



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kombo v Tumbo (Civil Appeal E118 of 2025)  
[2026] KEHC 611 (KLR) (30 January 2026) (Ruling)**

Neutral citation: [2026] KEHC 611 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL E118 OF 2025  
TA ODERA, J  
JANUARY 30, 2026**

**BETWEEN**

**GETRUDE MONG'INA KOMBO ..... APPELLANT**

**AND**

**DAMARIS NYANCHOKA TUMBO ..... RESPONDENT**

**RULING**

**Introduction**

1. Before this Court for determination is a preliminary issue raised by the Respondent touching on the competence and propriety of the Notice of Motion dated 12th January 2026, in light of the existence of an earlier application dated 9th January 2026 filed before the subordinate court.
2. The Respondent vide his replying affidavit contends that the two applications seek substantially similar orders, involve the same parties and subject matter, and that the instant application offends Section 6 of the *Civil Procedure Act*, amounts to forum shopping, and constitutes an abuse of the court process.
3. The Applicant, on the other hand, maintains that the two applications are distinct, properly anchored in law, and that this Court is clothed with jurisdiction under Order 42 Rule 6 of the Civil Procedure Rules to entertain the present application.
4. The narrow issue for determination is therefore:  
Whether the application dated 9th January 2026 filed before the subordinate court and the instant application dated 12th January 2026 can lawfully co-exist.

**Background**

5. It is not in dispute that:



1. The subordinate court delivered a ruling on 10<sup>th</sup> July 2025, imposing conditional orders for setting aside an interlocutory judgment.
2. The Applicant, being aggrieved, lodged an appeal before this Court being Kisii HCCA No. E118 of 2025.
3. Following non-compliance with the conditional orders, execution proceedings ensued, culminating in the issuance of warrants of arrest.
4. On 9<sup>th</sup> January 2026, the Applicant filed an application before the subordinate court seeking, inter alia, stay of execution.
5. On 12<sup>th</sup> January 2026, the Applicant filed the instant application before this Court seeking stay of execution pending appeal.

### **Parties' Submissions**

#### **Respondent's Case**

6. The Respondent argues that the Applicant filed two parallel applications seeking the same reliefs before courts of concurrent and appellate jurisdiction. It is submitted that this conduct offends Section 6 of the *Civil Procedure Act*, risks conflicting decisions, and is intended to harass and embarrass the Respondent.

Reliance was placed on, inter alia:

Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLRKNCHR v Attorney General & 16 Others Samson Mogikonyo Nyarangi versus Nyarangi Musyoki Mogaka & Co. Advocates [2022] KEHE

The Respondent urges the Court to strike out or stay the instant application.

#### **Applicant's Case**

7. The Applicant submits that Section 6 of the *Civil Procedure Act* applies strictly to suits, not applications, and only where two suits are pending before courts of competent jurisdiction.
8. It is further argued that once an appeal is lodged, jurisdiction to grant stay pending appeal lies squarely with the appellate court under Order 42 Rule 6, and that the instant application was necessitated by imminent execution.

### **Analysis and Determination**

#### **Applicability of Section 6 of the *Civil Procedure Act***

9. Section 6 of the *Civil Procedure Act* provides:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit...”

10. While the term “proceeding” is wide, courts have consistently held that the mischief targeted by Section 6 is the simultaneous prosecution of parallel matters before courts of competent jurisdiction, so as to avoid conflicting decisions and multiplicity of proceedings.



11. The Supreme Court in *Kenya National Commission on Human Rights v Attorney General & 16 Others* underscored that the doctrine of sub judice is aimed at preserving the integrity of the judicial process.
12. In the said *Samson Mogikonyo* case, it was held that filing a similar suit in a different court amounts to window shopping and an abuse of the process of the court. A similar holding was made in the case of *Muchanga* case (*Supra*)

### **Nature of the Two Applications**

13. Upon close examination of the record, this Court observes that:  
Order 42 rule 6 of the civil procedure rules provides that;
  - (3) the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
  - (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
  - 6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with. The application dated 9.1.2026 was filed before the trial court which has jurisdiction to grant stay pending appeal under Order 42 rule 6 (3) and (5) provides that the trial court has jurisdiction to grant interim stay of execution pending filing and hearing of a formal application. The instant application dated 12.1.2026 is anchored on Order 42 Rule 6, a provision which specifically vests jurisdiction in the appellate court to grant stay pending appeal.

### **Abuse of Court Process**

14. The Court of Appeal in *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd* defined abuse of process as the improper use of judicial machinery in a manner that is vexatious, oppressive, or meant to achieve an ulterior purpose.
15. In the present case, both applications filed in this court and in the trial, court are substantive and seek similar orders. Though nothing stops the applicant from moving either court for stay orders, both applications cannot be active at the same time as this may result in two divergent rulings which may eventually embarrass the courts as rightly submitted by Mr. Nyambati for the respondent. I agree with counsel for the respondent that the applicant is on a window-shopping mission.

### **Can the Two Applications Co-Exist?**

16. The answer is in the negative.
17. Once an application for stay pending appeal is properly placed before the appellate court, any similar application pending before the subordinate court cannot co-exist concurrently.
18. The preliminary objection thus succeeds to that extent. Since the application in the lower court was filed first and the applicant is entitled to seek similar orders in case the lower court application fails, I will stay the instant application dated 12.1.26 till the lower court application dated 9.1.26 is heard and determined.



## **Conclusion**

19. In light of the foregoing, I proceed to issue the following orders this Court finds that:

1. The preliminary objection succeeds.
2. The application dated 12.1.26 is stayed pending hearing and determination of the application dated 12<sup>th</sup> January 2026 pending before the subordinate court and the instant application dated 10<sup>th</sup> January 2026.
3. Upon the filing of the appeal, jurisdiction to entertain an application for stay pending appeal lies with this Court.
4. Costs to the respondent

It is so ordered.

**DELIVERED VIRTUALLY VIA TEAMS PLATFORM ON THIS 30<sup>TH</sup> DAY OF JANUARY 2026  
IN THE PRESENCE OF:**

**T.A ODERA**

**JUDGE**

**30. 1.26**

Delivered Virtually Via Teams Platform on this 30<sup>th</sup> day of January 2026 in the Presence of:

Mr. Wesonga for the Appellant/Applicant

Mr. Kirianki Holding brief for Mr. Nyambati for Respondent

C/A Kipchirchir

