



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CIVIL CAUSE NO. E129 OF 2025

JOSEPH

GACHIRI

MWANIKI.....APPELLANT

VERSUS

HON. JEREMIAH MAKIMI KARUKI

RESPONDENT

RULING

- [1] This is a ruling on Preliminary Objection dated 11th December, 2025 upon which the parties filed submissions by directions of the court dated 18th December, 2025.
- [2] The court has considered the submissions of the Respondent/mover and the Appellant/Respondent to the Preliminary Objection dated 26th January, 2026 and 20th November, 2025, respectively, and the case law authorities attached.
- [3] The Preliminary Objection was in the following terms:
1. ***THAT*** the entire Appeal and Notice of Motion are fatally defective, incompetent and bad in law having been filed outside the statutory period of thirty (30) days provided Under Section 79G of the civil Procedure Act, without leave of this honourable Court.
 2. ***THAT*** the Judgment and decree sought to be impugned were delivered on 8th august, 2024, and a decree dated 10th April, 2025 was issued, yet the Appeal herein was lodged in 17th November, 2025, long after the lapse of the statutory period.
 3. ***THAT*** in the absence of leave to appeal out of time, this Honourable Court lacks jurisdiction to entertain the Appeal or grant any orders arising therefrom.

4. *THAT the Appeal and the Notice of Motion are res judicata within the meaning of Section 7 of the Civil Procedure Act, the Appellant having previously approached the Baricho Law Courts by way of an application for review vide notice of Motion dated 12th May, 2025 in respect of the same Judgment and decree, seeking the same exact orders as sought in this court.*
5. *THAT the said application for review was heard and determined on merit and dismissed with costs, thereby exhausting the review jurisdiction of the trial court.*
6. *THAT having elected to pursue review and failed, the Appellant is estopped in law from re-litigating the same issues before this Honourable Court under the guise of an appeal and a Notice of Motion dated 17th November, 2025*
7. *THAT upon determination of the review application, the trial court because functus officio and the Appellant cannot lawfully seek to reopen the matter through parallel proceedings.*
8. *THAT the Appeal and Application are an abuse of the court process, vexatious mischievous and intended solely to delay execution and deny the Respondent the fruits of a lawful Judgment.*
9. *The Appeal and the Notice of Motion offend and contravene the mandatory provisions of **Section 79G of the Civil Procedure Act, Order 42 Rules 1 and 6, Order 45 Rule 1, Section 7, Section 1A, 1B and 3A** of the Civil Procedure Act, rendering the same fatally defective, incompetent and an abuse of the court process.*
10. *THAT costs of the Appeal and Application be awarded to the Respondent and THAT such further orders be made as this Honourable Court may deem just.*

[4] With respect, the Preliminary Objection is based on misconception that the appeal herein is from the Judgment of the trial court which gave the Judgment execution whereof sought is to be stayed, and that the appellant had already sought to have the same reviewed in terms of Order 45 of the Civil Procedure Rules.

[5] The application for stay of execution of the decree of 10th April, 2025 is a collateral order pending the hearing of the appeal from the decision on the trial court on an application for setting aside of the judgment and decree of 10th April, 2025. It is not an appeal against the court's Judgment of 10th April, 2025.

[6] The Memorandum of Appeal herein dated 17/11/2025 and the title of the pleadings indicate clearly that it is an appeal from a **“Ruling of Hon. Stephen Munene Nyaga**

at the Magistrate's Court at Baricho Law Court in Civil suit No. E186 of 2026 delivered on the 13th November, 2025.

- [7] The appeal is filed within the 30-day period provided under section 79G of the Civil Procedure Act.
- [8] The appellant did not seek review under order 45 of the Civil Procedure Rules which is an alternative remedy to the appeal process, so that he is barred from filing a subsequent appeal (See ***Otieno Rogot & Co. Advocates V. National Bank of Kenya*** [2020]eKLR and ***Muchanga Investments Limited v. Safaris Unlimited (Africa) Limited and 2 others*** [2009] eKLR.
- [9] All the Appellant did in the application leading to the Ruling of 13th November, 2025 is to exercise the right to seek setting aside of a default Judgment under order 10 Rule 11 of the Civil Procedure Rules. The court's ruling of 13th November, 2025 is clear on the issue for trial and the Court decision as follows:

“ISSUE OF TRIAL

Basically, the issue for determination at disposing the instant application is whether the applicant has shown a good reason to set aside the Judgement.

COURT DECISION

The relevant provision for setting aside Interlocutory Judgment is Order 10 Rule 11.

A court has discretion to set aside a regular default Judgement, but will only do so if the defendant provides a valid reason for their failure to appear or defend, shows there is a prima facie defence and the application is prompt.

The principles guiding the exercise of the discretion to set aside an Interlocutory Judgement include service of summons, delay and if there is a meritorious Judgment According to affidavit of service of 9th November, 2023, the defendant was duly served on the same day and signed on the first page of the plaint. The defendant has denied service with no evidence and especially noting he has not shown whether the said signature was a forgery. In addition, there was a counsel who appeared for him though the defendant has denied instructions. All these

denials are without evidence. He failed to seek the process server and the advocate appear for cross -examination.

This court thus find the summons were properly served and the defendant chose to ignore court process.

Secondly the defendant has only rushed to court after threats of execution. The time taken since service of Summons is long to be excused.

The applicant has denied the claim though with no draft statement of defence was attached and even if he has triable defence then he failed to utilise time given to him to enter appearance and defend suit.

In exercising such discretion court ought to balance rights of both parties. The defendant had a chance but ignored it. The Plaintiff faithfully prosecuted his case and now seek to enjoy fruits of his judgment. Re-opening matter would frustrate his keen prosecution of matter and award the indolent party which is not fair.

*Consequently, the application of 12th May, 2025 **lack merit** No reason whatsoever shown to excuse the defendant who failed to enter appearance.*

*As a result, the application of 12/5/2025 is hereby **dismissed with costs to the Respondents.***

Right of appeal explained.

*Ruling delivered, dated and signed at Baricho this **14th day** of November, 2025.*

S.M. NYAGA

PRINCIPAL MAGISTRATE

13/11/2025”

[10] As provided under Section 75 (1) (h) of the Civil Procedure Act and Order 43 Rule 1 (g) of the Civil Procedure Rules “**an appeal shall lie as of right**” from an order under Order 10 Rule 11 (setting aside judgment in default of appearance)

[11] The provision of Order 10 Rule 11 of the Civil Procedure Rule clearly indicates that a court cannot be *functus officio* after entry of default Judgment as final Judgment may be set aside:

“11. Setting aside judgment [Order 10, rule 11]

Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

[12] As submitted by the appellant the issues raised in the appeal from the decision of the trial court of 13th November, 2025, which in the material decision for purposes of the appeal, has not been heard and finally delivered by any other competent court and the principle of *res-judicata* as set out in Section 7 of the Civil Procedure Act does not arise, see ***Raila Odinga and 2 others v. IEBC and 3 others*** [2013] eKLR and ***Kenya Commercial Bank Limited v. Benjo Amalgamated Limited*** [2017] eKLR Court of Appeal and ***Supreme Court Pet. No. 17 of 2015 John Florence Maritime Services Limited & Another v. Cabinet Secretary, Transport & Infrastructure 3 Others***.

[13] Consequently, the Preliminary Objection dated 11th December, 2025 is declined. The application for stay of execution shall proceed to hearing on its merits in accordance with ***Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd*** [1969] EA 696.

ORDERS

[14] Accordingly, for the reasons set out above the Preliminary Objection dated 11th December, 2025 is declined.

[15] The application for stay of execution dated 20th November, 2025 shall proceed to hearing on 16th June, 2026.

[16] ***Status quo*** to be maintained until then and the interim order is extended.

[17] Costs in the appeal.

Order accordingly.

DATED AND DELIVERED THIS 16TH DAY OF APRIL 2026.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Wanyingi for Mr. Ndegwa for the Applicant/Absent.

Ms. Makimi for the Respondent/Absent.