

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL NO. E022 OF 2026

PETER KIBIWOT
APPELLANT

VERSUS

VINCENT CHERUIYOT METTO **1ST**
RESPONDENT

RICHARD KIPKORIR MUTAI **2ND**
RESPONDENT

Coram: Before Justice R. Nyakundi
M/s Cherono Jepkosgey & Co. Advocates.
M/s Cheruiyot Melly & Associates.

RULING

- 1.** This ruling determines the Appellant's/Applicant's Notice of Motion application dated 12th February, 2026 brought under the provisions of Order 42 Rule 6, Order 51 Rule 1 and Section 1A, 1B and 3A and 63(e) of the Civil Procedure Act. The application seeks the following orders:
 - a. Spent.*
 - b. Pending the hearing of this application inter partes, there be a temporary stay of execution of the Ruling delivered on 6th February, 2026 and the ex parte judgment in Eldoret Small Claims Court Claim No. E1204 of 2023 entered on 7th March, 2024 together with all consequential orders.*
 - c. There be interim stay of execution of judgment in Eldoret Small Claims Court Claim No. E1204 of 2023 and decree pending the hearing and determination of the Appeal herein.*
 - d. Such other orders as this court may deem fit to grant.*
 - e. Costs of this application be provided for.*

2. The application is premised on the grounds therein and is further supported by the Affidavit of Peter Kibiwot sworn on 21st February, 2026.
3. According to the applicant, the trial court delivered an ex parte judgment on 7th March, 2024 in favor of the Respondents as against the appellant/applicant. That the appellant filed an application to set aside the ex-parte judgment and the ruling dismissing the same was delivered on 6th February, 2026.
4. The appellant/applicant indicates that he is aggrieved by the said ruling and has filed the instant appeal on points of law against the whole ruling and that the intended appeal is meritorious and has high chances of success. Further that should the Plaintiffs/Respondents execute the ex parte judgment of 7th March, 2024 and decree, the said appeal shall be rendered nugatory and the appellant/applicant shall suffer irreplaceable damage and loss.
5. In response to the application, the 1st Respondent filed a replying affidavit stating as follows:
 - a. That the Applicant seeks orders of stay of execution pending appeal of the ruling delivered on 6th February 2026 and the ex-parte judgment delivered on 7th March 2024 in Eldoret Small Claims Court Claim No. E1204 of 2023.
 - b. That the said application is misconceived, unmeritorious and an abuse of the court process and is only intended to delay the 1st Respondent from enjoying the fruits of a lawful judgment.
 - c. That it is trite law that an appeal does not operate as a stay of execution unless the Applicant satisfies the requirements set out under **Order 42 Rule 6 of the Civil Procedure Rules**.
 - d. That the Applicant has failed to demonstrate that he will suffer any substantial loss if the decree is executed as required by law.
 - e. That the Applicant has merely made bare allegations of irreparable loss without providing any evidence whatsoever to support such claims.

- f. That the burden lies upon the Applicant to demonstrate substantial loss, which is the cornerstone for granting an order of stay, and failure to do so renders the application incompetent.
 - g. That the Applicant has not offered any security for the due performance of the decree as required under **Order 42 Rule 6(2) (b)** of the Civil Procedure Rules.
 - h. That security for costs is a mandatory condition for grant of stay of execution and the Applicant's failure to propose or deposit such security demonstrates lack of seriousness in prosecuting the appeal.
 - i. That the Applicant has only stated that he is willing to abide by conditions that may be imposed by the court, which in my view is insufficient and does not meet the legal threshold required for grant of stay.
 - j. That the Applicant has also not demonstrated that the intended appeal has overwhelming chances of success, and the allegations made in the application are speculative and unsupported.
 - k. That the 1st Respondent lawfully obtained judgment in Eldoret Small Claims Court Claim No. E1204 of 2023 after due process of the court.
 - l. That the Applicant was given an opportunity to challenge the said judgment through an application to set aside the ex-parte judgment, which application was heard and dismissed by the court on 6th February 2026.
 - m. That the present application is therefore a deliberate attempt by the Applicant to further delay execution of a lawful decree.
- 6.** The parties filed their respective submissions whose details I have captured as hereunder briefly.

Applicant's submissions

- 7.** Learned counsel Ms. Cherono, appearing for the Applicant, submitted that the application for stay of execution pending appeal was brought

pursuant to Order 42 Rule 6 of the Civil Procedure Rules and that the Applicant had fully satisfied the legal threshold thereunder.

8. On the question of substantial loss, Ms. Cherono submitted that the ex-parte judgment in the Small Claims Court was entered against the Applicant in circumstances where he was not properly served, and that should execution proceed before the appeal is heard, the Applicant would suffer irreparable prejudice rendering the appeal nugatory. Counsel placed reliance on **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** for the proposition that execution must not be allowed to defeat the essential core of the appeal.
9. On the issue of delay, Ms. Cherono submitted that the Applicant acted promptly upon delivery of the ruling of 6th February 2026 by immediately lodging the appeal together with the present application, and that no unreasonable delay could be attributed to him.
10. On security, counsel submitted that the Applicant had demonstrated willingness to provide such security as the Court may direct, relying on **Halai & Another v Thornton & Turpin Ltd (1990) KLR 365**. Ms. Cherono further urged that the appeal raised serious and arguable issues touching on the right to a fair hearing under Article 50(1) of the Constitution of Kenya, and that the balance of convenience favored preservation of the status quo. Counsel accordingly prayed that the Notice of Motion be allowed with costs.

1st Respondent's submissions

11. Learned counsel Mr. Cheruiyot, appearing for the 1st Respondent, submitted that the application for stay of execution pending appeal was misconceived and ought to be dismissed for failure to meet the mandatory conditions prescribed under Order 42 Rule 6 of the Civil Procedure Rules.
12. On the question of substantial loss, Mr. Cheruiyot submitted that the Applicant's supporting affidavit contained nothing more than bare allegations devoid of any evidential foundation, and that courts have consistently held that mere assertions are insufficient to establish

substantial loss. Counsel further urged that it was in fact the 1st Respondent who stood to suffer prejudice, having waited a considerable period to enjoy the fruits of a judgment lawfully entered on 7th March 2024 in Eldoret Small Claims Court Claim No. E1204 of 2023.

13. On the issue of security, Mr. Cheruiyot submitted that the provision of security under Order 42 Rule 6(2)(b) is mandatory and not discretionary, and that the Applicant's vague statement of willingness to abide by conditions was legally insufficient and could not substitute for the actual provision of security.

14. In conclusion, counsel submitted that the Applicant had failed on all three limbs of Order 42 Rule 6, having demonstrated no substantial loss, offered no security, and having brought the application merely to further delay execution of a lawful decree. Mr. Cheruiyot accordingly prayed that the Notice of Motion dated 27th February 2026 be dismissed with costs and that the 1st Respondent be permitted to proceed with execution.

Analysis and determination.

15. I have carefully considered the application, the affidavit in support, the replying affidavit of the 1st Respondent, and the rival submissions of counsel. The matter before this Court is an application for stay of execution pending appeal, brought under Order 42 Rule 6 of the Civil Procedure Rules. The central question is whether the Applicant has demonstrated entitlement to the discretionary relief sought.

16. An application for stay invokes the discretionary powers of this Court under **Order 42 Rule 6(1) of the Civil Procedure Rules, 2010**. The conditions to be met before stay is granted are provided for under Rule 6(2) of Order 42, which states 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.”

17. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that: -

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements.

5. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

18. On the question of substantial loss, the Applicant's case is founded on a fundamental and weighty grievance, namely that the ex-parte judgment entered against him on 7th March 2024 in Eldoret Small Claims Court Claim No. E1204 of 2023 was entered in circumstances where he was never properly served with the pleadings and court process. His application to set aside that judgment was dismissed on 6th February 2026, and it is that ruling which forms the subject of the present appeal.

The Applicant deposes that should execution proceed before the appeal is heard, he risks attachment and enforcement proceedings against his property, which would cause irreparable prejudice and render the appeal entirely academic.

- 19.** In the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR**, the Court of Appeal held thus:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”

- 20.** In the case of **G. N. Muema P/A (sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another [2018] eKLR**, the Court stated as follows: -

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

- 21.** I am satisfied that the Applicant has demonstrated a sufficient basis for a finding of substantial loss. The threat of execution is real and imminent, and allowing execution to proceed before the appeal is determined would have the practical effect of rendering the appeal entirely nugatory.
- 22.** On the question of delay, the ruling dismissing the application to set aside was delivered on 6th February 2026 and the Applicant promptly lodged the present appeal together with this application. I am satisfied that the application was brought without unreasonable delay and this requirement is duly met.

- 23.** The remaining question concerns the condition of security for the due performance of the decree. While the provision of security is ordinarily a mandatory requirement under Order 42 Rule 6(2)(b), this Court must exercise its discretion in a manner that is sensitive to the unique and compelling circumstances of each case. The requirement for security is not intended to operate as a punitive barrier to the pursuit of a legitimate appeal but rather to protect the interests of the decree holder. The nature, form and extent of any such security, or indeed whether it is appropriate to impose it at all, remains a matter within the discretionary jurisdiction of this Court.
- 24.** The singular and overriding feature of this matter is that the Applicant's entire appeal is rooted in the allegation that he was never lawfully served with the proceedings in the court below, and that the judgment was therefore entered against him without his knowledge or participation. This is not a case of a litigant who participated fully in the proceedings below and merely lost on the merits. It is a case where the Applicant contends that the foundational requirement of service, which is the gateway to the jurisdiction of any court over a party, was never satisfied. To impose upon such an applicant a condition of security as a prerequisite for stay would, in the particular circumstances of this case, amount to compelling him to partially satisfy a judgment whose very legitimacy he contests on the most fundamental procedural grounds. Such an outcome would place form over substance and would, in practical terms, operate to deny the Applicant the right of appeal altogether.
- 25.** The right of appeal is a constitutional and statutory right that must be jealously protected. Article 50(1) of the Constitution of Kenya guarantees every person the right to have their dispute determined by a fair hearing before a court or tribunal. Where the gravamen of an appeal is that a party was denied the opportunity to be heard at all by reason of non-service, the interests of justice demand that the parties are granted a fair opportunity to be heard.

26. In the case of **Mohammed Salim t/a Choice Butchery vs Nasserpuria Memon Jamat (2013) eKLR** where the court upheld the decision of **Portreitz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1991** and stated that: -

“That right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”

27. Therefore, there must be a just cause for depriving an applicant of the right of appeal, and the conditions attached to a stay must not themselves be so onerous as to extinguish that right. In the present circumstances, I find that imposing a condition of security would amount to precisely such an injustice.

28. The appropriate safeguard in the circumstances is not the imposition of security but the expeditious hearing and determination of the appeal itself, which will conclusively resolve the questions of service and the propriety of the ex-parte judgment. Justice to both parties is best served not by burdening the Applicant with conditions he cannot reasonably be expected to meet, but by ensuring that the appeal is disposed of with urgency so that the 1st Respondent, if ultimately vindicated, may proceed to enjoy the fruits of his judgment without undue further delay.

29. I accordingly allow the application dated 12th February 2026 in the following terms:

a. *There be a stay of execution of the ruling delivered on 6th February 2026 and the ex-parte judgment entered on 7th March 2024 in Eldoret Small Claims Court Claim No. E1204 of 2023 pending the hearing and determination of this appeal.*

b. *The appeal shall be heard expeditiously and as such the parties are hereby directed to file and exchange written submissions on the main appeal within 45 days. The matter shall be mentioned on **18th May, 2026** for further directions.*

c. *Costs of the application shall abide the outcome of the appeal.*

30. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 1ST DAY OF
APRIL, 2026**

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**R. NYAKUNDI
JUDGE**