

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL NO. E256 OF 2025

JOHN

KIPLANGAT.....APPELANT

VERSUS

JUDITH JEBICHI TUWEI.....1ST RESPONDENT

JOEL ROTICH.....2ND RESPONDENT

Coram: Before Hon. R. Nyakundi
M/s Munyaga Githaiga Advocates LLP

RULING

1. Before this Court is an Application dated 8th October 2025. The Applicant seeks for the following orders;
 - a. *Spent*
 - b. *Spent*
 - c. That pending the hearing and determination of the appeal, this court be pleased to order stay of execution of the judgment entered 23rd September 2024 together with any subsequent decree;
 - d. That pending the interpartes hearing and determination this of this application, Honorable Court be pleased to order the stay of proceedings in Eldoret SCCCOM No.E1245 Of 2024;
 - e. That pending the hearing and determination of this appeal, this Honorable Court be pleased to order the stay of proceedings in Eldoret SCCCOM No.E1245 Of 2024;
 - f. That costs of this application be provided for.
2. The application is made on the following grounds;
 - i. That the subordinate court delivered its ruling on 19th September 2025 setting aside interlocutory judgment entered on 23rd September 2024 on the condition that the Appellant pays

throw away costs in the sum of Kenya Shillings Twenty Thousand (Kshs. 20,000./=) within 7 days of the ruling date.

- ii. That the Applicant is aggrieved by the said ruling has since lodged an appeal against the same, noting that the applicant has an arguable appeal with a high probability of success.
 - iii. That there is an imminent threat to commence execution proceedings after the lapse of 7 days for payment of the throw away costs and which lapsed on 26th September 2025.
 - iv. That the proceedings in the trial court are to continue with a mention slated for 13th October 2025.
 - v. That any further proceedings in the trial court could distort the substratum of the appeal with the risk of the matter being heard on its merits whilst there is an impending appeal.
 - vi. That the trial court is likely to make further orders on the matter with the present appeal still subsisting which could be detrimental to the Appellant/Applicant.
 - vii. That it is therefore prudent that the proceedings at the trial court are stayed to enable parties to fully ventilate the present appeal before any further orders are made in the suit.
 - viii. That the application is brought timeously and the time to lodge the appeal is yet to lapse.
 - ix. That if the orders sought herein are not granted, the Applicant will be greatly prejudiced.
 - x. That this application has been brought in utmost good faith and it is in the interest of justice that the same be allowed.
 - xi. That if the stay orders sought herein are not granted, the Applicant is likely to suffer substantial harm.
 - xii. That this Honourable Court has the power to grant the orders sought herein in the interest of justice.
3. The Application is supported by an Affidavit sworn by the Applicant stating as follows;
- a. *That I am the Appellant/ Applicant well versed with the facts of this matter and competent to swear this affidavit.*

- b. *That the subordinate court delivered its ruling on 19th September 2025 setting aside interlocutory judgment entered on 23rd September 2024 on the condition that the I pay throw away costs in the sum of Kenya Shillings Twenty Thousand (Kshs.20,000./=) within 7 days of the ruling date. (Annexed and marked JK1 is a copy of the ruling)*
- c. *That being aggrieved by the said ruling I have since lodged an appeal against the same, noting that I have an arguable appeal with a high probability of success. (Annexed and marked JK2 and JK3 is a copy of a duly filed memorandum of appeal and a receipt indicating payment of the appeal respectively)*
- d. *That I have since written to the trial court requesting for a certified copy of the proceedings with the intention of prosecuting the appeal. (Annexed and marked E004 is a copy of the letter requesting for the proceedings)*
- e. *That there is an imminent threat to commence execution proceedings after the lapse of 7 days for payment of the throw away costs and which lapsed on 26th September 2025.*
- f. *That the proceedings in the trial court are to continue with a mention slated for 13th October 2025.*
- g. *That any further proceedings in the trial court could distort the substratum of the appeal with the risk of the matter being heard on its merits whilst there is an impending appeal.*
- h. *That the trial court is likely to make further orders on the matter with the present appeal still subsisting which could be detrimental to me.*
- i. *That it is therefore prudent that the proceedings at the trial court are stayed to enable parties to fully ventilate the present appeal.*
- j. *That the application is brought timeously and the time to lodge the appeal is yet to lapse.*
- k. *That if the orders sought herein are not granted I stand to be greatly prejudiced.*

- l. That this application has been brought in utmost good faith and it is in the interest of justice that the same be allowed.*
 - m. That I swear this affidavit in support to the application now before this Honourable Court and pray that the application be granted with an order as to costs.*
 - n. That all I have stated herein are true to the best of my knowledge, information and belief save where sources of information have been disclosed*
4. In response to the Application the 1st Respondent filed a Replying Affidavit opposing the motion stating as follows;
- a. THAT I am an adult female of sound mind and the 1st Respondent herein, hence competent to swear this affidavit.*
 - b. THAT I have read and fully understood the contents of the Application filed by the Appellant/Applicant's counsel dated 8th October 2025, and I respond as follows.*
 - c. THAT this matter originates from Small Claims Court Case No. E1245 of 2024 at Eldoret, where I was the claimant.*
 - d. THAT I had previously obtained an ex-parte default judgment against the Appellant/Applicant and the 2nd Respondent on 23rd September 2024 due to their failure to enter appearance and file a response to the statement of claim within the prescribed time.*
 - e. THAT the Appellant/Applicant's counsel later filed an Application under certificate of urgency seeking to set aside the interlocutory judgment. The court considered the Application and granted them leave to come on record and file their response out of time, on condition that they pay throwaway costs to me, the 1st Respondent, as shown in the ruling dated 8th November 2024, annexed hereto and marked "JJT-1."*
 - f. THAT on 27th November 2024, the matter was mentioned for pre-trial directions. Both parties were present, and the hearing date was fixed by consent for 15th April 2025.*
 - g. THAT on 15th April 2025, the matter came up for hearing. I was present in court; however, counsel for the Appellant/Applicant failed*

to appear, and the matter proceeded ex-parte in their absence. The case was then scheduled for judgment on 27th June 2025.

- h. THAT on 27th June 2025, judgment was delivered in my favour against both the Appellant/Applicant and the 2nd Respondent.*
 - i. THAT on 28th July 2025, the Appellant/Applicant's counsel filed yet another Application, this time seeking to set aside the ex-parte judgment delivered on 27th June 2025 in my favour.*
 - j. THAT the Appellant/Applicant's Application was heard, and I filed my Replying Affidavit, which is annexed hereto and marked "JJT-2."*
 - k. THAT the Honourable Court granted the Appellant/Applicant leave to be heard on condition that they pay me throwaway costs of Kshs. 20,000 within seven (7) days, which the Appellant/Applicant has failed to comply with to date, as shown in the annexed copy of the ruling marked "JJT-3."*
 - l. THAT court orders are not issued in vain; however, the Appellant/Applicant has consistently failed to take this matter seriously, having been granted leave twice by the court but failing to comply with both orders.*
 - m. THAT I humbly pray that this Honourable Court orders the Appellant/Applicant to deposit the entire sum of Kshs. 850,000 as security in court, pending the hearing and determination of the appeal on its merits.*
 - n. THAT litigation must come to an end.*
 - o. THAT the Appellant/Applicant's appeal lacks merit and is bound to fail. I therefore pray that this Honourable Court dismisses the same with costs to me.*
 - p. THAT what is deponed to herein above is true to the best of my knowledge, information, and belief.*
5. Besides the Affidavit evidence the 1st Respondent filed Written Submissions in which she argued there was an error of facts apparent on the face of the record the manner in which the trial court conducted the proceedings. It was her contention that on the 15th April 2025 the matter came up for hearing and the 1st Respondent was present in

court; however, counsel for the Appellant/Applicant failed to appear, and the matter proceeded ex-parte in their absence. The case was then scheduled for judgment on 27th June 2025 where it was delivered in the 1st respondent's favour against both the Appellant/Applicant and the 2nd Respondent. That further on 28th July 2025 the Appellant/Applicant's counsel filed yet another Application this time seeking to set aside the ex parte judgement delivered on the 27th June 2025 in the 1st Respondent's favor.

6. The 1st Respondent on beefing up her case relied on the following provisions of the law and corresponding cases; **Section 27 (1) of the Civil Procedure Act, County Government of Tana River & Another vs Hussein Fumo Hiribae [2021] eKLR and Machira t/a Machira & Co Advocates vs EastAfrican Standard (Supra).**
7. I have considered the Application dated 8th October 2025 seeking the primary stay of execution of proceedings to pave way for the hearing and determination of the intended Appeal.

Decision

8. The core provisions of the law on stay of execution or proceedings is provided for under **Order 42 Rule 6(2) of the Civil Procedure Rules**. The key principles include the following;
 - *Substantial Loss: The applicant must satisfy the court that they will suffer substantial loss unless the stay is granted. This prevents the appeal from being rendered nugatory.*
 - *Prompt Application: The application for a stay must be made without unreasonable delay.*
 - *Security: The applicant must provide security for the due performance of the decree or order that may ultimately be binding upon them.*
9. The law is now settled on the interpretation and construction of Order 42 Rule 6(2) of the Civil Procedure Rules as briefly reiterated in the following cases; in **Thuo vs Kimani and 2 Others 2025 KEHC 4520** the Court observed that it is trite law that an appeal does not operate as an automatic stay. Similarly, in **Butt vs Rent Restriction Tribunal**

1979 EA the court in considering the key principles of stay of proceedings pending an appeal by emphasizing that discretion should not impede an appeal and a stay should be generally granted if without it the appeal should be rendered nugatory. Further in the case of **Amoth & 10 Others vs Amoth & 3 Others (Environment and Land Case E23 of 2024) [2025] KEELC 18504 (KLR)** the court remarked that where stay of execution is granted pending an appeal the condition of depositing a specified amount of money into court within a set time frame is considered a proper exercise of discretion. I am also persuaded to incorporate in this discussion, The dicta in **Muchiri vs Lutere (2023) KEELC 22377 (KLR)** which in adopting the principles in **Butt vs Rent Restriction Tribunal 1979 EA** held that;

“Stay of execution pending appeal is a discretionary power bestowed upon this court by law. In Butt v Rent Restriction Tribunal (1982) KLR 417, the Court of Appeal gave guidance on how a court should exercise the said discretion and held that -;

a. The power of the court to grant or refuse an application for a stay of execution is discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

b. 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 reserve the judge’s decision.

c. A Judge should not refuse a stay if there are good grounds for it granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

d. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances in this case were that there was a larger amount of rent in dispute and the appellant had an undoubted right of appeal.

e. The court in exercising its power 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.”

10. I have reviewed the entire record first and foremost, the Applicant/intended Appellant is in breach of the order of throw-away costs as condition the lower court set in activating the fidelity of the proceeding pending before it. If in the event the Applicant/intended Appellant was financially ruined and was not able to comply with the order of throw-away costs he had the opportunity to invoke Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules on review so that the court can award a lesser figure than the one initially ordered to be paid by the Applicant.
11. In the present Application in his Affidavit there is no mention of the Applicant's financial incapacity so as to render him incapable of meeting the condition of throw-away costs which on compliance set aside the interlocutory proceedings which may have occasioned adverse rights implications. The Application under Order 42 Rule 6(2) of the Civil Procedure Rules lays greater emphasis on an Applicant seeking stay to discharge the burden of proof on substantial loss. This concept on substantial loss which is commonly found on Application in stay of execution or proceedings is considered to be considered to be a real risk of irreversible financial or irreparable harm if a stay order is not granted by the Court.
12. It is settled law that the purpose of stay of execution is to preserve the subject matter and, in this case, there is already disobedience of the court order on throw-away costs. The money is out there in the pockets of the Applicant so one wonders what is the court being asked to preserve. In this matter the court is of the view that if the amount on throw-away cost was colossal and beyond the reach of the Applicant the proper forum to address the issue on review is the trial court. In the Affidavit supporting the Application there is no evidential material on why the condition set by the court has not been met rendering the stay pending appeal necessary.

13. In considering the matter over and over again I am unable to appreciate the perspective by the Applicant that if the stay of proceedings pending appeal is not granted it will render the appeal nugatory. In fact, in the pronouncement of the trial court leave was granted to the Applicant to prosecute his case on the basis that the interlocutory proceedings were set aside. The only condition precedent was the condition of throw-away costs.
14. Looking at the issue of stay from the perspective of both sides and the legal dimension under Order 42 Rule 6(2) of the Civil Procedure Rules the Application lacks merit in dealing with the question of whether the success of an appeal will be rendered nugatory if the stay of an execution or proceedings or an injunction is not granted to the Applicant.
15. In the event the Applicant feels very strongly that he has to exercise his constitutional rights of appeal in the circumstances of this case he has to deposit the throw-away costs with the Deputy Registrar of the High Court within 30 days from today's date. That further to this order the subject matter of the appeal which seems to be an order of the throw-away costs should be canvassed by way of Written Submission filed simultaneously by both parties on what is legally wrong with the order by the learned trial magistrate. For avoidance of doubt the arguments on the appeal by way of Written Submissions shall take effect after the condition on deposit of Ksh 20,000/= throw-away costs, has been complied with by the Applicant. As a consequence of all this the highlighting of the submissions 16/2/2026.
16. It is so ordered

**GIVEN UNDER MY HAND AND THE SEAL OF THIS COURT THIS 7TH
DAY OF JANUARY 2026**

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R. NYAKUNDI
JUDGE