

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT ELDORET**  
**CIVIL APPEAL NO E270 OF 2025**

**JOEL KIPKETER SAWE.....APPELLANT/APPLICANT**  
**VERSUS**  
**STEPHEN           KAHIU           NG'ANG'A.....**  
**RESPONDENT**

**Coram:     Before Hon. R. Nyakundi**  
**M/s Mbungu E. & Co. Advocates**  
**M/s Kamau Lagat & Co. Advocates**

**RULING**

1. This is a Ruling on the Notice of Motion dated 3<sup>rd</sup> November 2025 brought under Article 159 of the Constitution, sections 1A, 1B and 3A of the Civil Procedure Act, Order 42 rule 6(1) and (2), Order 51 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. The Applicant moved this Court seeking the following Orders;
  - a. *Spent*
  - b. That pending hearing and determination of this application, this Honourable court be pleased to order stay of execution of the judgment dated 15th October, 2025 together with any subsequent decree.
  - c. That pending hearing and determination of the intended appeal, this court be pleased to order stay of execution of the judgment dated 15th October 2025 together with any subsequent decree.
  - d. That costs of this application be provided for.
2. The Application is made on the following grounds;
  - a. That the subordinate court delivered its judgment on 15th October 2025 in favour of the Respondent as against the Applicant and the Applicant is now seeking to set it aside and or

- vary the said judgment against itself and also seeks stay of execution of the judgment.
- b. That the Applicant is aggrieved by the said judgment and wishes to lodge an appeal against the same, noting that the applicant has an arguable appeal with a high probability of success.
  - c. That there is an imminent threat to commence execution proceedings.
  - d. That the application is brought timeously and the time to lodge the appeal is yet to lapse.
  - e. That if the orders sought herein are not granted, the Applicant will be greatly prejudiced.
  - f. That this application has been brought in utmost good faith and it is in the interest of justice that the same be allowed.
  - g. That if the stay orders sought herein are not granted, the Applicant will incur quantifiable and unquantifiable losses.
  - h. That the Applicant is ready and capable of abiding by the conditions for granting of stay of execution pending appeal as may be ordered by this Honourable Court.
  - i. That this Honourable Court has the power to grant the orders sought herein in the interest of justice.
3. The Application is supported by Affidavit sworn by the Applicant stating as follows;
- a. That I am the Applicant herein hence competent to swear this affidavit.
  - b. That I am well versed with the issues herein and therefore fit and competent to swear this affidavit.
  - c. That the subordinate court delivered its judgment on 15th October 2025 in favour of the Respondent as against the Applicant. (Annexed and marked JK 001 is a copy of the Judgment)
  - d. That the Applicant is aggrieved by the said judgment and wishes to lodge an appeal against the same, noting that the Applicant has 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)

- e. That there is an imminent threat to commence execution proceedings.
- f. That the application is brought timeously and the time to lodge the appeal is yet to lapse.
- g. That if the orders sought herein are not granted, the Applicant will be greatly prejudiced.
- h. That this application has been brought in utmost good faith and it is in the interest of justice that the same be allowed.
- i. That if the stay orders sought herein are not granted, the Applicant will incur quantifiable and unquantifiable losses.
- j. That the Applicant is ready and capable of abiding by the conditions for granting of stay of execution pending appeal as may be ordered by this Honourable Court.
- k. That this Honourable Court has the power to grant the orders sought herein.
- l. 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.
- m. 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.

### **Decision**

4. This was an Appeal pending before this Court based on the Memorandum of Appeal dated 3<sup>rd</sup> November 2025 which stated as follows;

*The Appellant being dissatisfied with the Judgment delivered by Hon. D.Mikoyan (CM) on 15th October, 2025 in the Eldoret Chief Magistrate's Court, Civil Suit No.E1041of 2016,appeals against the whole of the said judgment on the following grounds; THAT:*

1. *The learned Magistrate erred in law and fact in failing to consider the appellants' submissions on material damage hence the award was very high in the circumstances.*
2. *The learned Magistrate erred in law and fact by holding the appellant 100% liable for the accident whereas the appellant was not put to his defence due to the mistake of the predecessor advocate who failed to file a defence thus condemning the appellant unheard.*
3. *The learned Magistrate erred in fact and law in failing to accord the appellants' evidence on territorial jurisdiction due consideration.*
4. *The learned Magistrate erred in fact and law in failing to consider the rules of natural justice on fair hearing.*

*REASONS WHEREFORE - the Appellant prays for ORDERS that:*

1. *The appeal be allowed.*
2. *The Judgment of the Honourable Hon.D.Mikoyan (CM) delivered on 15th October, 2025 in the Eldoret Chief Magistrate's Court, Civil Suit No.E1041 of 2016 be and is hereby set aside in entirety.*
3. *The Judgment on material damage be set aside and be substituted with an award as this Honourable Court may deem fit and just to grant in the circumstances; and*
4. *The costs of this Appeal be awarded to the Appellants.*
5. In our jurisdiction, the withdrawal of suits or appeals is governed by **Order 25 of the Civil Procedure Rules** supported by the principles in **Section 27 of the Civil Procedure Act** regarding costs. It is trite law that a party to a litigation has a right to withdraw from the proceedings at any time may it be on the primary suit or an appeal subject to the payment of costs to the opposing party. The effect of withdrawal of a suit or an appeal is to render the proceedings moot or non-existence. This means once an Appeal or a suit has been withdrawn it can't typically be reinstated to have a new suit or appeal in place.
6. In the case at bar in compliance with **Order 25 Rule 1 of the Civil Procedure Rules** the parties recorded the following consent;
  - a) *This appeal be marked as withdrawn with no order as to costs*

*b) The appellant be granted 45 days from the date hereof to settle the sum of Kshs 979,358.00 being the negotiated amount.*

7. As a consequence, therefore, this Consent Order is adopted as the judgement of this court capable of being executed and enforced in all its terms and covenants unless reviewed or varied by this court. This Consent is never a subject of an appeal as now duly adopted by this court.

8. It is so ordered.

**GIVEN UNDER MY HAND AND THE SEAL OF THIS COURT THIS 6<sup>TH</sup> DAY OF JANUARY 2026**

.....  
**R. NYAKUNDI**  
**JUDGE**