

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ELCLA NO. E025 OF 2025

SAMUEL NJOROGE KIARIE
APPLICANT

VERSUS

GEORGE IRUNGU MUYA
RESPONDENT

RULING

1. Before me for determination is a Notice of Motion Application dated 22nd October 2025 brought under the provisions of Section 3A, 63(e), 79G, and 95 of the Civil Procedure Act, as well as Order 42 Rule 6 and 51 of the Civil Procedure Rules, where the Applicant/Appellant herein seeks an order for a stay of execution of the judgment/decree and all consequential orders in Naivasha CMELC No. 82 of 2018, pending the hearing and determination of his appeal.
2. The Applicant further seeks leave to file his appeal out of time against the said judgment/ decree delivered on 21st September 2021.
3. The application was supported by the grounds therein and the supporting Affidavit of Applicant, sworn on 22nd October 2025, indicating that judgment was delivered against him in Naivasha CMELC No. 82 of 2018 on the 21st September (sic). No formal application for execution had been filed or served on him.
4. Subsequently, an order notifying him of his eviction was served upon him on the 5th September 2025 during an attempted illegal eviction. The warrants of attachment and sale had been issued to M/S Direct "O" Auctioneers, who had since repeatedly attempted to attach his land/home.
5. He deponed that the execution process was irregular and void, having been undertaken without following due process, under Order 22 of the Civil Procedure Rules.
6. That he had an arguable appeal with high chances of success, as the trial court erred in both law and fact in rendering judgment against him and therefore, should the Court not grant him a stay, the auctioneers

will proceed to sell his property, rendering the intended appeal nugatory.

7. That no Notice to Show Cause (NTSC) was served upon him, the application has been filed without undue delay, and he was ready and willing to comply with any reasonable conditions the Court may impose for the grant of stay, that his application be allowed as prayed.
8. In response to the application, the Respondent, vide his Replying Affidavit, sworn on the 12th November 2025, deponed that the application was an abuse of the process of the court. That pursuant to the delivery of the impugned judgment. The Applicant filed an appeal to the Environment and Land Court at Nakuru, being Appeal No. 22 of 2021, in which he had also filed an application seeking a stay of execution of the decree, which was argued with his personal participation, where a ruling had been delivered on 14th December 2021, requiring him to deposit security in the amount of Ksh. 400,000/= within 45 days of the date of the Ruling. He did not comply, and the stay orders were discharged on 30th June 2022.
9. He subsequently filed a fresh application dated 20th July 2022 seeking a stay. That application was rejected, and the court directed that the appeal be heard instead. Parties filed their submissions. Judgment was rendered on 8th February 2024, where the appeal was dismissed with costs.
10. A detailed decree for execution was extracted, and a demand Letter dated 22nd April 2024 addressed to the applicant sought that he vacates the suit premises and also pay the sum awarded, all summing up to Ksh. 911,690/=.
11. He did not comply but instead filed a Nakuru ELC miscellaneous application, which was not coherent. The court then directed him to file the proper proceedings/documents before the Naivasha ELC. Apparently, he did not serve the Respondent with the subsequent application and the court's directions.
12. Subsequently, the Respondent filed their application dated 19th May 2025 seeking police security and supervision for the auctioneer to undertake the execution by eviction. The application was served on the applicant on 21st May 2025, and a hearing was scheduled for 4th June 2025. The court did not sit on that day, and the hearing was

rescheduled for 30th July 2025. A notice was served on the Applicant who failed to turn up for the hearing, and the application was allowed.

13. The auctioneers then went to the premises and informed him of his requirement to move out before being evicted, but he did not comply. On 12th September 2025, the auctioneers, in the company of the police, visited the premises, but the eviction was halted because the Applicant alleged that there was a pending appeal in Nakuru. That he then took that opportunity to file the present application, which was an afterthought, an abuse of the court process and an effort to frustrate the fruits of the judgment.
14. In rejoinder, the Applicant, vide his further affidavit, sworn on 2nd December 2025, deponed that the matter had originated as Criminal case No. 1228 of 2016, where he had been charged with forceful detainer, which matter was subsequently withdrawn, where the Magistrate directed that the complainant seeks a remedy at the Civil Court.
15. That Respondent then instituted Nakuru ELC case No. 18 of 2017, where a consent had been recorded inter alia allowing him to remain in the suit property so that the Respondent could provide CCTV footage from Equity Bank-Gilgil be produced in court for final determination of the matter. This consent order has never been complied with.
16. Instead, on the 24th July 2019, he was served with a new suit, being CMELC No. 82 of 2018, regarding the same matter. Either the matter had been transferred from ELC Nakuru to the Chief Magistrate's court at Naivasha without his knowledge, because he was not served with any transfer application, or the Respondent had filed a fresh suit before the Chief Magistrate, in which case it was unprocedural and a misuse of court process.
17. That either way, he was condemned unheard, for which reason he sought to be heard afresh on merit on the evidence and not on technicalities by filing Nakuru ELC Appeal No. 22 of 2021, which was dismissed with costs, and the court advised him to seek retrial/fresh hearing.
18. Later, he was served with a notice of motion application dated 19th May 2025, for hearing on the 4th June 2025, but the matter was

adjourned until 30th July 2025. He had attended court on both days when the court was not sitting.

19. On the 5th September 2025, the Respondent/agents invaded his dwelling house and started demolishing it without any service or a legally acquired eviction order to derail the legal procedure. The demolition was only halted when he informed the OCS commanding Gilgil Police Station of a pending Nakuru ELCL Misc/026/24. That despite service of the application, the Respondent did not file any response.
20. The application was disposed of by way of written submissions wherein the Applicant, via his submissions dated the 21st December 2025, sought to persuade the Court to bypass procedural lapses in favour of substantive justice. He argued that technicalities should not prevent a full hearing on the merits, especially regarding a land dispute where he claims no payment was ever received.
21. That his grievance arose from a dispute concerning the alleged sale of land, which he maintains was never consummated for want of consideration, to which he had consistently asserted that no purchase price was ever paid, rendering the alleged transaction legally void and unenforceable. Unfortunately, due to circumstances beyond his control, including late service by the Respondent and the untimely demise of his former counsel, he had been denied a fair opportunity ventilate his case fully.
22. He placed reliance on the provisions of Article 159(2)(d) of the Constitution to submit that the court should ignore technicalities if they stand in the way of justice. He further invoked the provisions of Sections 1A & 1B of the Civil Procedure Act to submit that the overriding objective of the Oxygen Principle was that the court's primary duty was to resolve the real dispute—the ownership of the land.
23. He stated that the provisions of Article 50(1) of the Constitution were a fundamental right to a fair hearing, arguing that rules of procedure are meant to facilitate justice, not act as barriers that prevent the court from seeing the truth. Reliance was placed on the decision in **Odd Jobs v Mubia [1970] EA 476.**

24. He thus sought that the court determine his application based on the following:
- i. Whether the Appellant has demonstrated sufficient cause for the grant of leave to appeal out of time.
 - ii. Whether the trial court erred in striking out the Appellant's affidavits purely on procedural grounds;
 - iii. Whether the Memorandum of Appeal already on record should be deemed as properly filed;
 - iv. Whether the doctrine of res judicata applies in the circumstances of this case;
 - v. Whether the Respondent has abused the court process;
 - vi. Whether the interests of justice and the Constitution demand that the appeal be heard on its merits.
25. On the first issue, the Applicant relied on the decision in the case of **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR**, to argue that the delay was not "inordinate" or intentional, citing three major excusable misfortunes, that there had been the untimely death of his former Counsel, which disrupted the handling of the case and secondly that the late service by the Respondent had made it impossible to meet strict procedural timelines. That once the impediments were resolved, he had acted diligently, wherein there had been no evidence of indolence, bad faith, or intentional disregard of court processes.
26. His submission was that for the grant of the order of stay of execution, he had to prove that he had an arguable appeal. The sale of the land was legally void because there had been no consideration, as the Respondent never actually paid the purchase price, which was contrary to the contract law. That a sale without payment was generally unenforceable.
27. He submitted that he has been in continued possession of the suit land wherein he still lives, and which was evidence that the sale was never completed. Lastly, he argued that the trial court made a fatal error by striking out his affidavits, which contained evidence of non-payment and, therefore, if reinstated, he would win the case.

28. He further argued that if the court does not stop the eviction now, the Respondent/Auctioneers would sell or destroy his home, and that, should he eventually win his appeal, his house would already have gone; the victory would be nugatory. That his Memorandum of Appeal, which was arguable, clearly set out the grounds of appeal for which it ought to be considered as properly filed. He placed reliance on the decision in **Microsoft Corporation v Mitsumi Computer Garage Ltd [2001] eKLR.**
29. He offered to comply with any reasonable conditions which the court may set, to prove his good faith, submitting that the Respondent would not be prejudiced if the orders sought were granted because he could be compensated with costs. On the other hand, he stood to suffer permanent loss of property rights without a fair hearing if his application was denied.
30. In response, the Respondent, in his submissions dated the 10th December 2025, characterised the Applicant's motion as a dishonest merry-go-round designed to frustrate a valid court judgment. He submitted that the case was Res Judicata, because the matter had already been heard and finally decided by competent courts, and therefore could not be reopened.
31. He submitted that a valid sale occurred on 23rd May 2016, where the Applicant was paid Ksh 800,000/= in cash, at his request, signed the transfer documents, and moved out, only to invade the property again in August 201.
32. That the case, being CMELCC No. 82 of 2018, was heard and determined in the presence of both parties, and Judgment was delivered in 2021. That subsequently, the Applicant filed No. ELC Appeal No. 22 of 2021. He, however, did not comply with the court's order, which had directed him to pay security of KSh. 400,000/= and his appeal was ultimately dismissed on its merits on 8th February 2024.
33. The Respondent argued that the Applicant lied to police officers during the September 2025 eviction by claiming an appeal was pending when it had actually been dismissed the previous year.
34. That in this regard, the court is legally barred from hearing this application for the reason that the parties, the subject matter (Plot No. 347 Ngomongo), and the issues are identical to the 2021 case and

2024 appeal. Therefore, the Application and appeal are res judicata and an abuse of the court process because the Applicant is seeking leave to appeal a judgment he had already appealed and lost.

35. That the issue of stay of execution had already been litigated upon, and the Applicant defaulted on the conditions. The Respondent placed reliance on the following landmark cases to emphasize finality in litigation: **John Florence Maritime Services Ltd & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR)**, **William Koross v Hezekiah Kiptoo Komen & 4 Others [2015] eKLR** and **Ngugi v Kinyanjui & 3 others [1989] KLR 146**, among others.

36. In Conclusion, the Respondent maintained that the Applicant had exhausted all legal avenues and sought from the Court to dismiss the application in its entirety as being frivolous, vexatious, and an abuse of process, and thereafter award him costs to compensate him for the expense of defending a settled matter.

Determination.

37. Having considered the application before the court herein, the opposition thereto, the submissions by both parties, the authorities cited and the applicable law, I find the issues that arise for determination as being;

- i. Whether the Applicant's Application is Res Judicata, if not;
- ii. Whether there should be an order for the stay of execution of the judgment/decree and all consequential orders in Naivasha CMELC No. 82 of 2018, pending the hearing and determination of the Applicant's appeal.
- iii. Whether time should be extended to allow the Applicant to file his Appeal after the expiry of the statutory period.

38. To determine whether this case is res judicata, Nakuru ELCLA No. 22 of 2021, the court of law, as is trite of me, should look at the decision

claimed to have been settled, the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

- i. What issues were really determined in the previous case?
- ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.
- iii. Whether the parties are the same or are litigating under the same title, and
- iv. whether the previous case was determined by a court of competent jurisdiction.

39. The Respondent has annexed to his Replying affidavit, the Memorandum of Appeal and the judgement in respect of the previous suit to show clearly that the suit fell on all fours on the doctrine of res judicata and which annexures I have considered and noted that pursuant to hearing and determination in Naivasha CMELC No. 82 of 2018, the Applicant herein filed both an Application and an Appeal being Nakuru ELCLA No. 22 of 2021, where the parties were Samwel Njoroge Kiarie (Appellant) vs George Irungu Muya (Respondent). In his application dated the 27th September 2021, the Applicant/Appellant sought the following orders;

"2.

3. THAT this honourable Court be pleased to Order a stay of execution of Judgement and Order made in Naivasha Magistrate Court Case No 82 of 2018 on 22nd September 2021 by Honourable Kennedy Bidali, pending the hearing and final determination of the applicant's appeal."

40. In a ruling dated 14th December 2021, the court gave the following orders;

"1. There shall be an order a stay of execution of the Judgement and order made in Naivasha Magistrates Court Case No.82 of 2018 on 22nd September 2021 by Honourable Kennedy Bidali in terms of prayer (a) (b) (c) of the plaint pending the hearing and determination of the Applicant's Appeal.

2. *The Appellant shall furnish security of Ksh. 400,000 for performance of the decree. The said amount shall be deposited in court within 45 days.*

3. *That in the event of failure to comply with the order in (2) above, the order in (1) shall stand vacated.*

4. *The cost of this Application shall be in the Appeal.”*

41. Subsequently, the appeal was heard and determined in a judgment dated 8th February 2024, where the court, in its disposition, held as follows;

“The learned Trial Magistrate correctly applied the facts to the law and made no mistake in arriving at his determination. Nothing, therefore, warrants interference with his finding.

In the result, I find that this Appeal lacks merit and it is hereby dismissed with costs to the Respondent.”

42. In the present Application, the Applicant/Appellant, save for leave to file his Appeal out of time, has sought the same orders as had been sought in Nakuru ELCLA No. 22 of 2021. There is no doubt that, indeed, the parties in the former Appeal, the subject suit, and the orders sought were similar to those in the present Appeal. There is no dispute that, whereas a ruling had been delivered in the previous Application, a judgment had subsequently been delivered in the main appeal, thereby barring the Applicant/Appellant from preferring the same application and appeal to a subsequent court of equal status, as the previous court, by the doctrine of Res judicata.

43. The Supreme Court of Kenya in **Dina Management Limited vs County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment)** held as follows:

“The doctrine of res judicata was founded on public policy and was aimed at achieving two objectives namely, that there must be finality to litigation and that the individual

should not be harassed twice with the same account of litigation. The doctrine of res judicata may be pleaded by way of estoppel so that where a judgment had been delivered, subsequent proceedings were estopped. Where res judicata was pleaded by way of estoppel to an entire cause of action, rather than to a single matter in issue, it amounted to an allegation that all the legal rights and obligations of the parties were concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact, that was a form of action estoppel. Res judicata, was embodied in section 7 of the Civil Procedure Act.

The elements to be proven before a court could arrive at the conclusion that a matter was res judicata were to be conjunctive rather than disjunctive before a suit or an issue was to be deemed res judicata on account of a former suit. It must be demonstrated that there was a former judgment which was final, it was on merit and by a court having jurisdiction and had identical parties, subject and cause of action.”

44. It must be noted, therefore, that the doctrine of res judicata is not a mere technicality that can be cured by invoking Article 159 (1)(d) of the Constitution but is a matter of substantive law and jurisdiction. It is a pillar of the judicial system that serves the greater public interest in finality and the efficient use of judicial resources.
45. Section 7 of the Civil Procedure Act uses mandatory language to prohibit courts from trying a *subsequent suit or issue that is 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 competent court, which issue has been heard and finally decided by such court.*
46. Once the conditions of *res judicata* are met, the court's power to hear and determine that specific dispute is extinguished. The court loses the competence to even look at the merits of the case.

47. In the end, being mindful of the attributes of the decisions in the above captioned cited authority, which is binding to this court, I find and hold that the Applicant/Appellant's Application and Appeal are incompetent and bad in law by virtue of being res judicata Nakuru ELCLA No. 22 of 2021. The Court cannot sit on appeal of its own judgment, nor can it grant leave to appeal out of time for a judgment that has already been the subject of a concluded appeal, as this is considered jurisdictionally impossible.

48. I therefore need not decide on the other issues herein above stated. In the words of Nyarangi JA, in **Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] KLR 1**, I must now down my tools and take no further step. Both the Application and the Appeal are herein dismissed with costs.

Dated and delivered via Microsoft Teams at Naivasha this 12th day of February 2026.



M.C. OUNDO

ENVIRONMENT & LAND COURT - JUDGE