

4. In opposing the Application, the Respondent, acting in person, filed the Replying Affidavit sworn on 25/09/2025 by one **Eric Namachanja Omukatara**, who described himself as a director thereof. He deponed that the Application is *res judicata*, that despite the trial Court's said Ruling dated 5/09/2025, and the mandatory order to release the attached goods within 24 hours, the Appellant still failed and/or refused to return the goods. He urged that the trial Court had earlier on 23/05/2025, issued an order that the Appellant unconditionally releases the goods to the Respondent, which the Appellant ignored and, instead, filed an appeal against the trial Court's order by way of **Eldoret HCCA E108 of 2025**, which Appeal was however withdrawn on 9/07/2025. He deponed that notwithstanding the lapse of the earlier stay order issued by the High Court, and the subsequent order directing release of the goods, the Appellant still continues to withhold the goods, and therefore, the trial Court specifically ordered for release of the goods within 24 hours, and also imposed the fine of Kshs 25,000/-, which although the Appellant has paid, he still, nevertheless, has not complied with the order to release the goods. He deponed that the Appellant's payment of the fine cannot be treated as performance of the primary obligation to release the goods, and does not cure contempt or substitute for compliance, that there is no undertaking, security, or credible proposal presented before the Court that may ensure that the goods will be safely dealt with pending determination of the Appeal, and the Appellant's conduct demonstrates that he cannot be trusted to obey Court orders.
5. According to the Respondent, the balance of convenience, and irreparable harm favours the Respondent as the goods are office property and the continued detention by the Appellant causes ongoing, irreversible loss and prejudice, which cannot be adequately compensated by damages alone. He prayed that the application be dismissed for the Appellant having been found in contempt, and for continuing to disobey Court orders, that the Appellant be ordered to forfeit any right to any auctioneer's costs in respect of the attached goods, and the contempt proceedings be allowed to proceed so that the Appellant can be directed to show cause why committal to civil jail should not be imposed for his continuing contempt.
6. The Appellant, with leave of Court, then filed the Supplementary Affidavit sworn on 3/11/2025, in which he deponed that his payment of the fine does not defeat the Application for stay of execution, and that in the event of the appeal succeeding and the conviction for contempt being reversed, the Court will order a refund of the money paid, and if a stay of execution is not granted even after he has paid the fine, the Respondent will still move the Court to enforce the order, which action will be detrimental to him.

7. The parties then filed written Submissions. The Appellant's Submissions is dated 3/11/2025, while the Respondent's is dated 21/10/2025. The Respondent, then with leave of the Court, filed the Supplementary Submissions dated 7/11/2025.

Appellant's Submissions

8. Counsel for the Appellant, **Mr. Kiprop**, basically restated the legal provisions, authorities and principles applicable in considering Applications for stay of execution pending appeal. He urged that the Appellant has laid down the grounds of the appeal, which constitute sufficient cause to warrant the grant of a stay of execution. As regards substantial loss, he urged that the Appellant has well explained that the actions undertaken by him in the **Eldoret Small Claims Court Case No. E909 of 2023** were strictly pursuant to orders issued therein, and he did not act in any contrary manner or disobeyed any Court order. He reiterated that the Learned Adjudicator, being aware of the then Appeal before this Court, should have stayed any proceedings before it, pending hearing and determination of the appeal, to avoid the embarrassment by issuance of contradicting Court orders. Counsel submitted that the Appellant is an officer of the Court conducting auctioneering business, and could not act contrary to Court orders, that he is likely to be punished for obeying orders of the Superior Court, and would be incarcerated, and that by the time the Appeal is heard and determined, he would have served the sentence meted out by the Adjudicator. He invited the Court to be guided by the authority in the case of **Governor, County Government of Laikipia & Another v Laikipia & Another [2021] KECA 196 (KLR)**, and also the case of **Egerton University & 3 Others v University Academic Staff Union Egerton University Chapter & 4 Others [2023] KECA 795 (KLR)**. He contended further that the Appellant has filed the Application expeditiously, and that he has already indicated that he is willing to abide by any such terms as the Court may impose in respect to security for performance of the order.

Respondents' Submissions

9. The Respondent, in his unnecessarily lengthy Submissions, submitted that the Appellant having already complied with the impugned Order, the Court should dismiss the Appeal. He urged that the Appellant has failed to disclose that the Respondent had already been paying the decretal sum through the Appellant (the same auctioneer), and that the balance outstanding was only Kshs 55,000/-, which the Respondent later cleared pursuant to orders made on 23/05/2025. He contended further that the trial Court would not have issued the drastic breaking orders and attachment had these facts been disclosed, and that the

concealment of such material facts amounts to fraud and abuse of Court process, contrary to the equitable maxim that “*he who comes to equity must come with clean hands*”. According to him therefore, the Appellant obtained the breaking orders through deceit. He cited the case of **Republic v Chief Land Registrar & Another Ex Parte Yosabia Kerubo Manyura [2018] eKLR**. He then unprocedurally, introduced various new matters pointing out a number of irregularities and omissions allegedly committed by the Appellant during the process of proclamation and/or carting of the goods away, which matters were not deponed in the Replying Affidavit, and are also not subject of the instant Application. I will not therefore recite that portion of the Submissions. He then reiterated that the Appellant has paid the fine and filed his Bill of Costs, which amounts to full compliance and acceptance of the same orders now appealed against, and also reiterated that the related appeal, namely, **Eldoret HCCA No. E108 of 2025**, filed by the original Claimant on the same matters herein was withdrawn after full determination, rendering this Appeal *res judicata*, as the issues herein were determined in that Appeal, involving the same parties and subject matter.

10. He submitted further that the Appellant has not demonstrated any substantial loss he stands to suffer if the Appeal is dismissed, and that his constitutional and property rights have been violated by the continued detention of his goods causing him losses, and he holds the Appellant personally liable for such loss. He submitted that the contempt findings were properly grounded, that the appeal is an abuse of the Court process, that the doctrine of acquiescence and estoppel bars the Appeal, that the Appellant, having filed his Bill of Costs for taxation in compliance with the impugned order, and having released some goods as ordered, cannot now turn around and disown the same order. He cited the case of **Serah Njeri Mwobi v. John Kimani Njoroge [2013] eKLR**, and also the case of **Kinyanjui v. Macharia [2019] eKLR**. He then went into great lengths to demonstrate how, as a director of the Respondent, he had the legal authority to act on its behalf. Again, this was unnecessary as no challenge was raised on his authority to act for, or on behalf, which matter is therefore not in contention herein.
11. Regarding the Respondent’s Supplementary Submissions, I do not deem it necessary to recite the contents thereof as the same are mere repetitions and/or duplications of matters already deponed and/or stated by the Respondent in his Affidavit and/or Submissions. The rest of the matters are, again, unprocedurally newly introduced, not having been deponed in the Affidavits, and thus not permissible to be considered.

Determination

12. It is clear that the issue herein is “**whether this Court should stay the execution, pending Appeal, of the orders made on 5/09/2025 in Eldoret SCCCOM E909 of 2023 whereof the Appellant, an Auctioneer, was found to be in contempt of Court, and ordered to release the Respondent’s goods proclaimed and carted away by him, and to pay a fine.**

13. The Court’s power to grant stay of execution pending Appeal is provided under **Order 42 Rule 6(2)** of the **Civil Procedure Rules** 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 Appellant 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 Appellant.

14. Therefore, an Appellant for stay of execution of a decree or order pending Appeal is required to satisfy the conditions set out above. The first one is that the Application has been made “***without unreasonable delay***”, the second is to demonstrate that “***substantial loss***” may result to the Appellant unless the order is granted, and the third is the Appellant’s willingness or readiness to “***deposit security***” for due performance of the decree or order.

15. The first condition that I need to consider is therefore whether the Application has been made without “***unreasonable delay***”. In determining this limb, I note that the impugned order was made on 5/09/2025, while the instant Application was then filed on 11/09/2025, only about 6 days later. There should therefore be no contention that the Application was filed timeously, and without delay.

16. The second condition is whether the Appellant would suffer “***substantial loss***” should the order of stay of execution not be granted. As regards what constitutes “***substantial loss***”, **F. Gikonyo J** in the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, stated as follows:

“**11. No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to**

substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The Appellant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Appellant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under order 42 Rule 6 of the CPR only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above.”

17. Further, **Platt, Ag. JA** (as he then was) in **Kenya Shell Limited vs. Kibiru [1986] KLR**, pronounced himself as follows:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Appellant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.

18. On his part, **Gachuhi, Ag. JA** (as he then was) in the same case, stated as follows:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the Appellant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the Appellant should show the damages it

would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

19. Regarding chances of success of the intended Appeal, in applying the above principles to the facts of this case, a draft Memorandum of Appeal has been filed in which the Appellant challenges the legality of the trial Court’s finding of contempt, arguing that before he could comply with the trial Court’ order requiring him to release the proclaimed goods, he was served with another order from the High Court staying the said order of the trial Court. Although I note that the counter-contention is that the order to release the goods was directed to be complied with within 24 hours and the subsequent order of the High Court staying the same was issued almost 1 week after lapse of the 24 hours deadline, the matters raised in the Memorandum of Appeal cannot be said to constitute a frivolous contention. The parties will have their day in Court, during hearing of the Appeal, to canvass all these matters. I am therefore satisfied that the grounds alleged raise pertinent issues requiring further interrogation on Appeal, and that therefore, the Appellant has an arguable appeal.

20. Regarding “*substantial loss*”, the order challenged herein is one of a finding of contempt of Court. A finding of contempt is technically a conviction and what may potentially follow is imprisonment. It is also an impeachment of a person’s character, and as such, it no doubt leads to loss of respect and ostracization to the contemnor thus prejudicing his future interactions with others. It is not lost on me that the Appellant herein is an Auctioneer whose “bread and butter” chores emanate from licences, authorization and services given out by the same Courts that has found him to be in contempt. This clearly puts his future survival in this field in jeopardy. The above, no doubt, may give rise to loss that may not be quantifiable or capable of being compensated in any other plausible manner. I am therefore satisfied that the Appellant has demonstrated the possibility of his suffering substantial loss thus justifying grant of the order of stay of execution pending Appeal. In any case, there is no dispute that the Appellant has already complied with the second limb of the order requiring him to pay a fine of Kshs 25,000/-, which compliance, contrary to the contention by the Respondent, does not in any way estop the Appellant from seeking to clear his name by appealing. Further, the suit before the trial Court, which was between the Respondent and a third party (Claimant therein) is already concluded, and the Respondent, who was the Judgment-Debtor before the trial Court, confirms that he has substantially already settled the decree issued against him. I do not therefore find any serious prejudice that may be suffered by the Respondent if execution of the order finding the Appellant to be in contempt is stayed.

21. Having found as above, I also do not find any reason why the Appellant should continue holding or detaining the Respondent's property. Since it is said that he has already filed his Bill of Costs for taxation of his fee as Auctioneer as directed by the Court, he has no reason to continue keeping the property. Once the Bill of Costs has is taxed, the Appellant shall b e at liberty pursue his payment in the normal manner.

Final Orders

22. In the circumstances, the Notice of Motion dated 11/09/2025 succeeds, and I rule and order as follows:

- i) An order of stay of execution is hereby issued suspending execution of the orders made on, and/or Ruling dated 5/09/2025 delivered in **Eldoret Small Claims Court Case No. E909 of 2023**, and/or any consequential order arising therefrom, pending the hearing and determination of this Appeal.
- ii) Costs shall be in the Cause.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 27TH DAY OF FEBRUARY 2026

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WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Ms. Mugambi for the Appellant
N/A for the Respondent
Court Assistant: Brian Kimathi