Situma v Ochong (Miscellaneous Civil Application E401 of 2025)
[2026] KEHC 4662 (KLR) (13 April 2026) (Ruling)

Neutral citation: [2026] KEHC 4662 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CIVIL APPLICATION E401 OF 2025

RN NYAKUNDI, J

APRIL 13, 2026

BETWEEN

ELYVES WANJALA SITUMA ..... APPLICANT

AND

SAMUEL OMOLLO OCHONG ..... RESPONDENT

RULING

1. Before this Court is an Application dated 28th November 2025 brought under Sections 1A, 1B, 3A, 3B, 79G & 95 of the *Civil Procedure Act*, Order 42 Rule 6 of the Civil Procedure Rules 2010 and all other enabling provisions of Law. The Applicant seeks the following orders:

    a. Spent

    b. That pending the hearing and determination of this application inter-parties, there be interim stay of execution of the decree in Eldoret CMCC No. 521 of 2003 and all its consequential orders.

    c. That this honorable court be pleased to grant leave to the Applicant by deeming the notice and memorandum of appeal filed out of time as properly on record subject to payment of the requisite filing fees.

    d. That this court be pleased to make any such further orders or directions that will ensure ends of justice are met.

    e. That the costs of this application be in the cause.

2. The Application is made on the following grounds:

    i. That the Applicant is aggrieved by the ruling delivered by the trial court on 28th October, 2025 and desires to lodge an appeal against the same out of time.

ii. That due to indisposition of the Counsel's father, the notice and memorandum of appeal were not filed and served within the legally stipulated timelines hence rendering leave of this court mandatory to deem the same as properly filed albeit out of time.

iii. That the Respondent may proceed and execute the decree in force yet the amount claimed therein, especially the accrued interest is in dispute hence rendering appropriate orders necessary pending the hearing and determination of this application and the intended appeal.

iv. That failure to file and serve the aforesaid notice and memorandum of appeal within time was occasioned by factors beyond the counsel on record.

v. That if this application is not heard, disposed off expeditiously and the orders sought therein granted, justice will be greatly prejudiced as the Applicant will have been denied his right to be heard on appeal.

vi. That the Applicant has a meritorious appeal with very high chances of success.

vii. That in the above premises, it is necessary and just that appropriate orders be made by this Honourable court in the best interest of justice in order to preserve the substratum of the instant application and the intended appeal. viii. That this application has been brought in utmost good faith in line with the prevailing circumstances.

viii. That allowing the application will greatly avert an injustice as it shall have upheld the provisions of Article 50 of *the Constitution*, 2010 on fair trial particularly on the disputed decretal sum.

ix. That this Honourable court reserves the discretion to allow this application as prayed which discretion we hereby urge it to exercise.

x. That no prejudice whatsoever will be occasioned to the Respondent as he will be heard on merit on both the application and the intended appeal.

3. The same is annexed by an affidavit sworn by Laureen M. Isiaho who states as follows;

a. That I am an advocate of the High Court of Kenya practicing as such in the name and style of M/s Isiaho Sawe & Company Advocates who have the conduct of this matter for and on behalf of the Applicant hence competent and legally authorized to swear this affidavit.

b. That I was instructed by the Applicant herein to move the trial court vide the application dated 21st July,2025 and seek inter alia orders for reconciliation of accounts with respect to the decree issued vide Eldoret CMCC No. 521 Of 2003. (A copy of the application is hereby annexed and marked.

c. That the Applicant particularly disputes the tabulation of interest as contained in the warrant of arrest issued against him which rendered reconciliation necessary. (A copy of the warrant of arrest is hereby annexed and marked “B”).

d. That the trial court rendered itself vide a ruling delivered on 28thOctober, 2025 by which ruling the Applicant is greatly aggrieved. (A copy of the ruling is hereby annexed and marked “C”).

e. That from a casual reading of the above ruling, the trial court left the issue of reconciliation of the contested amount unresolved hence necessitating this application and the intended appeal.

f. That there is a possibility of the warrant in force being executed against the Applicant albeit the amount claimed being in dispute hence rendering appropriate orders in the best interest of justice.

g. That the timelines within which to file the notice of appeal having lapsed, leave of this court is mandatory to have the same lodged out of time hence this instant application.

h. That failure to file this application and the notice of appeal within the stipulated timelines was caused by my absence from office as I have been attending to my ailing father.

i. That having been absent from the office and considering the fact that practice as a sole proprietor, I could not follow up on office matters.

j. That I am undertaking to abide with such conditions as may be set by this honourable court if granted leave so as to avert any injustice being visited upon my client, the Applicant herein.

k. That there is therefore need in the above circumstances for appropriate orders to be granted expeditiously in the best interest of justice.

l. That the Applicant has a meritorious appeal with very high chances of success. (A draft memorandum of appeal is hereby annexed and "D").

m. That justice will be served by granting the orders as sought.

n. That if this application is not heard, disposed off expeditiously and the orders sought therein granted, the applicant stands to be greatly prejudiced as he risks being committed to civil jail based on a disputed amount.

o. That in the above premises, it is necessary and just that appropriate orders be made by this Honourable court in order to avert an injustice.

p. That the delay in bringing this application earlier is not unreasonably inordinate in the circumstances of my father's indisposition.

q. That this Honourable court reserves the discretion to allow this application as prayed which discretion I urge it so to exercise in the best interest of justice.

4. In response to the Application the Respondent filed Replying Affidavit sworn and stating as follows;

i. That I am an Advocate of the high court of Kenya and 1 have the conduct of this matter on behalf of the Respondent herein.

ii. That 1 am conversant with the facts of this case and 1 am therefore duly competent to depone to the matters herein.

iii. That 1 have read and understood the Applicant's application dated 28th of November 2025 and 1 wish to respond thereto on behalf of my client as follows;

iv. That as the lower court rightly observed in its ruling delivered on 28th October 2025, the Applicant is a vexatious litigant who has constantly engaged in abuse of the court process.

v. That the Applicant has filed multiple applications in the lower court and appeals before this Honourable court over this matter that have all been dismissed for want of merits.

vi. That in regard to this Honourable court the Applicant has filed the following matters;

a. Eldoret High court miscellaneous civil application number 13 of 2020. Elyvis Situma Wanjala and Bernard Barmasai Vs. Samuel Omollo Ochung. The matter was dismissed for want of prosecution.

b. Eldoret High court Miscellaneous Civil application number 174 of 2024. The application was dismissed and the application later withdrawn. Annexed is the ruling of the court and notice of withdrawal of suit marked as annextures GNK 1 and GNK 2.

c. Eldoret High Court Civil Appeal number E058 of 2025. Bernard Barmasai and Elyvis Situma Wanjala Vs. Samuel Omollo Ochung. The application was dismissed by this Honourable court. Annexed is a copy of the Ruling of the court marked as annexture GNK 3.

vii. That in all these matters the Respondent has incurred costs in defending the suits and the Applicant has never paid any of the costs.

viii. That in all these applications, the Applicant annexed the decree of the court that indicated the interest due at that particular time.

ix. That the judgment complained of was delivered by the court on 28th May 2019 and has definitely continued to accrue interest.

x. That the interest due is calculated by the court and not the Respondent.

xi. That the Applicant has not demonstrated to the court the interest due in his opinion.

xii. That if the Applicant was acting in good faith, he ought to have paid the undisputed decretal amount and then contest the interest.

xiii. That the Applicant is acting in utmost bad faith and is not desirous of this Honourable court's intervention.

xiv. That no leave was obtained from the lower court to file this application and the intended appeal and therefore this application is fatally defective.

xv. That it will be unfair and unjust for this Honourable court to entertain such a vexatious litigant who does not believe that litigation must end.

xvi. That the Respondent has suffered loss in defending the Applicant's appeals and applications that the lower court and this court have in their ruling found to be vexatious and an abuse of the court process.

xvii. That all that 1 have deponed to hereinabove is true to the best of my understanding, knowledge and belief.

Decision

5. The origin of this litigation dates back in Misc. Civil E174 of 2024 in which a motion was filed on 10/6/2024 seeking the following orders:

a. Spent

b. That leave be granted to the firm of M/s Isiaho Sawe & Co. Advocates to come on record for the Applicant in place of M/s Lusinde Khayo & Co. Advocates.

c. That pending the hearing and determination of this application inter-parties, there be stay of execution of the decree issued in Eldoret Civil Case No. E521 of 2003 and/or all its consequential orders.

d. That pending the hearing and determination of Eldoret Chief magistrate's Court Civil Case No. E349 of 2024, there be stay of execution of the decree issued in Eldoret Civil Case No. E521 of 2003.

e. That his court be pleased to issue any such further orders/directions in the circumstances in order to safeguard justice.

6. This Court ruled as follows;

21. It is my view therefore the applicant's effort to bring the ripeness doctrine under the umbrella of the case or controversy filed in the Chief Magistrates Court E349 of 2024, is unfortunate. The subject matter being canvassed was not ripe as at that stage, the litigation by the applicant and the respondent is already pending hearing and determination on the merits before that forum as constituted in Art. 50(1) of *the Constitution*. It is now well settled a principle of law, that mere filing of a suit or an interlocutory application would not ripen the jurisdiction of the court. If I understand the application before me very well as initiated by the applicant, I take the broader question in holding that the applicant is guilty of not exhausting the jurisdiction of the Magistrates Court before inviting an appeals court to render itself on the subject matter. What is more, a party is bound by law to fulfill a jurisdictional exhaustion requirement and apply it faithfully so as not to allow injustice or create multiplicity of suits at different forums on the same subject matter. The steps necessary to exhaust all remedies are specific to the statutory scheme in the civil administration of justice.

22. For the above reasons, I have reached one main conclusion that the application is voidable to save it from a doctrinal and conceptual quagmire on jurisdiction with costs to the Respondent.

7. This litigation continues on the same trajectory of interlocutory Applications. It is to this effect that a Notice of Motion dated 26th March, 2025 expressed to be brought under the provisions of Sections 1A, 1B, 3, 3A and 63(e), 79(G) & 95 of the *Civil Procedure Act* Order 42 Rule 2 & 6, 51 Rule 1 of the Civil Procedure Rules in which they seek orders as follows:

a. Spent

b. That this honorable court do enlarge the time within which the appellants/applicants can file their appeal.

c. That the notice and memorandum of appeal dated and filed on 26th March, 2025 be deemed as properly on record upon payment of the requisite filing charges.

d. That pending the hearing and determination of this application inter-parties, there be stay of execution of the decree issued in Eldoret Civil Case No. E521 of 2003 and/or all its consequential orders.

e. That this court be pleased to issue any such further order/directions in the circumstances in order to safeguard justice

8. In consideration of the matter the Court proclaimed itself as follows;

30. Having determined that the Appellants have failed to demonstrate good and sufficient cause for extension of time, the issue of stay of execution subsequently becomes moot. The

application for stay cannot pass this threshold, having been dismissed at the first hurdle. Moreover, considering the inordinate time lapse since the original judgment in 2019, and the sequential pattern of applications evidently designed to forestall execution, granting stay at this juncture would be tantamount to sanctioning an abuse of the court process and perpetuating injustice against the Respondent who has patiently awaited the fruits of litigation for over half a decade.

31. The instant application therefore lacks merit and is dismissed with no orders as to costs.

9. The Courts have ruled now and again that to extend time it is within the purview of the jurisdiction vested in each one of them at various levels to extend time for compliance with procedural rules. However this discretion is limited by strict statutory time limits particularly concerning appeals. It is the Applicant who bears the burden to provide good and substantial reasons for non-compliance within Section 107(1), 108 and 109 of the *Evidence Act*.

10. This is a very unfortunate incident both under procedural and a substantive law within the operative principles of judicial discretion on extension of time in favor of an aggrieved party to undertake a particular activity may it be a review or an appeal. The record therefore ears me witness that from a practical point of view that this same issue has been addressed by this very same Court.

11. The core guiding principles on extension of time should not be forgotten in this discourse which include but not limited to the following;Discretionary Nature: Extension of time is not a right of a party, but an equitable remedy available only to a deserving party at the discretion of the court.Burden of Proof: The applicant has the burden of laying a proper basis to the satisfaction of the court for the delay.Length of Delay: The court considers the duration of the delay (e.g., inordinate vs. short delays).Reason for Delay: The delay must be explained with a plausible and satisfactory reason (e.g., illness, mistakes of counsel, administrative constraints).Arguability of the Appeal: Whether the intended appeal has chances of success (is "arguable") or is merely frivolous.Prejudice to the Respondent: Whether granting the extension will unfairly prejudice the opposing party.Public Interest: In certain cases, such as election petitions or constitutional matters, public interest is a significant consideration.Conduct of the Parties: The diligence of the applicant in pursuing their rights.

12. The protocols on extension of time by the Applicant have been precisely addressed by this Court. What that means is that the latest Application is res judicata in consonant with Section 7 of the *Civil Procedure Act*. The key aspects of the doctrine include the following guidelines;Definition: A matter is res judicata if it has been directly and substantially in issue in a former suit between the same parties, litigating under the same title, in a court competent to try the subsequent suit.Objective: The doctrine acts as a defense against harassment through repeated litigation over the same subject matter.Application: It is frequently applied in the Kenyan judicial system to strike out suits that have already been adjudicated upon by lower courts, ensuring that parties do not attempt to revive settled matters.Exhaustion of Remedies: Coupled with the Fair Administrative Actions Act 2015, the doctrine is also part of the broader legal framework that requires litigants to exhaust all statutory dispute resolution mechanisms before approaching higher courts.Finality: It is in the public interest that there should be an end to litigation.Competence: The previous court must have had the jurisdiction to make a binding decision on the matter.Identity of Parties: The parties in the subsequent suit must be the same as, or successors in title to, those in the previous suit

13. The Court of Appeal in John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR observed as follows;

> " The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defense. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defense to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process..."

14. I have reminded myself of the words stated in Halsbury's Laws of England, 4th edition, Vol.16, paragraph 1528. The passage reads, in part:

> " In order for the defense of res judicata to succeed it is necessary to show not only that the cause of action was the same but also that the plaintiff has had an opportunity of recovery and but for his own fault might have recovered in the first action that which he seeks to recover in the second action... It is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it was actually put in issue or claimed."

15. In this case, the issue of estoppel arises as against the latest Application by the Applicant for the plea of res judicata under Section 7 of the *Civil Procedure Act* is inescapable. In the comparative case of Hoystead v Commissioner of Taxation [1925] AC 155, Lord Shaw made the following observation;

> " In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle- namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true

enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs."

16. This Court being guided by the following principles as elucidated above this is a re-litigation on the precise point on extension of time. Al these issues have been canvassed by the parties as evidenced by the record and embodied in judicial decisions that are final. The Application therefore is lost with costs to the Respondent.

17. It is so ordered

GIVEN UNDER MY HAND AND THE SEAL OF THIS COURT THIS 13TH DAY OF APRIL 2026

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R. NYAKUNDI

JUDGE