REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. E019 OF 2026

KERAI NAVINKUMAR……………………..………………………………..APPELLANT

VERSUS

PAUL MURIMU MUGO………………………..……………………… RESPONDENT

RULING

Introduction

[1] This is a ruling on an application for stay of execution pending appeal. The trial court declined an application for setting aside of a default judgment by its Ruling dated 5/2/2026 provoking the appeal herein and the interlocutory application the subject of this ruling.

[2] The substance of the trial Court's ruling subject of the appeal is as follows:

> *"16. Briefly, the above cited authorities reveal the law as established on setting aside an exparte Judgment. I have already found that the service upon the Respondent was proper and his failure to enter appearance was deliberate. I have perused the draft response and the Respondent has merely denied the claim and no triable Issue has boon presented. It is undisputed that the claim was served upon the Respondent hence the reason on 21/10/2025, his counsel sought time to respond and 7 days were granted. On 03/11/2025, no response had boon filed and the Respondent was absent. Had the Respondent been acting in good faith, the response would have been filed by 28/10/2025. The Respondent did not also avail any extract of thelr advocates' diary to prove that the matter was diarized for 05/11/2025 as alleged.*
>
> *17. At this point, this court finds the Applicant guilty of indolence. It was unnecessary that the Applicant had to wait until 05/11/2025 for filing when he had been granted time on 21/10/2025 to do so within 7days.*

Further, this being a small claims court matter, the same was to be concluded within 60days. Default judgment was entered on 03/11/2025 which was over 30days into the matter. At such point in time, the Respondent/Applicant must be held accountable for dragging the matter. In any event, the Applicant has a legal recourse against their advocates, if at all they are to blame as alluded to in the subject application.

18. In a nutshell, it follows that the Respondent/Applicant has proved to be indolent and has not satisfied the parameters under Rule 11 (4) of the Small Claims Court Rules to warrant a grant of the orders sought herein. Guided by the timelines of this court, the delay by the Applicant was clearly deliberate, the draft response filed does not raise any triable issue whatsoever and is a mere denial and hence no sufficient ground has been raised to warrant setting aside of the default judgment herein.

19. The Respondent/Applicant's application dated 03/11/2025 therefore fails in its entirety and this court finds that the Claimant is entitled to costs thereof. This court awards the Claimant/Respondent costs of the application and proceeds to assess the same at an all-inclusive sum of Kshs. 5,000/= in line with Section 33 (1) of the Small Claims Court Act, Rule 37 of the Small Claims Court Rules and the Second Schedule thereof noting that the Claimant is represented by counsel and further the time taken in hearing the application and the attendances thereto."

[3] The appeal was based on grounds of appeal set out in the memorandum of Appeal dated 4/3/2026, as follows:

"MEMORANDUM OF APPEAL GROUNDS OF APPEAL

1. The Trial Magistrate erred in law and in fact in failing to properly exercise judicial discretion in dismissing the Appellant's application to set aside interlocutory judgment.

2. The Trial Magistrate failed to appreciate that the non-attendance was occasioned by excusable mistake of counsel who inadvertently misdiarized the hearing date.

3. The Trial Magistrate erred in law by visiting counsel's mistake upon an innocent litigant.

4. The Trial Magistrate failed to consider that the draft Defence annexed disclosed triable and arguable issues deserving a full hearing.

5. The Trial Magistrate failed to consider that no prejudice would be suffered by the Respondent if the application was allowed.

6. The Trial Magistrate failed to uphold the Appellant's constitutional right to a fair hearing under Article 50(1) of the Constitution.

7. The Trial Magistrate misdirected himself by elevating procedural technicalities over substantive justice contrary to Article 159(2)(d) of the Constitution.

8. The Trial Magistrate failed to appreciate that courts exist to determine disputes on merit rather than shut out litigants. 9. The Trial Magistrate failed to give adequate reasons for dismissing the Appellant's application.

10. The Trial Magistrate failed to consider the overriding objective of the Civil Procedure Act and Rules.

11. The decision was against the weight of evidence presented before the Court.

12.The Trial Magistrate erred in law and fact in failing to find that the Appellant's explanation was reasonable and plausible.

Therefore the reliefs sought by the appellant in this suit areas follows:

1. The Appeal be allowed.

2. The Ruling dismissing the application to set aside interlocutory judgment be set aside.

3. The interlocutory judgment entered in SCCCOMM E 378 OF 2025 be set aside.

4. The Appellant be granted leave to file Defence out of time. 5. Costs of this Appeal be awarded to the Appellant."

The application before the Court

[4] By Notice of Motion dated 4/3/2026 the Appellant brought under Order 42 rule 6 seeks stay of execution pending appeal and specific relief as follows:

"1. THAT the matter be certified urgent

2. That pending the hearing of this Application inter parties, there be a temporary stay of execution of the Judgment and Decree in SCCCOMM E378 OF 2025.

> ***<u>3. That pending the hearing and determination of this Appeal, there be stay of execution of the Judgment and Decree in SCCCOMM E 378 OF 2025.</u>***
>
> *4. That costs of this Application be in the cause.”*

[5] The grounds of the application are set out in the application as follows:

> *“**<u>GROUNDS</u>***
>
> *1. The Appeal is arguable and raises serious issues of law and fact.*
>
> *2. The Appeal shall be rendered nugatory unless stay is granted.*
>
> *3. The Appellant shall suffer substantial loss if execution proceeds.*
>
> *4. The Application has been filed without unreasonable delay.*
>
> *5. The Appellant is ready and willing to furnish security as the Court may direct.”*

[6] The application was supported by the Affidavit of the appellant sword on 4/3/2026 as follows:

> *“2. THAT interlocutory judgment was entered against me in SCCCOMM E378 OF 2025.*
>
> *3. THAT I filed an application seeking to set aside the said judgment and annexed a draft Defence raising triable issues.*
>
> *4. THAT the said application was dismissed on 5th February, 2026 (attached hereto and marked as KN1 is a certified copy of the ruling and a decree).*
>
> ***<u>5. THAT failure to attend court was occasioned by inadvertent misdiarisation of the hearing date by my advocate, which mistake was neither deliberate nor intended to obstruct justice.</u>***
>
> *6. THAT I have since filed an Appeal challenging the said ruling.*
>
> *7. THAT the Respondent is likely to proceed with execution unless restrained by this Honorable Court.*
>
> *8. THAT I shall suffer substantial loss if execution proceeds before the Appeal is heard.*
>
> *9. THAT this Application has been made without unreasonable delay.*
>
> *10. THAT it is in the interest of justice that this application is allowed.”*

[7] In reply, the Respondent urged that the application had no merit as despite alleged misdiarization of the hearing date, the appellant had not filed a response within the time allowed by the court and for purposes of the application stay of execution

pending appeal had not shown substantial loss or offered to deposit security, as follows:

> *"2. THAT I was the claimant in Kerugoya Small Claim's Case No. E378 of 2025.*
>
> *3. THAT the matter came up for first mention on 21.10.2025 and the appellant herein who was the respondent in the matter was ably represented by an advocate and his advocate requested for 7 days to file a response to the statement of claim.*
>
> *4. THAT the Small Claims court works under strict timelines and hence they were to file their response by 28.10.2025.*
>
> ***5. THAT the respondent did not comply as directed and on 3rd November 2025 when the matter came up for mention to confirm whether the said response had been filed, neither the respondent nor his advocate appeared in court and hence a default judgment was entered against the respondent for a sum of Kshs.284,965/=***
>
> *6. THAT later in the day, the respondent's counsel on 3.11.2025 filed an application under certificate of urgency dated 3.11.2025 seeking to set aside the default judgment claiming that she misdiarized the hearing date to be on 5th November 2025 instead of 3rd November 2025. However, no explanation was given as to why they never filed their response to the claim within 7 days from 21.10.2025 when leave was granted given that 7 days lapsed on 28.10.2025 when they ought to have complied.*
>
> *7. THAT the application dated 3.11.2025 was dismissed with costs in a ruling delivered by Hon. Lisper Gakii Nyaga on 5.5.2026 and still on this day, the respondent and his advocate did not appear in court to take the ruling.*
>
> *8. THAT the Small Claim's court had unfettered discretion as to whether or not to set aside the interlocutory judgment and a well-reasoned ruling was delivered given that the respondent is an indolent litigant who had been granted leave to file his response but he deliberately sought not to comply within the timelines given.*

> ***<u>9. THAT in the present application, the appellant / applicant has not demonstrated that the respondent has threatened to commence execution or that the execution process has been put in motion.</u>***
>
> *10. THAT the appellant/applicant has further not demonstrated what irreparable or substantial loss he will suffer if stay orders are not granted.*
>
> *11. THAT the applicant has not demonstrated that he has an arguable appeal with high chances of success.*
>
> *<u>12. THAT given that this is a money decree, the respondent should deposit the decretal amount in court as awarded in the decree and in the ruling of 5.2.2026 making an all-inclusive sum of Kshs.323,061/= as security for the due performance of the decree and as a sign of` good faith.</u>"*

[8] Counsel for the parties then made brief oral submissions in support of their respective contentions set out in the pleadings and affidavits, and ruling was reserved.

<u>Determination</u>

[9] The applicant has not attached his draft response to the respondent's suit before the trial Small Claims Court top enable this Court to assess whether there are triable issues raised in the proposed defence. The appeal is from the ruling refusing to set aside the default judgment. The applicant needed to show, prima facie, that the refusal was unreasonable and that the applicant has a reasonable defence on the merits of the claim before the trial court.

[10] There is no question that the refusal by the trial court to set aside a default judgment raises a matter of law for which the High Court has appellate jurisdiction under section 38 (1) of the Small Claims Court Act as the court would have to consider whether there were sufficient grounds in law in terms of section 43 of the Act and rule 11 (4) of the Rules of the Court for the setting aside.

[11] However, in assessing whether there is a *prima facie* arguable case to be presented before the appellate court, the Court observes that the grant or refusal of an application of an application ofr setting aside of a default judgment is the exercise of judicial discretion of the trial court under section 43 of the Small Claims Court Act and Rule 11 (4) of ***The Small Claims Court Rules (Legal Notice 145 of 2019)*** **(Rev.**

2022) (similar to Order 10 Rule 11 of the Civil Procedure Rules), which provides as follows:

> *"(4) The Court may set aside a default judgment or any consequential orders given under this rule on the written request of any party that is aggrieved by the decree or order if the Court is satisfied, on evidence given by the applicant, and on hearing the other parties to the proceeding, that—*
>
> *(a) the default was inadvertent;*
>
> *(b) the applicant has a valid defence with a probability of success; or*
>
> *(c) there are sufficient grounds to warrant setting aside the default judgment, decree or order."*

[12] The exercise of such discretion may only be interfered with in accordance with well known principles set out in ***Mbogo v Shah*** **[1968] EA 93:**

> ***"A Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice."***

See Court of Appeal at Nairobi Civil Appeal No. 217 of 2009 ***Jomo Kenyatta University of Agriculture & Technology v. Mussa Ezekiel Oebah*** [2014] eKLR.

[13] Having looked at the ruling of the Court appealed from, there is prima facie, not demonstrated any misdirection or error in principle and it cannot be said that the decision is plainly wrong as to attract the appellate interference by this Court. The applicant before the Court does not demonstrate an arguable case for the favourable determination of the appeal to warrant the grant of relief sought.

[14] In addition, on the principles for the grant of stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules, he applicant has not shown that ther is a risk of substantial loss if stay is not granted. There was no evidence or, indeed, allegation that the applicant would not be able to recover the decretal; sum for the respondent if execution is levied and the appeal eventually succeeds upon hearing. The judgment sum of Ksh.284,965/= is not so substantial as to be evidence of likely substantial loss in view of risk of non-recoverability, if execution is levied before hearing and determination of the appeal.

[15] There is no offer for provision of security for the due performance of such decree or order as may ultimately be binding on the appellant upon hearing and determination of the appeal.

[16] The Court does not find any merit in the application for stay of execution pending appeal as no substantial loss has been demonstrated and no security has been provided.

[17] From the nature of Small Claims matters, for which despatch is prescribed in accordance with the principle of ***"Expeditious disposal of cases"*** under section 34 of the Small Claims Court Act, an application filed on 4/3/2026 for stay of execution of a ruling given a month earlier on 5/2/2026 cannot be said to be without delay.

ORDERS

[18] Accordingly, for the reasons set out above, the application for stay of execution dated 4/3/2026 is declined.

[19] The costs of the application shall be costs in the appeal.

[20] Being a Small Claims Court matter, the appeal shall be expedited to hearing and appropriate directions shall be taken on a date to be fixed in consultation with the Counsel for the parties.

[21] The Record of Appeal shall be filed within seven (7 days.

[22] Mention for compliance/directions on **16/4/2026 at 2.30pm.**

Order accordingly.

DATED AND DELIVERED THIS 9TH DAY OF APRIL 2026.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Ms. Waweru for the Respondent.

Mr. Mwanza for the Appellant/Applicant.