

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**CIVIL APPEAL NO. E042 OF 2025**

**JOSEPH  
BOR .....APPLICANT**

**VERSUS**

**STANLEY  
BETT .....RESPONDENT**

**RULING**

1. Before me for determination is an undated Notice of Motion filed by the Applicant, JOSEPH BOR, seeking nine (9) substantive orders against the Respondent, STANLEY BETT. The application is expressed to be brought under Order 16, Order 51 of the Civil Procedure Rules, and Sections 1A, 1B, and 3A of the Civil Procedure Act.

2. The Applicant was initially acting in person. However, on 14<sup>th</sup> August 2025, Mr. Ngeno came on record for the Applicant. The Respondent is represented by the firm of M/s Mwita & Co. Advocates.

3. I have carefully considered the application, the Supporting Affidavit sworn by the Applicant on 25<sup>th</sup> July 2025, the annexures thereto, and the Respondent's Replying Affidavit sworn on 17<sup>th</sup> November 2025 and the annexures thereto.

4. The Applicant prays for the following orders;

- a) *Summon the Head of Kenya Forest Service (Nairobi) and DFO Kericho to appear in person and clarify who paid the sum of Kshs. 591,602/- to the Kenya Forest Service.*
- b) *Set aside the ex parte Court Order dated 11th November 2024, which was granted without the Applicant being accorded a fair hearing.*
- c) *Allow the Applicant to harvest trees in Mololo 6M Portion 4, Sorget Forest, since the Kenya Forest Service allocated the same to him.*
- d) *Summon DFO Kiptoo to explain why he dictated the agreement dated 18th February 2015 and coerced the Applicant to sign it.*
- e) *Compel the Respondent to produce all receipts of payments made after the cancellation of the agreement through the letter dated 15<sup>th</sup> March 2015.*
- f) *Summon the law firm of Nyadimo Advocates to explain how an application was filed purporting to proceed on the Applicant's behalf after he had withdrawn his matter being E071 of 2024.*
- g) *Order the Director of Criminal Investigations (DCI) Headquarters to investigate the alleged forgeries on the application filed after withdrawal.*
- h) *Set aside the ruling delivered in the lower court on 3<sup>rd</sup> April 2025, as the Applicant was denied a fair hearing.*
- i) *Grant general relief to prevent the Applicant from suffering irreparable harm.*

5. The Applicant's case is set out in his Supporting Affidavit sworn on 25<sup>th</sup> July 2025. He deposes that the dispute concerns trees on land parcel known as Mololo 6M Portion 4, Sorget Forest.

6. On 18<sup>th</sup> February 2015, the Applicant and the Respondent entered into a handwritten agreement. The Applicant contends that this agreement was dictated to him by one DFO Kiptoo. By that agreement, the Respondent was to pay the Applicant Kshs. 500,000/- and also pay the Kenya Forest Service (KFS) a sum of Kshs. 621,552/-. The Applicant alleges that he was to receive Kshs. 310,000/- on that day but the agreement was not honoured.

7. The Applicant's core contention is that the Respondent failed to honour his obligation to pay the money. As a result, the Applicant issued a letter dated 15<sup>th</sup> March 2015 cancelling the agreement. A copy of this letter is annexed to the Supporting Affidavit and marked as "JB-3".

8. The Applicant states that he only ever received a total of Kshs. 20,000/- from the Respondent, contrary to the Respondent's claims of having paid the full Kshs. 500,000/-. He further avers that the Respondent has never provided any proof of payment to the Kenya Forest Service for the Kshs. 621,552/-.

9. Crucially, the Applicant has placed before this Court evidence that he, through his son Darius Kiptoo Koskey, paid the sum of Kshs. 591,602/- to the Kenya Forest Service on 26<sup>th</sup> April 2024.

The Applicant has annexed sworn affidavits from himself and his son, along with bank statements, to substantiate this claim.

10. The Applicant further deposes that he had previously filed a suit, Kericho CMCC No. E071 of 2024, but withdrew it on 17<sup>th</sup> July 2024 on the advice of the Cabinet Secretary, Ministry of Environment and Forestry. He alleges that after he withdrew the suit, an application was fraudulently filed in that matter by Nyadimo Advocates using his name without his authority.

11. Regarding the lower court proceedings, the Applicant claims that on 3<sup>rd</sup> April 2025, when the ruling in Kericho CMCC No. E013 of 2024 was delivered, the court proceeded virtually while he was physically present in the courtroom, and he was not granted an audience. He contends this violated his constitutional right to a fair hearing under Article 50 of the Constitution.

12. The Respondent opposes the application through his Replying Affidavit sworn on 17<sup>th</sup> November 2025. His primary contention is that the application is misconceived, incompetent, and an abuse of the court process, intended only to delay the hearing and determination of the main suit pending in the lower court.

13. The Respondent argues that as an appellate court, this Honourable Court has no power to call and interrogate witnesses, as that is the prerogative of the trial court. He asserts that the orders sought by the Applicant are untenable as they seek to determine issues that properly belong to the trial court.

14. On the issue of fair hearing, the Respondent contends that the Applicant fully participated in the lower court proceedings. He has annexed copies of the Applicant's Replying Affidavit dated 27<sup>th</sup> November 2024 and his written submissions dated 28<sup>th</sup> January 2025, to demonstrate that the Applicant was heard. He maintains that the ruling delivered on 3<sup>rd</sup> April 2025 was a regular ruling that took into account the Applicant's submissions, and was not ex parte as alleged.

15. The Respondent expresses apprehension that if the orders sought are granted, the Applicant will harvest and dispose of the trees, rendering the main suit nugatory.

16. From the rival affidavits, the following issues arise for determination:

*a) Whether this court should grant orders summoning witnesses to appear before it.*

*b) Whether the court should set aside the ex parte order of 11<sup>th</sup> November 2024 and the ruling of 3<sup>rd</sup> April 2025.*

*c) Whether the Applicant should be allowed to harvest the trees pending the hearing of the main appeal.*

*d) Whether the court should compel production of receipts and order DCI investigations.*

*e) What orders should issue on costs.*

17. On Prayers 1, 4, and 6 the Applicant seeks to have this court summon;

- The Head of Kenya Forest Service (Nairobi) and DFO Kericho
- DFO Kiptoo
- The law firm of Nyadimo Advocates

18. The power to summon witnesses is a power exercised during a trial, where witnesses can be examined-in-chief, cross-examined, and re-examined. This court, sitting as an appellate court on an interlocutory application, cannot and should not assume the role of a trial court. To do so would be to usurp the function of the lower court where the main suit (Kericho CMCC No. E013 of 2024) is pending.

19. The issues the Applicant seeks to clarify through these witnesses; who paid KFS, the circumstances of the 2015 agreement, and the alleged forgery, are all matters that properly belong to the trial court. The trial court has the jurisdiction to summon these witnesses, hear their testimony, and subject them to cross-examination. This court does not.

20. In the persuasive authority of ***Nguruman Limited v Jan Bonde Nielsen & 2 others [2013] KECA 347 (KLR)***, the Court of Appeal emphasized that an appellate court on an interlocutory application should not conduct what amounts to a trial. The Applicant's remedy lies in applying to the trial court to summon these witnesses.

21. Consequently, Prayers 1, 4, and 6 are hereby declined. The Applicant is at liberty to pursue the summoning of these witnesses before the trial court in Kericho CMCC No. E013 of 2024.

22. On Prayer 5 the Applicant seeks to have the Respondent compelled to bring all receipts of payments made after the cancellation of the agreement post 15<sup>th</sup> March 2015. This is essentially an application for discovery. While this court has inherent power to order discovery under Section 3A of the Civil Procedure Act, such orders are more appropriately made by the trial court where the documents can be produced, admitted as exhibits, and tested during trial. The proper time for discovery is during the trial, not in interlocutory proceedings in an appeal, unless the documents are necessary for the just determination of the appeal itself. The receipts sought by the Applicant are relevant to the substantive dispute, not to the appeal against the injunction.

23. The Applicant is at liberty to apply before the trial court for orders compelling the Respondent to produce any receipts or documents in his possession relating to payments made to KFS or to the Applicant. The trial court has the necessary machinery to enforce such orders.

24. Prayer 5 is hereby declined, with leave to apply before the trial court.

25. On Prayer 7 the Applicant seeks an order directing the Director of Criminal Investigations to investigate alleged forgeries by Nyadimo Advocates. This court's jurisdiction in this matter is civil, not criminal. The Director of Public Prosecutions and the Director of Criminal Investigations have independent constitutional mandates under Articles 157 and 245 of the Constitution respectively. While this court can make observations or recommendations, it cannot direct the DCI to conduct investigations, especially in an interlocutory application in a civil appeal. Prayer 7 is hereby declined.

26. On Prayer 2 the Applicant seeks to set aside an order dated 11<sup>th</sup> November 2024, which he claims was granted ex parte without according him a fair hearing. I have carefully perused the record. The Respondent's application in the lower court was dated 6<sup>th</sup> November 2024. The record shows that the Applicant filed a Replying Affidavit on 27<sup>th</sup> November 2024 and written submissions on 28<sup>th</sup> January 2025. This clearly demonstrates that the Applicant was given an opportunity to respond and did, in fact, respond to the application.

27. The ruling delivered on 3<sup>rd</sup> April 2025 made specific reference to the Applicant's replying affidavit and submissions. Therefore, the order of 11<sup>th</sup> November 2024 was not the final ruling. It was likely an interim order pending the full hearing. The final ruling was delivered on 3<sup>rd</sup> April 2025, and it is that ruling that is the subject of the main appeal. In any event, an interim order of 11<sup>th</sup>

November 2024 would have been superseded by the final ruling of 3<sup>rd</sup> April 2025. Prayer 2 is therefore spent.

28. Prayer 8 seeks to set aside the ruling delivered in the lower court on 3<sup>rd</sup> April 2025. The Applicant claims he was denied a fair hearing as the court proceeded virtually while he was physically present. It is important to note that this is the very subject matter of the main appeal. The Applicant has filed this Civil Appeal to challenge that ruling. To grant Prayer 8 at this interlocutory stage would effectively determine the appeal without a hearing. The proper place to argue whether the lower court ruling should be set aside is during the hearing of the main appeal, where both parties will have an opportunity to present full submissions on the matter. The Applicant will have the chance to argue his case on the alleged denial of fair hearing, and the Respondent will have the chance to respond. Prayer 8 is hereby declined, as it is sub judice the main appeal.

29. Prayer 3 is the most substantive prayer in the application. The Applicant seeks to be allowed to harvest the trees on Mololo 6M Portion 4, claiming he has paid KFS Kshs. 591,602/- and has been allocated the plantation. The principles for granting such relief pending appeal are well settled in ***Nguruman Limited v Jan Bonde Nielsen & 2 others*** (supra). An applicant must show;

- That the appeal is arguable and not frivolous
- That if the order is not granted, the success of the appeal, if successful, will be rendered nugatory.

30. I have considered the material placed before me. The Applicant has provided;

- Evidence of payment of Kshs. 591,602/- to KFS on 26th April 2024 (through his son's affidavit and bank statements)

- A letter of cancellation of the 2015 agreement dated 15th March 2015.

- Affidavits explaining the source of the funds (sale of cows).

31. The Respondent, on the other hand, relies on the 2015 agreement but has not provided evidence of having paid the Kshs. 621,552/- due to KFS, which was a fundamental term of that agreement. His claim of paying a Kshs. 30,000/- deposit in 2015, even if true, does not equate to paying the full amount due.

32. I find that the Applicant has demonstrated an arguable appeal. The question of whether the 2015 agreement was validly rescinded and whether the Applicant's subsequent payment to KFS gives him superior rights are serious issues worthy of determination by this court. An arguable appeal is not one that must succeed, but one that is not frivolous and warrants full consideration. However, I must also consider the second limb; whether the success of the appeal would be rendered nugatory if the order is not granted. This requires me to consider the nature of the subject matter.

33. The subject matter of this dispute is trees a perishable and consumable commodity. If I allow the Applicant to harvest the

trees and the appeal ultimately fails, the Respondent's suit in the lower court would be rendered completely nugatory. The trees, once cut, cannot be restored. The subject matter of the dispute would be gone, and any judgment in favor of the Respondent would be an empty victory, compensable only in damages. On the other hand, if I decline to allow harvesting and the Applicant ultimately succeeds in his appeal, he will have suffered loss by being kept from his property. However, that loss can be compensated by an award of damages. The Applicant has not demonstrated that the Respondent is a man of straw who cannot pay damages. The balance of convenience, therefore, tilts in favor of preserving the suit property pending the hearing and determination of the appeal. I am not in doubt. The trees must be preserved. To allow harvesting now would be to put the cart before the horse and to potentially render the entire appeal and the lower court suit academic exercises. Accordingly, Prayer 3 is hereby declined.

34. Prayer 9 is a general prayer for the court to intervene to prevent irreparable harm. Having declined the specific prayers above, I find that no further orders are necessary under this general prayer at this stage.

35. In the upshot, I find the Application to be without merit. Consequently,

***a) The undated Notice of Motion is hereby dismissed in its entirety.***

***b) Each party shall bear their own costs of this application.***

**Dated, signed and delivered at Kericho this 10<sup>th</sup> day  
of March, 2026.**

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

In the Presence of:-

C/Assistant - Rutoh

Mwita for the Respondent

No Appearance for the Appellant