2**, the provisions of **Section 4** are not at all couched in mandatory terms. But even supposing that were to be the case, **Section 72 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya** whose provision is couched in mandatory terms states as follows on issues pertaining to the form of documents:

Save as is otherwise expressly provided, whenever a form is prescribed by a written law on instatement or document which purports to be in that form *shall* not be void by reason of a deviation there from *which does not affect the substance* of the instrument or document or which is not calculated to mislead.”

71.Further to the above, the provisions of **Order 19 Rule 6** of the **Civil Procedure Rules, 2010** herein below reproduced which provide for instances when the Court may strike out an affidavit states that an affidavit cannot be

struck out merely on technicalities as set out **in Order 19 Rule 7** of the **Civil Procedure Rules, 2010**. The said provision states as follows-

“The Court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect of misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.”

72.The above being the case, it is my finding that the defect and/or omission raised by Counsel for the Appellant on the Respondent’s Replying Affidavit as already herein summarized amounts to a technicality of form as envisaged under **Section 72 of Cap 2 of the Laws of Kenya** and **Order 19 Rule 7 of the Civil Procedure Rules** herein above cited not substance, and does not in any way affect the substance and/or correctness and therefore the admissibility of the supporting affidavit. In this regard, I find that the Preliminary Objection lacks merit and the same is accordingly dismissed.

73.On the stay of execution sought, the principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under **Order 42 Rule 6(2)** of the **Civil Procedure Rules** which provides as follows:

No order for stay of execution shall be made under subrule (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

74. The factors to consider in stay pending appeal is set out in the Court of Appeal decision in **Butt v. Rent Restriction Tribunal [1982] KLR 417, (Supra)**. The Court gave guidance on how a Court should exercise discretion in such an Application and held as follows: -

- 1) The power of the Court to grant or refuse an Application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**
- 2) The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the judge's discretion.**
- 3) A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.**
- 4) The Court in exercising its discretion whether to grant [or] refuse an Application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the Appellant had an undoubted right of appeal.**

5) The Court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon Application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.

75. On the issue of substantial loss particularly in the circumstances of this case, the decision of Ogola J in the case of **Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation) [2004] 2 EA 331 (Supra)** which I associate myself with fully, is of particular relevance. The learned Judge therein stated that:

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

76. On the issue of unreasonable delay. The Court of Appeal sitting in **Meru in Civil Appeal No. 45 of 2015 M'ndaka Mbiuki v James Mbaabu Mugwiria [2016] eKLR** held that;

“This ground is normally easy to determine and is usually straight forward. Although there is no exact measure as to what amounts to unreasonable delay, it will not be difficult to discern inordinate delay when it occurs. It must be such delay that goes beyond acceptable limits given the nature of the act to be performed.”

77. On whether the appeal is arguable, I find the decision in the case of **Athuman Nusura Juma Vs. Afwa Mohamed Ramadhan [2016] eKLR** to be relevant. Therein, the Court held as follows:

“whether the intended appeal has merits or not is not an issue to be determined by a Court when dealing with an Application of this nature but by the Court dealing with the merits of the appeal, that is why the requirement that the intended appeal be arguable is preferred with the word “possibly”.

78. On whether a stay of proceedings should issue, in the persuasive authority of **Kenya Wildlife Service Vs James Mutembei (2019) eKLR**, Gikonyo J held that:

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”.

79. Without a doubt that stay of proceedings is a grave matter to be entertained only in the most deserving cases as it impacts the right to expeditious trial. It is a discretionary power exercisable by the Court upon consideration of the facts and circumstances of each case. As stated by the Court of Appeal in the case of **David Morton Silverstein v Atsango Chesoni (2002) eKLR**: -

“The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court's own rules. But as the Court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay”.

80.In the instant case, the Applicant’s main contention firstly is that the Court Order that the Appellant/Applicant was alleged to be in contempt of firstly was issued by a different Court, and that secondly he did not know of the existence of the said Court Order and lastly that said court order was ambiguous, unclear and uncertain. On his part, it is the Respondent contention that the Applicant ought to have been aware of the said order for the reasons already herein summarized.

81.In considering these divergent views, it is imperative to note that for a party to be held to have ignored a valid court order, the party so alleging apart from demonstrating that such an order exists is also duty bound to also demonstrate to the satisfaction of the court that the said order was duly served upon the contemnor as required by law or as has been herein alleged, demonstrate to the satisfaction of the court the circumstances under which the court can safely conclude that the contemnor was aware of or ought to have been aware of the existence of the said order and therefore rendering the service of the same to be unnecessary. In this instance, I note that even as the 1st Respondent has annexed the order said to have been breached by the Appellant to her Replying

Affidavit, nowhere has she deposed that the said order was, as is required by law, served upon the Applicant.

82.The court further notes that no Affidavit of Service as provided under **Order 5 of the Civil Procedure Rules 2010** confirming that service of the said order was duly effected upon the Applicant has been availed for the Respondent then to authoritatively state that the Applicant was aware of the orders of stay of the sale of the **Land Title No. Pioneer/Racecourse Block 2 (Kapmalel)**. Also, it is my considered opinion, having addressed my mind to the reasons given by the Respondent in seeking that the court finds that the Applicant ought to have been aware of the order, that the same are not sufficiently satisfactory as to lead the court to safely find on a balance of probabilities for the Respondent on this issue.

83.Further, I am satisfied that the Applicant moved to court without unreasonable delay, and that in light of my finding on service of the order as above, he has an arguable appeal, and lastly given that he is liable to arrest and committal to civil jail, the loss he stands to suffer if the orders of stay are not granted amount to substantial loss as envisaged in the holding of Ogolla J in the herein cited case of **Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation) [2004] 2 EA 331 (Supra)**. In light of the above, I find merit in the Applicant's application for stay of execution and I am also satisfied that this is one such case where the Application for stay of proceedings is also merited.

84. In this regard, I allow the Applicant's Application in its entirety with costs to be borne by the Respondents.

Read Dated and Signed at ELDORET on 19th December 2025

E. OMINDE
JUDGE