

REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MERU

CIVIL APPEAL NO. E093 OF 2023

JOY KATHAMBI.....

APPELLANT

VERSUS

STANLEY MUTWIRI MWIRICHIA.....1ST

RESPONDENT/APPLICANT

MUNGANIA MUTHOMI EDWARD.....2ND

RESPONDENT

RULING

1. For determination is the Notice of Motion dated 19/9/2025 under **Sections 1A, 1B, 3A and 63 of the Civil Procedure Act, Order 9 Rule 10, Order 10 Rule 11 and Order 51 (c) of the Civil Procedure Rules** seeking that:

1. This Honourable court be pleased to grant leave for the firm of M/S Muchomba Law Advocates to come on record for the applicant herein.

2. This Honourable court be pleased to issue an order staying the execution of the judgment delivered on 4th December, 2024, and all consequential orders pending hearing and determination of this application inter-partes.

3. The judgment entered against the 1st Respondent/Applicant together with all the consequential orders be set aside and leave be granted to him to defend the suit.

4. Leave be granted to the 1st Respondent/Applicant to file his defence together with the list of documents, list of witnesses and witness statements and the matter be heard and determined on merit.

5. Costs for this application be provided for.

2. The application is premised on the grounds that subsequent to being served with summons to enter appearance, the Applicant forwarded them to his insurer, who neglected to appoint an advocate to defend his interest in the mater. The Applicant was thus condemned

unheard, and it is in the interest of justice that the orders sought are granted.

3. The Appellant swore a replying affidavit on 17/11/2025 in opposition to the application. She averred that the appeal against the trial court's judgment of 18/5/2023 was dismissed on 4/12/2024, and the judgment sought to be stayed was thus a negative order of dismissal

of the Appellant's appeal, which is incapable of execution. In addition, the Applicant is seeking leave to file a defence before a court that did not hear and determine the matter in the first instance, and the application ought to therefore be dismissed. When the Applicant intentionally failed to enter appearance despite having been duly served with the summons to enter appearance and pleadings, the matter unsurprisingly proceeded undefended, and judgment was entered.

4. The Applicant swore a supplementary affidavit on 29/11/2025 in support of his application.

5. The 2nd Respondent did not file any response.

Determination

6. The singular issue for determination is whether the orders sought should be granted.

7. Order 42 Rule 6 (2) of the Civil Procedure Rules provides as follows; ***“No order for stay of execution shall be made under subrule (1) unless - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court***

orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

8. The order sought to be stayed was a dismissal of the Appellant’s appeal by this court on 4/12/2024. The question that begs is whether a dismissal is a positive order capable of execution.

9. The Court of Appeal in **AG v James Hoseah Gitau Mwara [2014] eKLR** expounded that in order for a court to exercise its discretion to grant stay, it must ask itself the question whether there is anything capable of being stayed in the ruling sought to be impugned.

10. The Court of Appeal in **Kaushik Panchamatia & 3 Others v Prime Bank Limited & Another [2020] eKLR** espoused that; ***“...A negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by Applicants.”***

11. I thus find that the impugning decision of 4/12/2024 was a dismissal, which is by its nature a negative order incapable of being stayed.

12. The Applicant has equally sought setting aside of the judgment and leave to defend the suit. The matter herein

emanated from the trial court and was appealed to this court. That appeal was heard on merits and subsequently dismissed.

13. I find that the said prayers for setting aside and leave to defend the suit are tantamount to this court sitting on appeal on its own decision, which is untenable.

14. On leave to come on record, the provisions of **Order 9 Rule 9 of the Civil Procedure Rules** make it mandatory that for any change of Advocates after judgment has been entered to be effected, there must be an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming Advocate.

15. In order not to impede the Applicant's right to be represented by an Advocate of his choice, I hereby grant the leave sought.

16. The upshot from the foregoing analysis is that the application dated 19/9/2025 is in want of merit, and it is

accordingly dismissed with costs to the
Appellant/Respondent.

**DATED AND DELIVERED AT MERU THIS 11TH DAY OF
MARCH, 2026.**

S. M. GITHINJI
JUDGE

Parties:-

- 1) Mr. Kaaria for the 1st Respondent/Applicant.
- 2) Mr. Atheru for the Appellant