

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CIVIL APPEAL CASE NO.E061 OF 2025**

**TIMOTHY**

**WACHANGA**

**WARUI**

**.....APPELLANT/APPLICANT**

**- V E R S U S -**

**JANET**

**CHERONO.....RESPONDENT**

**RULING**

1. The Appellant/Applicant herein took out the motion dated 1<sup>st</sup> October, 2025 where he sought for inter alia an Order for Stay of Execution of the Trial Court's Judgment/Decree pending the Appeal.
2. The Applicant swore an Affidavit he filed in support of the motion. The Respondent swore and filed a Replying Affidavit to oppose the application.
3. It is the submission of the Appellant/Applicant that unless an order for Stay of Execution of the decree of the Trial Court is granted, the Respondent may proceed to execute the decree thus making the Appellant suffer substantial loss.

4. The appellant also stated that the Appeal may be rendered nugatory if this Court does not grant the Stay Orders. The Appellant pointed out that the auctioneers have already attached Motor Vehicle Registration No. KCY 099A Isuzu D-Max and may actually proceed to sell the aforesaid Motor Vehicle if the stay order is not granted.

5. The Respondent in the other hand filed a Notice of Preliminary Objection dated 15/8/2025 and put forward the following grounds:-

**(i) THAT the Memorandum of Appeal herein is fatally and incurably defective, bad in law, incompetent and misconceived.**

**(ii) THAT the Memorandum of Appeal herein dated 11<sup>th</sup> July, 2025 offends the express provisions of Section 38 (1) of the Small Claims Court Act as the same does not raise any cogent points and or matters of law.**

***(iii) THAT in the premise, the Memorandum of Appeal herein is an abuse of the Court process as the same is defective for raising matters of fact as opposed to matters of law in accordance with Section 38 of the Small Claims Court Act.***

***(iv) THAT in the premise of the foregoing, this appeal ought to be dismissed with costs to the Respondent.***

6. The Appellant filed a Replying Affidavit to oppose the Preliminary Objection. Parties were directed to file written submissions.

7. I have considered the grounds put forward in the Notice of Preliminary Objection. Those grounds can be determined by one main ground which is to the effect that the Grounds of Appeal raised factual issues Contrary to the provisions of Section 38 (1) of the Small Claims Act. The Appellant has opposed the Preliminary Objection arguing that the Memorandum of appeal raises matters of law.

8. I have carefully examined the grounds set out on the Memorandum of Appeal and it is apparent to me that the Appellant has raised both factual matters and points of law. A careful perusal will show that the Appellant actually raised points of law in grounds 5, 6 and 7 of the Memorandum of Appeal in compliance with provisions of Section 38 (1) of the Small Claims Act.

9. In ***Bashir Haji Adbullahi -vs- Adan Mohamed Nooru & 3 Others (2014) eKLR***, the Court of Appeal held ***inter alia*** that when faced with a situation where a Memorandum of Appeal raises factual issues, an Appellate Court is at liberty to strike out the offending ground(s) while retaining those that are complaint. It is obvious that the Preliminary cannot be sustained. It is dismissed with costs abiding the outcome of the Appeal.

10. Turning back to the application for Stay of Execution dated 1<sup>st</sup> October, 2025, I find merit in it. It is allowed.

Consequently, an order for Stay of Execution of the decree is granted on condition that the appellant/Applicant deposits in Court the decretal sum of Kshs.239,444/= within 45 days from the date hereof. Costs of the application to abide the outcome of the Appeal.

**Dated, signed and delivered at Kericho this 3<sup>rd</sup> day  
of December, 2025.**

.....  
**J. K. SERGON  
JUDGE**

In the Presence of:-

C/Assistant - Rutoh

Miss Njuguna for the Appellant

Morata for the Respondent