

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL APPEAL NO. E238 OF 2025**

**BETWEEN**

**MARTIN MATOLO MULWA.....**

**APPELLANT**

**AND**

**NELSON NDUNGI MBWIKA.....**

**RESPONDENT**

*(Being an appeal from the Judgement and Orders of Hon. M.  
Thibaru delivered on 29<sup>th</sup> September 2025 in SCCC E738 of 2025  
at the Small Claims Court in Machakos)*

**RULING**

1. By way of a Notice of Motion application dated 30<sup>th</sup> September 2025 the applicant seeking an order for the stay of proceedings in Machakos Small Claims Court Case No. SCCC/E738/2025. The application is brought under Section 3A, 3B of the Civil Procedure Act, Cap 21, Order 42 Rule 6(1) of the Civil Procedure Rules, and is supported by grounds set out therein and the supporting affidavit sworn by Martin Matolo Mulwa.
2. The brief factual background to this appeal is that on 30<sup>th</sup> June 2024, a road traffic accident occurred involving the

appellant's vehicle (KBJ 322P) and the respondent's motorcycle (KMDM 095H). As a consequence, the respondent filed Machakos SCCC No. E1392 of 2024 seeking compensation for personal injury. A judgment was delivered on 9<sup>th</sup> January, 2025, awarding the respondent a sum of Kshs 511,050. Thereafter, on 6<sup>th</sup> May 2025, the respondent filed Machakos SCCC No. E738 of 2025 seeking compensation of material damage of the said motor cycle. This claim was opposed by the appellant on the basis that the suit was *res judicata*. The appellant argued that SCCC NO. E1392 of 2024 involved the same parties and the same cause of action.

3. By a ruling dated 29<sup>th</sup> September 2025, the learned adjudicator found that the causes of action in SCCC NO. E1392 of 2024 and SCCC No. E738 of 2025 were clearly distinct being personal injury and material damage and therefore the suit before the trial court was not *res judicata*. This ruling is what has triggered the filing of this instant appeal.
4. The appellant filed a Memorandum of Appeal dated 30<sup>th</sup> September 2025 on two grounds; firstly, that the learned adjudicator erred in law by disregarding the doctrine of constructive *res judicata* and secondly that the learned adjudicator erred in law, fact and in principle by making a blanket finding that the cause of actions are clearly distinct being personal injury and material damage. Thus, the

appellant seeks for orders that this court allow the appeal, and grant an order setting aside ruling and orders delivered on 29<sup>th</sup> September 2025 in Machakos SCCC No. E738 of 2025 , and an Order allowing the appellant's Notice of Motion dated 12<sup>th</sup> August, 2025, an order to strike out the claimant's Statement of Claim dated 6<sup>th</sup> May, 2025, in Machakos SCCC E738 of 2025, in its entirety, and costs of this appeal and the costs of the application and the suit in the Small Claims Court.

5. It is the appellant's case that the appeal raises fundamental points of law on whether the respondent can split different heads of damage arising from a single tortious event into separate law suits, thereby violating the principle of constructive *res judicata*.
6. The appellant submits that he has met the legal test for stay of proceedings as expressed in Section 3A of the Civil Procedure Act and as espoused by *Ringera J.* in **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000.**
7. It is the appellant's case that his appeal is arguable because it raises a serious question on whether a party can circumvent *res judicata* through procedural negligence.

8. The appellant submits that if the matter is not stayed, he will be forced to defend a suit that is arguably a nullity. He cites the decisions in **Auma & 4 Others v Godana [2025] KEHC 17751(KLR)** and **Port Florence Community Health Care v Crown Health Care Limited [2022] KEHC 2848 (KLR)** to buttress his submission.
9. This appeal is opposed by the respondent via a replying affidavit sworn by Nelson Ndungi Mbwika on 16<sup>th</sup> January 2026. It is his case that the case before the trial court is a distinct, quantifiable, and ascertainable cause of action brought within the prescribed limitation period and not barred by the doctrines of *sub judice* or *res judicata*, the said claim having neither been pleaded, heard nor determined on its merits.
10. The respondent submits that whereas the two suits, SCC E1392 Of 2024 and SCC E738of 2025 involve the same parties, they involve two separate subject matters namely, a claim for personal injury and a claim for material respectively and hence not *res judicata*.
11. It is the respondent's case that the appellant has not met the requirements of stay of proceedings set out under Order 42 Rule 6 of the Civil Procedure Rules and that this appeal should therefore be dismissed with costs.

### **Analysis and Determination**

12. I have considered the grounds of appeal, read through the record of appeal and the submissions of the parties. The sole issue for determination is whether the application meets the requirements of stay of proceedings under Order 42 Rule 6 of the Civil Procedure Rules.
13. The jurisdiction of the High Court to stay proceedings in a subordinate court is a discretionary power exercised under Section 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules. It is grantable at the discretion of the court on sufficient cause being established by the applicant.
14. Order 42 Rule 6 provides that the applicant must satisfy the court that:
- a) Substantial loss may result to the applicant unless the order is made,*
  - b) The application has been made without unreasonable delay, and*
  - c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.*
15. I am also guided by the case of **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR; Global Tours & Travels Limited (Nairobi HC Winding Up Cause No 43 of 2000); David Morton Silverstein v Atsango**

**Chesoni [2002] eKLR** where the following six principles were laid down by the Court:

- a) First, there must be an appeal pending before the higher Court;
- b) Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
- c) Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- d) Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
- e) Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case

concluded and all arising grievances taken up on a single appeal; and

f) Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.

16. All these factors must be considered, in a given case as expressed in **Halsbury's Law of England, 4th Edn. Vo. 37** page 330 that:

***"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 proceeding 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."***

17. Consequently, an applicant seeking a stay of proceedings faces a significantly higher threshold than one seeking a stay of execution. While a stay of execution pauses the enforcement of a final decree, a stay of proceedings halts the litigation process itself, thereby interfering with the trial court's hearing schedules and potentially violating the constitutional right to access justice without delay under Article 159 of the Constitution.

18. The applicant has raised a question of *res judicata* to demonstrate that the appeal is arguable. He alleges that the case being appealed against is *res judicata* since SCCC NO. E1392 of 2024 involved the same parties and the same cause of action.
19. That is an arguable point of law except that in my considered view, the same issues were not determined in that matter. While the two suits, SCCC E1392 of 2024 and SCCC E738 of 2025 involve the same parties, they involve two separate subject matters, a claim for personal injury and a claim for material damage respectively. I am also guided by Section 12 of the Small Claims Court Act which provides that the jurisdiction of the court includes to hear and determine personal injury claims and material damage claims. However, it does not mandate consolidation of personal injury and material damage claims in a single suit.
20. In the present case, should the trial proceed to judgment, the Applicant remains at liberty to appeal the final decision. If the High Court eventually finds that the lower court erred on the issue of *res judicata*, any judgment delivered in the interim would be set aside or declared a nullity. Therefore, the Applicant's right to challenge the legality of the split-claim is not lost; it is merely deferred to a stage where the entire dispute can be resolved with finality. The mere fact that a party must participate in a trial they believe is legally

barred does not, by itself, meet the stringent threshold of rendering an appeal nugatory

21. The other issue to be considered is whether the applicant has demonstrated that substantial loss will occur unless an order for stay of proceedings is issued.
22. The Court is of the considered view that a stay of proceedings is an exceptional remedy that should be granted sparingly. In the context of a Small Claims Court matter, which is inherently time-bound, the interests of justice are best served by allowing the trial to conclude without interruption. The Applicant has failed to meet the higher threshold required to show that the appeal would be rendered worthless without the stay
23. The appellant argues that if an order for stay of proceedings is not granted, he will be forced to defend a suit that is arguably a nullity. The respondent contends that his rights to expeditious litigation under Article 159 (2) (b) and rights under Article 48 and 50 of the Constitution will be curtailed.
24. I am guided by the Court of Appeal decision in **M/S Karsan Ramji & Sons Limited v Athumani & another (Suing for and on behalf of the Wamwanyundo Clan & 6 others [2024] KECA 563 (KLR)** where it agreed with Gikonyo, J's holding in the case of **Lucy Waithera Kimanga & 2 Others v John Waiganjo Gichuri Gichuri [2015] eKLR** at paragraph 25 that, "*.... constitutional desire demands proceedings should not be hindered without just and*

**sufficient cause.”** The Court of Appeal was also very clear that each case must depend on its own facts as to whether it will be rendered nugatory.

25. In my considered view, the facts of this case cannot allow me to hinder proceedings because just and sufficient cause had not been demonstrated by the applicant for me to do so. Further, there is nothing to show that there will be substantial loss to the applicant if I do not grant a stay.

26. Consequently, I grant the following orders;

- a. **THAT** the Application for Stay of Proceedings dated September 30, 2025, is hereby dismissed.
- b. **THAT** the Machakos Small Claims Court Case No. SCCC/E738/2025 shall proceed to hearing and determination. The Deputy Registrar to transmit the Lower court file back to the trial court for determination of the suit.
- c. **THAT** the Applicant is directed to file the Record of Appeal within thirty (30) days from the date of this order to ensure the expeditious determination of the substantive appeal.
- d. **THAT** the costs of this application shall abide by the outcome of the appeal.

Dated, signed and delivered at Machakos this 26<sup>th</sup> day of March, 2026

**RHODA RUTTO**

**JUDGE**

**In the presence of:**

.....for Appellant

.....for Respondent

Selina Court Assistant

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