

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**MISCELLANEOUS CIVIL APPLICATION NO. E101 OF 2025**

**JOHN KIPKEMBOI LAGAT.....1<sup>ST</sup> APPLICANT**  
**EQUATOR FLOWERS (K) LIMITED .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**RAYMOND LONGOLAN LODESI**  
**(suing as Administrator of the Estate**  
**of the Late THOMAS EKAI EKOPIRI) .....RESPONDENT**

**RULING**

1. By way of a Notice of motion dated 5<sup>th</sup> May 2025 seeking the following orders;

1) Spent

2) Spent

3) That the Applicants be allowed to file an appeal out of time from the Judgment of Hon. D. Mikoyan Chief Magistrate, delivered on 8<sup>th</sup> May, 2024 in ELDORET ELDORET CMCC NO. 560 OF 2018.

4) That there be stay of execution and/or further execution of the decree herein pending the hearing and final determination of the intended appeal.

5) That the Memorandum of Appeal annexed hereto be deemed properly filed and served upon payment of the requisite court fees.

**6) That cost hereof be costs in the appeal.**

2. The Application is expressed to be brought under Articles 50(1) and 159 (d) of the Constitution of Kenya, 2010, Sections 1A, 1B. 3A.63(e) and 79G of the Civil Procedure Act. Order 42 Rule 6 and 7, 50 Rule 5 and 51 Rule 1 of the Civil Procedure Rules. 2010 and all enabling provisions of the law.
3. The Application is premised on the grounds on the face of it and the contents of the annexed affidavit of Esther W. Ndungu, the Legal Officer M/S Fidelity Insurance Company Limited. She deponed that judgment was delivered against the Applicants on 8<sup>th</sup> may 2024, annexing a copy of the judgement as “EN1”. Further, that the matter came up for judgement in the absence of the parties on 8<sup>th</sup> May 2024 and without any notice of delivery of judgement served upon the parties and their advocate came to learn of the judgement on 23<sup>rd</sup> May 2024. The applicants then filed an application for stay of execution which Application was thereafter compromised and the Applicants granted for 45 days from 28<sup>th</sup> May 2024 vide a consent which she annexed and marked as EN2.
4. That on 18<sup>th</sup> June 2024 the Applicant’s insurance Company M/s Fidelity Shield Insurance Company Limited instructed M/s Nyairo & Company Advocates to Appeal the decision of the court. That these instructios came after the period within which to lodge the appeal had lapsed. That the Counsel filed the appeal before the Trial Court and the said Application was heard and after numerous adjournments, the same was dismissed on 2<sup>nd</sup> May 2025 hence the instant Application. She annexed and marked a copy of the Trial Court’s Ruling as EN4.

5. That Counsel was instructed to appeal against part of the judgement after a resolution was passed by the members from the legal department. Though M/s Nyairo and Company Advocates prepared the Memorandum of Appeal as instructed, the time within which to file an appeal had lapsed. She annexed and marked as "EN3" a copy of the draft memorandum. That further, during the period, she was on compassionate leave with no access to emails and was therefore not in a position to give instructions.
6. That the failure to lodge an appeal on time was not deliberate on the part of the Applicants but due to factors beyond her control. She stated that the intended appeal raises very weighty legal issues with very high chances of success and this court should issue the orders sought to allow the Applicants an opportunity to ventilate its appeal before this court.
7. She deponed that the Respondent has already commenced execution process by applying for warrants of attachment and there is need to issue orders of stay of execution. That should the Respondents proceed with execution before the intended appeal is heard and determined the Applicants' stand to suffer loss that cannot be monetarily compensated and the intended appeal risks being rendered nugatory. She stated that the Respondents means are unknown and in the event execution issues, any money recovered by the Respondent under the trial Court's judgment will be out of reach of this Court hence the need to grant the orders sought in the instant application. She urged that the Applicants are ready and willing to abide by any reasonable conditions for the grant of the orders of stay pending appeal sought herein. She prayed the court allow the application.
8. In response to the Application, the Respondent raised a Preliminary Objection (P.O) based on the following points of law-

- 1) **The Applicant's Application offends the provisions of section 7 of the Civil Procedure Act Cap 21 Laws of Kenya and hence the instant Application is Res Judicata whereby similar Application dated 12<sup>th</sup> July 2024 seeking same prayers was filed in the Chief Magistrates Court vide Eldoret Chief Magistrates Court Civil Case No. 560 of 2018 and declined on 2<sup>nd</sup> May 2025.**
  - 2) **The instant application offends the provisions of section 79G of the Civil Procedure Act Cap 21 Laws of Kenya as read together with Order 42 Rule 1 of the Civil Procedure Rules 2010 of whereby the Applicant should have filed an appeal as per the provisions of the aforestated sections of the law and not the instant application that is disguised as an appeal.**
  - 3) **The instant application offends the provisions of Order 42 Rule 6 of the Civil Procedure 2010 which guarantees conditional stay on the basis of the pending appeal. In the instant case there is no pending appeal and hence no stay of execution can be granted.**
9. The Court directed that the Preliminary Objection be dispensed with first by way of written submissions and the parties complied.

#### **Applicants' submissions**

10. Learned counsel for the applicant submitted that it is settled law that a preliminary objection must raise clear and uncontested points of law that are capable of disposing of a suit. Further, that this principle was articulated in **Independent Electoral & Boundaries Commission v Cheperenger & 2 others (Civil Application 36 of 2014) [2015J KESC 2 (KLR)** where the

Supreme Court endorsed the leading decision on Preliminary Objections, **Mukisa Biscuit Manufacturing Co. Ltd vs M West End Distributors Ltd. (1969) EA 696**. Counsel urged that from the onset, it is apparent that the Respondent's purported preliminary' objection does not disclose any valid legal or procedural ground capable of disposing of the matter at this preliminary' stage. Rather, it prematurely invites the Court to delve into substantive matters that should properly be determined upon full hearing of the application.

**11.**Counsel stated that the objections raise both factual and legal points of law, particularly resting on whether the matter is *res judicata*, whether the instant application is disguised as an appeal and whether the application for stay of execution without a filed appeal is competent. These are not pure points of law and thus fails the substantive test set in the locus classicus of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors (Supra)**.

**12.**On the issue of *res judicata*, counsel urged that the purported preliminary objection is anchored on a wrong understanding of the law, it is misconceived and unfounded in law. He cited **Order 42 rule 6 of the Civil Procedure Rules** and urged that consequently, that the application is not *res judicata* and therefore **Section 7 of the Civil Procedure Act** is not applicable to the instant application. He cited the provisions of **Section 7 of the Civil Procedure Act** and urged that as the lower court's dismissal of the earlier application was not a final determination on the merits in a separate suit as envisaged under **Section 7 of the Civil Procedure Act**.

**13.**On whether leave to appeal out of time should be granted by the High Court under **Section 79G of the Civil Procedure Act**, Counsel urged that this Court, being an appellate court, is clothed with jurisdiction to grant leave for

an appeal to be lodged against the subordinate court's decision. This being an application for leave to appeal, it is this superior Court to consider the application and grant it as it has jurisdiction to hear and determine the instant application. Further, that the present application is a separate and distinct application and it does not amount to re-litigation of the same issue before the same court. Rather, the Applicants are properly invoking the jurisdiction of this Court under **Section 79G of the Civil Procedure Act** and **Order 42 Rule 6 of the Civil Procedure Rules**. He submitted that this Court has power to entertain and grant the orders sought.

14. Counsel reiterated that a denial by the lower court does not bar the Applicant from approaching the appellate court for redress. That this Court is well empowered to grant these remedies independently of any previous determination by the trial court which may be made even after refusal by the trial court, provided the High Court is satisfied with the reasons for delay in filing the appeal. Counsel cited **Patrick Kalaya Kulamba & Another vs Philip Komasu & Roda Ndanu Philip (Deceased)** 2016 eKLR; **Equity Bank Ltd vs West Link MBO Ltd [2013] eKLR Civil Application No. 78 of 2011** in support of the submissions.

15. Counsel urged that the Respondent's preliminary objection is not only misconceived and misplaced in law but it is also premised on a fundamental misapprehension of the nature and purpose of **Section 79G of the Civil Procedure Act** and **Order 42 Rule 1 of the Civil Procedure Rules**. He pointed out that the Respondent argues that the instant application offends **Section 79G of the Civil Procedure Act** and **Order 42 Rule 1** because the Applicants ought to have filed an appeal instead of an application and urged that this argument is misconceived. That statute does not provide for filing an appeal first then seeking leave retrospectively such a drastic action would

offend the statutory provision spelt out in **Section 79G**. It is evident that the Respondent's argument is anchored on a total misunderstanding of the law as to the appeal process and should be ignored.

**16.**Counsel cited **Order 42 Rule 1 of the Civil Procedure Rules** and urged that this provision clearly grants the Court discretion to enlarge time for filing an appeal out of time. He reiterated that the Applicants are properly before this Court seeking that leave and further, that the issue of whether an appeal has been filed cannot oust the Applicant's right to seek leave under **Section 79G**. That the instant application is properly grounded in law and procedure as **Section 79G of the Civil Procedure Act**.

**17.**Counsel submitted that the Applicants have also annexed a draft memorandum of appeal, clearly evidencing intention to appeal. The fact that an appeal has not been filed is not fatal to an application seeking leave to do so out of time. Therefore the Respondent's position is moot and lacks legal basis as the very essence of the application is to seek leave to file such appeal. Counsel cited the case of **Salat vs Independent Electoral and Boundaries Commission & 7 others (Application 16 of 2014) [2014] KESC 12 KLR**).

**18.**Counsel urged that the respondent's contention that no stay can issue under **Order 42 Rule 6** since there is no pending appeal is a technical reading of the rule and ignores the principle of access to justice. It is well established that Courts can grant stay even before a formal appeal is filed as long as there is a demonstrable intention to appeal. He reiterated that the Applicant has already expressed intent to appeal by annexing a Draft Memorandum of Appeal to the application (EW3). Had the judgment been delivered in the presence of parties, the Applicants would have filed the appeal on time. He

urged that the purpose of stay at this stage is to preserve the substratum of the intended appeal and denying stay would render the appeal nugatory.

19. Counsel cited Order 42 and urged that the trial court and the Appellate Court have concurrent and distinct jurisdiction to entertain applications for stay of execution. The Applicants conceded that while a previous application for leave to appeal out of time was filed before the lower court, it was dismissed without a substantive determination on the merits, particularly regarding the Applicants' right to be heard by an appellate forum. This Honourable Court, seized with appellate jurisdiction to make an independent determination of whether to grant leave to appeal out of time and stay of execution under Order 42 Rule 6. It would be an affront to justice to suggest that once the trial court denies stay, the appellate court is bound by that decision and divested of jurisdiction to determine a properly filed application under its appellate mandate.

20. Counsel prayed that the preliminary objection should be dismissed for lack of merit with costs to the Applicants.

### **Respondents' Submissions**

21. On whether the application is Res Judicata, counsel cited Section 7 of the Civil Procedure Act and urged that the application is res judicata having been deliberated upon and determined by the lower court. He stated that the first application that was filed by the Applicant seeking stay of execution pending the settlement of the decree was dated 24<sup>th</sup> May 2024 which application was compromised whereby the parties consented to a stay of execution of 45 days for the settlement of the decree. The second application that was filed by the applicant seeking stay of execution and leave of the court to appeal out of time is dated 12<sup>th</sup> July 2024. The said application was dismissed and after the said dismissal, once again the Applicant has

preferred the instant application seeking similar prayers that had been earlier either compromised by consent and / or dismissed by the lower court.

**22.**Counsel urged that a prayer for stay of execution cannot be entertained by this court because of the following reasons; that the stay of execution had been concussively dealt with by the consent dated 10<sup>th</sup> May 2024 whereby both parties had consented for a stay of execution of 45 days for the settlement of the decree herein. Therefore, the Applicant is estopped by dint of the doctrine of estoppel from seeking further stay. Additionally, that there is no appeal pending before this court and such a prayer for stay of execution is untenable baseless and cannot be entertained having been declined by the lower court. By dint of the provisions of Order 42 of the Civil Procedure Rules, 2010, an application for stay of execution can only be replicated on denial by the lower court where there is an appeal pending in the sense that if the trial court declines stay then a party is at liberty to seek the said stay of execution from the appellate court.

**23.**Counsel cited Order 42 Rule 6 of the Civil Procedure Rules 2010 and urged that the first qualification for an application for stay of execution is that there must be a pending appeal lodged. Secondly, if the application is declined by the trial court, the court appealed from, then the application can be replicated or rather lodged in the court where the appeal is preferred or pending. He reiterated that there is no appeal pending and as such an application for stay cannot be replicated once declined by the trial court.

**24.**On leave to appeal out of time, Counsel submitted that Applicant had sought similar prayer in the earlier application dated 12<sup>th</sup> July 2024 which was declined and therefore, the prayer is res judicata having been declined by the trial court. He cited Uhuru Highway Development Limited v Central Bank of

Kenya & 2 others (1996) eKLR and urged that it is apparently clear that the Applicant's instant application is res judicata. He stated that by dint of the provisions of section 89 of the Civil Procedure Act, the Applicant had the option of seeking a review or filing an appeal. That the applicant is seeking an appeal through the backdoor and urged the court to dismiss it.

### **Analysis & Determination**

25. In my considered opinion, the following issues arise for determination;

- 1) **Whether the Preliminary Objection is merited**
- 2) **Whether the Application is Res Judicata**

### **Whether the Preliminary Objection is merited**

26. The law pertaining to Preliminary Objections is well captured by all the parties herein. In the famous **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the Court of Appeal for Eastern Africa, stated (Law JA) in part that

**"So far as I'm aware, 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."**

27. Sir Charles Newbold President of the Court in the Mukisa case went on to state;

**“a Preliminary Objection cannot be said to be such if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.” (Page 710).**

**28.**In the case of **Avtar Singh Bhamra & Another vs Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, the court held that: -

**“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”**

**29.**The doctrine of *res judicata* in Kenyan law is embodied or anchored on Section 7 of the Civil Procedure Act. It is in these terms: -

**No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”**

**30.**The Civil Procedure Act also provides explanations with respect to the application of the *res judicata* rule. Explanations 1-3 are in the following terms:

**“Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.**

**Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.**

**Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.’’**

**31.**The principle was well explained in the case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR)** in which the Court of Appeal held that:

**“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;**

**a) The suit or issue was directly and substantially in issue in the former suit.**

**b) That former suit was between the same parties or parties under whom they or any of them claim.**

**c) Those parties were litigating under the same title.**

**d) The issue was heard and finally determined in the former suit.**

**e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.’’**

**31.** In the case of **Henderson vs Henderson (1843) 67 ER 313** res-judicata was described as follows;

**“...where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigations in respect of a matter which**

might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The pleas of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time”.

32. In **Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 others [2014] eKLR** the court held:

“To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.”

33. In **E T V vs Attorney General & another (2012) eKLR** it was held: -

“The courts must be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.”

34. In the instant case, the court notes that the Applicants filed an Application dated 12<sup>th</sup> July 2024 seeking stay of execution and leave to file the appeal out of time before the trial court which application was dismissed. The Applicants did not appeal against the order of dismissal by the Trial Court. Instead, they have come to this court seeking similar orders as they had sought before the Trial Court.

35. Having not appealed that decision of the Trial Court, the position that appertains with regard to the application now before the court is that the Applicant are seeking to re-litigate a cause that has already been litigated before another court of competent jurisdiction. In light of the doctrine of Res Judicata as herein summarised, the same is not permissible. Accordingly, therefore, the applicant's Application is misconceived and lacks merit and the same in the circumstances is now hereby dismissed with costs to the Respondents. The upshot then is that the Preliminary Objection raised in this respect has merit and the same is now hereby allowed.

**Read Dated and Signed at ELDORET on 19<sup>th</sup> December 2025**

**E. OMINDE**

**JUDGE**