



REPUBLIC OF KENYA



**KENYA LAW**  
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**VOO (Suing as Father and Next Friend to RCO and RNO (Minors)) v LJK (Civil Appeal E033 of 2025) [2026] KEHC 3229 (KLR) (12 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 3229 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E033 OF 2025  
E OMINDE, J  
MARCH 12, 2026**

**BETWEEN**

**VOO (SUING AS FATHER AND NEXT FRIEND TO RCO AND RNO (MINORS)) ..... APPLICANT**

**AND**

**LJK ..... RESPONDENT**

**RULING**

1. By way of Notice of Motion dated 18<sup>th</sup> February 2025, the Applicant seeks the following orders;
  1. Spent
  2. Spent
  3. Spent
  4. Spent
  5. That this Honourable Court be pleased to issue temporary Orders staying further proceedings and execution of the orders made on 4<sup>th</sup> February, 2025 and 18<sup>th</sup> February, 2025 in Eldoret children's case NO. E111 of 2022 pending the hearing of this Appeal.
  6. That this Honourable Court be pleased to set aside the Orders issued by the Chief Magistrate's Court in Eldoret Children's Case NO. E111 of 2022 on 4<sup>th</sup> February, 2025 and 18<sup>th</sup> February, 2025.
  7. That the Honourable Court be pleased to issue any other order and/or direction it deems just and expedient.



2. The application is expressed to be brought under Section 1A, 1B, 3, 3A of the *Civil Procedure Act*, Order 42 Rule (6) of the Civil Procedure Rules, Article 53 of *the Constitution* of Kenya, 2010 and all other enabling provision of the law.
3. The application is premised on the grounds on the face of it and the averments of the applicant in the affidavit sworn in support of the same. The deponent averred that he is informed that by an Order of the Chief Magistrates Court, made on 4<sup>th</sup> February, 2025, he was unjustifiably found guilty of being in contempt of Court Orders and ordered to appear in Court on 18<sup>th</sup> February, 2025 for mitigation and sentencing. The said Order was never extracted, nor was he served with the Order nor made aware of the said Orders requiring his attendance to Court.
4. The above assertion notwithstanding, he explained that his Advocate did inform him that his presence in court was required on 18<sup>th</sup> February 2025. That however, he was called to attend to an urgent meeting at Lodwar Law Courts where he works, and could therefore not possibly attend Court on the said date.
5. The deponent averred that on the said date, his absence notwithstanding, the Court on its own motion, ordered for warrants of arrest to be issued against him without appreciating the fact that he was not served with any of the Orders. That prior to the said Orders being issued, the Respondent had filed an Application for contempt dated 20<sup>th</sup> September, 2024, to which he duly filed a Replying Affidavit in response thereto and that on 15<sup>th</sup> October, 2024, the Respondent through her Advocate sought for leave to file a further Affidavit. He deposed that the said Application was still pending in Court.
6. That in the said Application, the Respondent had sought for temporary orders but that Application was denied, and the Court directed that the matter be heard on its merits and each party was directed to file their respective submissions. That as directed he filed submissions to the said Application and when the matter came up on 4<sup>th</sup> February, 2025 understandably for mention to fix a ruling date on the two Applications that were pending, the Court made a determination that he was in Contempt and proceeded to issue summons for his physical attendance for mitigation and sentencing. He urged that there were two Applications pending determination in Court, all which were ready for ruling and all which were never considered but were summarily dealt with by the Order issued on 4<sup>th</sup> February, 2024
7. He urged that he was not present when the said order was made and curiously, the Order he had purportedly violated was issued on 5<sup>th</sup> December, 2024 in his absence and the same was not brought to his attention. He stated that the said Orders finding him in contempt were made erroneously, as he was not invited to show cause why the said Orders should not have been issued nor was he served with the Orders that he had purportedly violated. He deposed that having stated that the Applications be heard on merit, he expected that the Court will consider his evidence as well and render a ruling on the Application. That the Orders issued by the trial Court have far-reaching consequences on him and on the welfare of the minors who depend on him largely for their upbringing.
8. He deposed that he is also employed, and entirely relies on his salary, and if committed to civil jail, he might not be in a position to provide for my family and the minors who are subject to the suit. He deposed further that the said Orders of contempt had no basis as no evidence was adduced to show that he had reneged on any of his obligations, nor was evidence adduced to show that he was in violation of any Court Order. He urged that the said Orders finding him guilty of contempt were hastily made, and premature as he is employed and therefore salaried, and finding him in contempt and possibly condemning him to jail ought to have been the very last option.
9. He stated that the Learned Magistrate failed to appreciate the fact that he had made an Application dated 5<sup>th</sup> November, 2024 where he had also raised the issue of contempt as against the Respondent, and that the Court ought to have considered the evidence without discriminating either party. Further,



that the trial Court erred in finding him guilty of contempt of a Court Order under the circumstances presented in the pleadings which required specificity of any such Order for it to be capable of being enforced. That the best interests of the minors were not fully considered in the directions by the Learned Magistrate, and have the effect of subjecting them to more suffering. He deposed that the said Orders offend the principles of the right to be heard, Fair Administration and the best interests of the child.

10. He deposed further that he had withdrawn the suit against the defendant in its entirety and filed the requisite notice to withdraw. He annexed as annexure E. The Applicant filed a further affidavit dated 16<sup>th</sup> May 2025 wherein he simply reiterated the contents of his supporting affidavit in its entirety and urged that he is a government employee, and risks losing employment if the said Orders are allowed to stand. That if there are any claims against him, there are other means in which such a claim ought to have been realized since he has disclosed his place of employment, and he earns a salary. He submitted that having withdrawn the suit, then the Court ought not to have made any such orders as there existed no suit to sustain the Orders. He therefore prayed that the Court reviews, varies and or sets aside the decision (s) made by the trial Magistrate Court as per the Application.

### **Respondents' Replying and Supplementary Affidavit**

11. The respondent filed a Replying Affidavit dated 3<sup>rd</sup> March 2025 and Supplementary Affidavit dated 27<sup>th</sup> June 2025. She reiterated the orders of the Court wherein he was found guilty of contempt and deposed that the said finding was proper and not erroneous as alleged. That the Applicant's Counsel was aware of the proceedings prior to the date and the Counsel was informed. That his supporting affidavit
12. She further deposed that the Applicant is evidently abusing the process of the Court by taking up proceeding after proceeding only meant to waste the Court's precious time and delay justice for the minors considering that a mediation settlement was entered into but the Applicant has become adamant, abusive and often disregards court dates and directions. That he has been delaying the process and acting out of ill will, spite and malice and yet his own act of neglecting the minors and abdicating responsibility is a social, moral and legal wrong and it is this that resulted in the eventual contempt and orders of warrant of arrest.
13. She deposed that the allegations of lack of service are totally unwarranted and insincere and is simply an attempt to evade accountability and responsibility for the minor's wellbeing urging that there is an urgent need to address the substantive issue and the "contempt warrant of arrest" orders would have helped to accelerate compliance. She deposed that the Applicant is before this Court with unclean hands as he is contempt of court orders that are in force and have not been stayed and that he has and continues to ignore, neglect and/or refused to provide for the children as agreed upon in Mediation whose Settlement Agreement dated 27<sup>th</sup> July 2022 which was adopted as an Order of court.
14. That the said contempt is in grave contravention of the rights of the minors herein as established in law in that the Applicant herein has not been paying school fees for the minors until only recently when he paid Ks. 7000/- for the 1st minor Ronald leaving arrears of Ks. 27,300/-. That he has also not paid for the 2nd minor Reagan whose arrears now stand at Ks. 10,000/-. She annexed and marked as UK1A & B copies of documents from both minors' schools. That the Applicant never paid rent for the children for a total of 12 months leading her to be evicted from two (2) houses that she had lived with the children from March to June 2024 and thereafter from August 2024 to March 2025 with the total arrears outstanding from both houses being Ks. 90,000/-. She annexed and marked as UK2A&B copies of Notice to Vacate and Tenancy Confirmation Letter from the landlords/agents.



15. She deposed that as the Applicant has refused to pay for rent and she cannot afford to raise the rent on her own, she and the minors herein are destitute and homeless. That she is currently left with no choice but to go back with the children to her parents' home in the village and stay there until she can find a source of income. Additionally, that the Applicant was supposed to be paying Ks. 2,700/- for milk every month. That from January 2023, he started sending Ks. 50/= per month only for the milk until March 2023 and he stopped paying for the milk altogether from April 2025 to date with the arrears for milk now standing at Ks. 74,300/-.
16. The deponent averred that in view of all the above, it is clear that the Applicant is not interested in obeying the orders of this court but only wants to abrogate parental responsibility over his children and leave her to struggle by herself to care for the children's needs. She urged that the application is brought in bad faith, is brought forth to delay justice and is an abuse of the court process. She further urged that it is a blatant lie that this case was withdrawn and if at all it was, it was an afterthought for reasons that it was withdrawn after the court ordered the Appellant to appear before it and he failed to do so. He was therefore purporting to withdraw in a desperate attempt to escape parental responsibility over the minors herein. She therefore prayed to court to dismiss the application.
17. The court directed that the Application be canvassed by way of written submissions and both Counsel filed submissions on behalf of the respective parties which I now proceed to summarise as below

### **Applicants' Submissions**

18. Learned counsel for the Applicant submitted that the plaintiff filed a Notice of Withdrawal of suit on 5<sup>th</sup> February, 2025 and that he further informed the Court of his intention to have the suit withdrawn when the matter came up on 18<sup>th</sup> February, 2025. He urged that Order 25 of the Civil Procedure Rules, 2010 provides for withdrawal of suits and the right to withdraw a suit under the said order at Rules 1 and 2(1) is not fettered by any conditions and a party who intends to withdraw their suit, has an absolute right to do so.
19. He cited the case of Nicholas Kiptoo Arap Korir Salat - Versus - IEBC & 7 Others, Supreme Court Application No. 16 of 2014 and the case of Beijing Industrial Designing & Researching Institute v Lagoon Development Limited [2015] eKLR as well as Bawan Limited v County Council of Kwale & another (Environment & Land Case 522 of 2011) [2024] KEELC 1348 in support of this submissions and urged that having made an Application for withdrawal on 5<sup>th</sup> February, 2025, before the impugned orders were made, the trial Court erred in making further Orders for the arrest of the Appellant as the suit no longer subsisted. Further, that the Court erred in expressly denying the Appellant his right to withdraw his suit which decision is not only erroneous, but has no standing in law.
20. On whether the Applicants are entitled to the order of stay, counsel urged the Court to consider the conditions for granting an order for stay of execution pending appeal as set out in Order 42 Rule 6(1) & (2) of the Civil Procedure Rules, 2010 which specifies the circumstances under which either the trial court or appellate court may order for stay of execution pending an appeal. Counsel submitted that the Application has met the said conditions set out in Order 42 Rule 6. The Applicant filed the application due to the fear of being arrested after an order by the lower court in Eldoret Children's Case No. E111 OF 2022 after the court erroneously and unjustifiably found him guilty of contempt.
21. First he submitted that it is a requirement that application of stay will only be allowed where the applicant has made the application without unreasonable delay and urged that the application was made on the same date that the decision was made and therefore the same was not delayed. On the second requirement that a party needs to demonstrate that he stands to suffer substantial loss if the order of stay is not granted, he submitted that if the application is not allowed he is likely to suffer



- substantial loss as the appeal will be rendered nugatory. This is because he has an arguable appeal with high chances of success. He cited the case of Kenya Airports Authority vs Mitu Bell Welfare Society & Anor (2014) eKLR in support of his submissions.
22. Counsel reiterated that the decision of the trial court was erroneous and that the learned Magistrate misapprehended the proceedings as they were for reasons that there were two applications for contempt which were both pending. He cited the case of Philip Chemwolo & Another v Augustine Kubende, [1982-88] KAR 103 in this regard and submitted that the orders for contempt issued had no basis as no evidence was adduced to show that the Applicant had reneged on any of his obligations, nor was evidence adduced to show that he was in violation of any Court Order.
  23. He cited the case of Kenya Power & Lighting Company vs Esther Wanjiru Nyokabi (2014) eKLR in this regard. He further submitted that the standard of proof required in cases of contempt is higher than that required in an ordinary civil cases. Before a finding of contempt is made, there must be a demonstration of wilful and deliberate disobedience of a Court Order.
  24. In citing the case of Oilfield Movers Ltd vs Zahara Oil & Gas Limited [2020] eKLR he urged that if the proceedings in the lower court are allowed to continue, and in the event this appeal succeeds, the Respondent is a person of straw and she will not be able to refund the sums that would have been paid and any other costs, hence it is prudent that stay of execution be granted pending the hearing and determination of the appeal filed.
  25. On whether the orders issued on 18<sup>th</sup> February, 2025 should be set aside, vacated and/or varied, Counsel submitted that the jurisdiction of the court to review and set aside its decisions is wide and unfettered, citing the case of Shah v Mbogo and Another [1967] EA 116. Further, that the legal threshold to consider before exercising the said discretion is whether the applicant has demonstrated a sufficient cause warranting setting aside of the decision or proceedings. He cited the case of Wachira Karanja v Bildad Wachira [2016] eKLR and the decision of The Supreme Court of India in Civil Appeal 1467 of 2011 Parimal v Veena Bharti (2011) and maintained that the applicant has met the threshold for the orders sought hence his application ought to be allowed in that respect. He urged the court to allow the application as prayed.

### **Respondents' submissions**

26. Learned counsel for the respondent reproduced the facts leading up to the application and set out the issues which in her opinion arose for determination and to which she then proceeded to submit. On whether the Appellant is entitled to temporary orders staying execution of orders, she urged that the record has shown how the orders came about and it is obvious that the Appellant was indeed in contempt and is adamant at abrogating parental responsibility over the minor's the subject matter of the suit.
27. Counsel urged that it is a basic principle of law that "he who comes to equity must come with clean hands". That the Appellant has approached this Court with very unclean hands because as at the time the trial court made the orders the Appellant is seeking to stay execution of, he was in contempt of court by failing to provide for the children's needs as per the Court Orders in force.
28. That up to date, the said orders have not been stayed and the Appellant has not at all complied. That he is therefore in present continuous contempt of court orders and this Court therefore ought not to lend the Appellant a listening ear at all as it is surely unfair for a person who has failed to abide by the law to expect to be undeservedly covered and/or protected by the very same law that he has broken.



29. Counsel reproduced the details of the Supplementary Affidavit on how the Appellant had abrogated his parental responsibility over the minors by failing to comply with Court Orders and urged that the Appellant has been leaving the Defendant/Respondent to singlehandedly provide for all the children's needs which has caused great suffering to the Respondent and the children.
30. Further, that the instant Appeal is based on blatant lies and is an obvious abuse of court process. That one of the main things the Appellant is relying on in the instant application is that he was not served with the orders granted on 4<sup>th</sup> February 2025. Counsel submitted that this is surely ridiculous because his legal representative was present in court when the said orders were issued.
31. That further, the Appellant's Counsel was also present in court on the 18<sup>th</sup> of December 2024 where his client was ordered to pay rent failure to which he would be held to being in contempt. That this being the case, the orders of contempt were not anything new to the Plaintiff/Appellant or his Counsel and neither was it a surprise. On the submission by the hat Counsel for the Appellant claiming that the suit was withdrawn. Counsel for the Respondent urged that this Court should take judicial notice of how children's cases work.
32. That the position is that one cannot just withdraw a children's case when orders of parental responsibility are pending and additionally, the timing of so-called withdrawal is suspect for reasons that why would the Appellant suddenly want to withdraw the suit after being found to be in contempt of court? Counsel submitted further, that even if the Appellant withdraws the suit, he can never withdraw court orders which must be obeyed. Counsel urged that the court should also take judicial notice that a child's needs are continuous, ever present and increase as they age and like time and tide that waits for no man, they cannot wait for anything or anyone.
33. On the stay of execution sought, Counsel cited Order 42 Rule 6(2) of the Civil Procedure Rules and urged that many courts of this land have been faced with the issue of what substantial loss entails and have pronounced themselves as follows in these cases that she sought to rely on; Muchene vs Karungu & 5 Others (Civil Appeal E042 of 2025) KEELC 6546 KLR, and James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR. Counsel urged that the Appellant/Applicant's appeal is frivolous and he has not demonstrated any loss that is so substantial that would render the appeal nugatory in the event that the orders of stay are not granted.
34. Counsel also cited Article 53(1) (b) and 53(1)(e) of *the Constitution*, and Section 8(1) and Section 8(2) of the Children's Act and urged the court to consider these provisions which require that the best interest of the child is of paramount consideration before any court in any matter before it involving minors in adjudicating upon the instant application. Counsel further submitted that staying the orders would mean that school fees for the children remains unpaid hence interfering with their education, it would mean the children will not have a roof above their heads and will therefore be destitute, and it would also mean that the children will not have a daily supply of milk which is required for their good health and development.
35. She urged that staying any orders in the trial children's case would be utterly unjust and against the best interests of the children and they ought therefore never to be granted by any court of law including this Honourable Court. She urged the court not to grant the orders sought in the circumstances.
36. On whether this Court ought to set aside the orders granted on the 4<sup>th</sup> of February 2025 and the 15<sup>th</sup> of February by the trial court, Counsel urged that the trial court already pronounced itself correctly acting within the confines of the law and there is nothing that was conducted against procedure or against the jurisdiction that the trial court had. That the Court rightfully exercised its inherent discretion in granting the orders it did, which orders were in the best interests of the children. She cited Section 6(c)



of the *Contempt of Court Act*, Cap 8F of the Laws of Kenya and urged that the applicant has established herein that orders were granted by the trial court and the same were disobeyed by the Appellant herein hence the correct finding of contempt and eventual warrant of arrest. He urged that the court should not set aside the orders of the court as that would not be in the interest of the minors.

### **Analysis & Determination**

37. The following issues arise for determination;
- i. Whether orders for stay of execution should issue
  - ii. Whether the finding of contempt and subsequent warrant of arrest issued by the trial court should be set aside
  - iii. Whether orders of stay of proceedings pending determination of the appeal should issue
38. On the first issue on the orders of stay of execution sought, in determining matters involving children, including an Application for stay of execution as herein, the “best interest” of the child is what is paramount. This is expressly provided under Article 53(2) of *the Constitution* and also in Section 8(1) (a) of the *Children Act* as follows:
- Article 53(2) of *the Constitution* provides;
- “A child’s best interests are of paramount importance in every matter concerning the child.”
- Section 8(1)(a) of the *Children Act* provides;
- “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies;
- a. the best interests of the child shall be the primary consideration;”
39. These principles were aptly restated by Muriithi J in the case of *Bhutt v. Bhutt Mombasa HCCC NO. 8 of 2014 (O.S.)* as follows:
- “In determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution Order 42 Rule 6 of the Civil Procedure Rules, must be complemented by overriding consideration of the best interest of the child in accordance with Article 53 (2) of *the Constitution*.”
40. The principles guiding grant of stay of execution pending Appeal are as set out in Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows:
- “No order for stay of execution shall be made under sub rule (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.”



41. In the case of ZMO v EIM [2013] eKLR, the court stated thus;

“As a matter of principle, grant of stay of execution of maintenance orders in children’s cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide for the upkeep of their minor children. There are no two ways about it. Suspension of a maintenance order is not in the best interests of the child, particularly in cases such as this one, where paternity is not in dispute. To my mind once a maintenance order is made where parentage is undisputed, it should not be suspended pending appeal where the appeal is on the quantum payable.”

42. I have considered the pleadings filed as well as the submissions made by both Counsel in support of and against the prayer for an order of stay of execution pending Appeal under the provisions of Order 42 Rule 6 of the Civil Procedure Rules. I have also perused the proceedings filed before the court by the said Appellant. It is not in issue, and the court is indeed satisfied that the Application for stay of execution was filed well within time.

43. On the requirement that the Appellant demonstrates the substantial loss that he stands to suffer if the order is not stayed, I shall handle the same in concert with the issue of whether the finding of contempt and subsequent warrant of arrest issued by the trial court should be set aside. Lastly, I note that no security for the due performance of the order has been offered by the Appellant.

44. The above said, the parallels that the court can draw between the above cited cases upon which the court shall rely in reaching its determination and the instant case is that the emphasis as provided by *the Constitution* and Statute is that in matters involving children, it is the best interest of the child that should be of paramount consideration. In this case, the court notes that paternity is not disputed and/or denied. Further that the terms and conditions of the maintenance of the minors the subject matter of this cause arose out of a Mediation Settlement, which is still in force as there is no averment that the same has been set aside.

45. In order that the court puts the issues that it has raised for determination in context, it is important that the court herein restates in a more systematic manner what transpired before the trial court that led to the finding of contempt as against the Appellant. The same arose out of an allegation that the Appellant had failed to meet his obligations as per the Mediation Settlement and more particularly his obligation to pay rent. From my perusal of the pleadings, I note that on 18<sup>th</sup> December 2024, the Respondent herein was present in court in person and the Appellant was represented by Counsel.

46. The defendant then asked the court to order the Appellant to pay rent since the landlord was about to throw them out. Counsel for the Respondent who was present in court did not contradict and/or deny the assertion that the rent had not been paid to the extent that the Respondent and the children were on the verge of being evicted. The court then gave a raft of orders and at 6) thereof, she ordered as follows;

“Since there is an unsuspended order requiring the plaintiff (now Appellant) to pay rent for the children, the plaintiff is hereby ordered to make good any outstanding rents as ordered before the next mention date failure to which he stands to be in contempt of court.”

47. On 4<sup>th</sup> February 2025 when the matter came up for mention, Counsel for the Appellant who was again present in court told the court that the Respondent had relocated to an unknown location hence the Appellant’s inability to pay rent and that the Appellant used to pay rent directly to the landlord. The Respondent in her response to this assertion stated that after she relocated, the Appellant went to her



new place for the children's birthday and when she served him with the court order, he told her to serve herself and that he works with the court and she will do nothing to him. Counsel responded were new matters not deposed in the Affidavit.

48. The court then proceeded to render itself that if the plaintiff had encountered challenges, he ought to have returned to court on the same and because of the fact that there is the court order of 18<sup>th</sup> December 2024, she directed that the Appellant attends court on 18<sup>th</sup> February 2025 for sentencing for being in contempt of the court.
49. At the attendance of 4<sup>th</sup> February 202, Counsel Mr. Oyaro for the Appellant informed the court that they had filed a Notice to withdraw the suit which act the court ruled was sought to defeat the court's order to appear before court for sentencing and dismissed the same and issued a warrant of arrest hence this appeal.
50. It has been alleged by the Respondent that not only was the Appellant in default of the court maintenance order as at the time the finding of contempt was made, but that he is also still in default to date. She outlined the monies due as a result of this default in her further affidavit as herein summarised. In light of this deposition by the Respondent, her Counsel Ms. Ruto submitted that as matters stand, the Appellant is in present continuous contempt of court orders and this Court therefore ought not to lend the Appellant a listening ear at all as it is surely unfair for a person who has failed to abide by the law to expect to be unreservedly covered and/or protected by the very same law that he has broken. These depositions were at all not contradicted, rebutted, controverted and/or denied by the Appellant.
51. Counsel further submitted that it is a basic principle of law that "he who comes to equity must come with clean hands". That the Appellant has approached this Court with very unclean hands because as at the time the trial court made the orders the Appellant is seeking to stay execution of, he was in contempt of court by failing to provide for the children's needs as per the Court Orders in force. That up to date, the said orders have not been stayed and the Appellant has not at all complied.
52. On all the above issues pertaining to this matter as above summarised, it is significant that the maintenance orders were agreed upon through a mediated process. As observed by Counsel Ms. Ruto and as the court too has noted from the record, the said orders have not been set aside and/or appealed against. From my above summary, it is also apparent that on the most part, the Appellant has not complied with the orders of the court as arrived at through mediation.
53. The Appellant has deposed that he is an employee of the judiciary and if he is imprisoned by the trial court for contempt, then he stands to lose his job and in this regard, he stands to suffer substantial loss. To my mind, from his assertion as to his place of work, the Appellant is one person who ought to know better that a court order is a command to the person to whom it is directed and unless varied and/or set aside, it is meant to be obeyed to the letter for reasons that court orders are not issued in vain.
54. Having applied my mind to all these issues at length, I shall be guided by the finding of Maureen Odero J in the case of JMR v RNM [2022] eKLR, where her Ladyship held as follows on a party who seeks the protection of the court but have themselves failed to comply with the orders of the very same court. The Hon Judge held as follows:

".....It has been revealed that the Applicant has not complied with the orders of maintenance made by the Children Court. The Applicant has not denied this allegation. The Applicant is reminded that courts do not make orders in vain. Parties are obliged to obey court orders even when they do not agree with said orders.....It is trite that he who comes to equity must come with clean hands. It is duplicitous of the Applicant to approach this court seeking to stay orders, which he has in any event disobeyed.....The appellant has applied to the court



for a discretionary relief, yet he is not ready to obey the orders that he is seeking relief against it. He has therefore come to court with unclean hands. The court cannot exercise discretion in favour of such a litigant who has no respect for the rule of law” [emphasis mine].”

55. It should be noted that the orders that the Appellant seeks from this court are discretionary orders. The court should, and only ought to exercise discretion in favour of a party who demonstrates to the satisfaction of the court that he has come to court with clean hands, that his application is brought in good faith, and is not at all calculated to defeat the ends of justice. In light of my conclusions herein, I am very well satisfied and now hereby find that the Appellant has not at all come to court with clean hands.
56. This is because he had not complied with the orders of the court at the time the court found him to be in contempt. He has not made any attempts to make good the non-compliance during the course of this hearing. He was well aware that he was required in court but he chose to attend to other business. As a Judicial Officer, the presumption is that he ought to be amongst the people that know the consequences of non-compliance with an order of the court as a matter of fact by dint of the fact that he works in court.
57. However, even with this knowledge, he still chose to treat the orders of the court dismissively, with contempt and disdain. In this regard, I do not find any merit at all in his application for stay of execution and the said prayer is accordingly dismissed.
58. On whether the court should set aside the orders issued by the trial court on 4<sup>th</sup> and 18<sup>th</sup> February 2025, the proceedings of the trial court as well as the deposition made by the Appellant in his various affidavits serve as a useful guide. As already herein summarised, both orders that he seeks to set aside were given in the presence of his Counsel Mr. Oyaro and/or the Counsel who was holding his brief who were present in court all along.
59. Of significance however, is that even as the appellant insists that he was not aware of the order of 4<sup>th</sup> February 2025 for reasons that the said order was not served upon him, he deposed in his affidavit in support of the Application as can be gleaned from the above summary that his Advocate did inform him that his presence was required in court on 18<sup>th</sup> February 2025. That however, because he was called to attend to an urgent meeting at Lodwar Law Courts where he works, he could not possibly attend Court on the said date.
60. In this regard, it is clear by his own admission that he was aware that his attendance in court was required but he chose to ignore that and attend to what he considered to be the more urgent meeting at his place of work. Further to the above, on this same issue the Respondent also stated that she attempted to serve the Appellant with the court order that required his attendance when he went to the children’s birthday at the Respondent’s newly rented premises and he was dismissive of her telling her he works in court and nothing will happen to him.
61. This being the case, it follows that the alleged lack of service upon which this Application and the entire Appeal is hinged becomes a non-issue in light of the admission that the Appellant had been notified of the requirement to appear in court on several occasions and more particularly by his advocate but he chose to attend to other matters at the expense of the court attendance. Further to the above, the rights of the Appellant that he alleged were infringed, for reasons that he was condemned unheard must also then fall by the wayside in light of this admission by the Applicant.
62. Lastly, the court also notes that the Appellant seeks to have the orders of the court that he has appealed against set aside. This prayer in this regard is contradictory in nature because if the orders are to be set aside then the appeal filed will be rendered nugatory for reasons that the prayer if granted would



effectively remove the foundation upon which the same is anchored. The court therefore finds the Application in this regard to be misconceived and incapable of being granted. I therefore find the same to be without merit and it is accordingly dismissed.

63. Counsel for the Appellant faulted the trial court's finding on the Notice to withdraw the suit. It was his submission that with the said notice in place, the trial court erred in making further orders for the arrest of the Appellant for reason that the suit no longer existed. The court in its determination made a finding that the purported notice filed by Counsel of their intention to withdraw the suit in light of the fact that it had been filed after the court had found the Applicant to be in contempt, was an act that was intended to defeat this finding by the court on the part of the Appellant in a bid to circumvent the subsequent order that the said Appellant appears before court for sentencing. The court therefore dismissed the said notice seeking to withdraw the suit stating that even supposing that the suit was withdrawn, the order of contempt was still legal, valid and in force and the withdrawal of the suit if at all was incapable of erasing this fact.
64. In considering this submission, this court notes firstly, that the Order 25 of the Civil Procedure Rules which Counsel has cited in support of this submission, is not couched in mandatory terms by dint of the fact that the operative word used is may. In this regard, I am satisfied that the court is at liberty to consider the circumstances surrounding any intended withdrawal and make any orders that it deems appropriate given the circumstances of the case before it so as to ensure that the ends of justice are met. In any event a notice of any intent filed by a party, until acted upon by the court, simply remains as just that, an intention.
65. Further on the above, the requirement under the same said Order 25 of the *Civil Procedure Act* provided that the said notice must be served on all the parties. This requirement on the other hand, is a mandatory requirement by dint of the fact that this time round, the operative word used is shall. In the instant case, no evidence was availed before the trial court, and even before this court, to show that the said notice was served upon the defendant herein. For this reasons, I am satisfied that the trial Magistrate did not at all err in her finding to dismiss the said notice and the submission by Counsel in this regard therefore lacks merit.
66. On the issue of whether the proceedings before the trial court ought to be stayed, the court notes that this is a decision to be reached by the court based on the exercise of discretion which discretion the law demands must be grounded on judicious principles and must therefore be exercised judiciously. Ringera J in the case of *Global Tours & Travels Limited, Nairobi HC Winding Up Cause No. 43 of 2000* held as follows on this issue;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice ..... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is so, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”



67. Further, in the case of Kenya Wildlife Services v Jane Mutembi (2019) eKLR, again, F. Gikonyo J, held that:

“stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. [emphasis mine] It impinges on right of access to justice, right to be heard without delay and overall right to fair trial. Therefore, the test for stay of proceedings is high and stringent.”

68. Similarly, Halsbury’s Law of England, 4<sup>th</sup> Edition, Vol. 37 page 330 and 332 gives guidelines on the threshold to be met in Applications for stay of proceedings as follows:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court’s general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue...This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The appellant for a stay on this ground must show merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

69. In light of my above findings, I do not find this case to be one such exceptional case to warrant the issuance of orders of stay of proceedings as herein sought. In the circumstances, I find that this prayer too lacks merit and the same is therefore denied. The upshot of my conclusions herein, on all the issues that the court raised for determination, is that I am well satisfied and I now do hereby find that the Appellant’s Application lacks merit and the same is dismissed in its entirety with costs to the Respondent. The interim orders herein issued are now hereby vacated.

**READ DATED AND SIGNED AT ELDORET ON 12<sup>TH</sup> MARCH 2025**

**E. OMINDE**

**JUDGE**

