

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SMALL CLAIMS APPEAL NO. E001 OF 2026

PRISCAH CHEPNGETICH NGETUNY
APPELLANT

VERSUS

MILTON KIPKOECH NYANGENO
RESPONDENT

Coram: Justice R. Nyakundi
M/S Terer & Co. Advocates
M/S Chelang'at Koskei & Co. Advocates

RULING

- 1.** By a Notice of Motion dated 13/01/2025, brought under Sections 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Order 42 Rules 1(1), and 6 of the Civil Procedure Rules and Section 38 of the Small Claims Court Act, the Applicant seeks the following orders:
 - a)** *That this Honourable Court be pleased to grant stay of execution of the warrant of arrest and all consequential execution proceedings arising from Small Claims Court Case No. Eldoret E1195 of 2025, pending the hearing and determination of this appeal.*
 - b)** *That such further or other orders be made as be necessary for the ends of justice.*
 - c)** *That costs of this application abide the outcome of the appeal.*
- 2.** The Application is premised on the grounds on the face of it and it is further supported by the Affidavit sworn by the Applicant on the same date.
- 3.** The Applicant deposed that this Appeal arises from the *Small Claims Court Case No. Eldoret E1195 of 2025* wherein a ruling was delivered

on 12/01/2026 dismissing her application for stay of execution of a warrant of arrest. She further deposed that following the said dismissal, the Respondent who is the decree holder has signaled intention to execute the warrant against her. The Applicant is apprehensive that unless this Court grants stay of execution, she is at risk of immediate arrest and committal to civil jail, which will cause her substantial hardship and prejudice. The Applicant stated that she has filed a Memorandum of Appeal challenging the said ruling on serious points of law, including lack of proper service, denial of the mandatory time to respond, unlawful electronic service and the enforcement of a fraudulent and illegal contract. The Applicant urged that the appeal raises arguable issues with high chances of success and is not frivolous. She contended that unless the stay sought is granted, the appeal shall be rendered nugatory as her arrest and committal would have already taken place. The Applicant deposed that this application has been made without unreasonable delay and in utmost good faith. The Applicant is ready and willing to abide by any reasonable conditions including provision of security.

The Response

- 4.** The Application is opposed by the Respondent vide the Replying Affidavit dated 20/1/2026. He deposed that the Application herein is fatally, incurably defective, frivolous, vexatious, scandalous, full of falsehood and is an abuse of Court process, a waste of judicial time and should be dismissed with costs.
- 5.** The Respondent further deposed that on 19/8/2025, the Court pronounced judgment in his favour as against the Respondent in the sum of Kshs.460,000/= together with interests and costs and that he has since extracted a decree therefrom and partially executed it and that the Appellant has already paid Kshs.100,000/= in fulfillment of the said decree of the trial Court and in satisfaction of the debt owed to

him and thus the instant Application and Appeal are designed to evade recovery and payment of the debt. The Respondent maintained that before entering its judgment on 19/8/2025, the trial Court carefully considered and analyzed the evidence of service and thereafter entered judgment in his favour. The Respondent urged that a successful litigant should not be deprived of fruits of their judgment.

6. The Respondent contends that the Applicant herein has not demonstrated that she has an arguable appeal with high chances of success, save for the mere assertion. The Respondent further contended that the Applicant has not offered any form of reasonable security save for a mere assertion that she is willing to give security for due performance of the decree of the trial Court.
7. According to the Respondent the Memorandum of Appeal annexed to the Applicant's Application does not raise any arguable points of law since the same seeks to challenge the trial Court's findings on matters of fact contrary to Section 38 of the Small Claims Court Act. The Respondent further deposed that the Applicant has not demonstrated any factors which show that she will suffer any substantial loss if stay of execution is not granted. The Respondent urged that the mere filing of an Appeal does not operate as stay of execution. The Respondents contends that it is trite law that execution is a lawful process and the fact that it has commenced is not a ground for granting stay of execution. The Respondent restated that the instant application is devoid of merit and should be dismissed with cost. The Respondent urged that the Court should order the Applicant to deposit the entire decretal sum of Kshs.512,117.26/= in a joint interest earning account in the name of both Advocates on record as a condition precedent if the Court is inclined to grant stay.
8. Parties did not file any submissions.

Determination and Determination

- 9.** The relief of stay of proceedings or judgement as adverted to under Order 42 rule 6(1) of the Civil Procedure Rule can better be described as a temporary suspension of the regular orderliness or proceedings where a final decision has not been arrived at or where there is a final judgement or ruling and there is a likelihood of execution to enforce the decree of the court. It is a discretionary remedy which has its conditions of application as laid down by the legislature as well as the principles developed over time both at common law and our domestic decisions to guide the courts in exercising the judicial discretion not with whim or caprice so that at the end of it all it is about to meet the end of justice of both parties. The court exercising this jurisdiction should also be in a position to appreciate the cause of action, the historical litigation of the matter and the issues of fact and law forming the basis of the dispute. It is only through this legal lens the court will consider the competing rights of both the Applicant or intended Appellant and the Respondent to give either of them a ray of hope that justice not only seen to be done but it would be conscientiously delivered by the court at the end of it all. In other words the court will take into consideration the equity and justice of the application.
- 10.** The court in doing so, would be exercising a balancing act so as to prevent the abuse of fundamental rights which are entrenched in our constitution 2010. Why is this important? In view of the importance the courts rightly attach to the protection of fundamental rights as entrenched in our constitution and application for stay of proceedings would be granted if a final determination of the interlocking issues as between the Applicant and the Respondent is likely to render the rights sought to be protected null and void. In the foregoing, as I navigate the evidential material and the brief record of the trial court some of this issues to do with fundamental rights may qualify as a fundamental res

11. I have given due consideration to the pleadings and submissions filed in this application. The issue for determination is whether the Applicant should be granted stay of execution orders.

12. The principles guiding the grant of stay of execution pending appeal are well settled. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.

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 1st 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.*

13. An applicant needs to satisfy the Court on the following conditions before they can be granted the stay orders:

- 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.*

14. As to whether the applicant shall suffer substantial loss, in the case of **Kenya Shell Limited -vs- Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018** (Supra) the Court of Appeal pronounced itself to the effect that:

“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

15. The Applicant has a burden to show the substantial loss it is likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Appellant to his Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Applicant herein contends that she shall suffer irreparable loss if stay is not granted in the event the appeal succeeds as she was not served and was never given the opportunity to be heard by the trial Court. The Respondent on the other hand has not provide any evidence to prove that it the event the Appeal succeeds he will be able to repay the Applicant herein. In the circumstances am of the view that stay ought to be granted.

16. The Applicant ought to satisfy the condition of security. The Applicant has expressed that she is ready to offer security of costs.

17. On whether this application has been filed timeously. The ruling herein was delivered on 12/01/2026. The Applicant filed the application

herein on 13/1/2026 as such there has been no unreasonable delay in bringing the instant application.

18. In our Civil adjudication of disputes and based on established case law courts typically consider the following grounds in exercising discretion for or against grant of stay of execution.

(a) Substantial Loss: Whether the applicant will suffer substantial loss if the stay is not granted.

(b) Special Circumstances: Existence of exceptional circumstances that require the court to protect the subject matter of the appeal

(c) Security for Performance: Whether the applicant has provided adequate security for the judgement sum (if monetary)

(d) Avoidance of a futile Appeal: Ensuring the appeal is not rendered useless by the actions of the respondent.

(e) There must be pending appeal

(f) The appeal must be competent and arguable on its merits

(g) A stay of proceedings or Judgement will be granted to preserve the res

(h) Where a stay of proceedings or execution will cause greater hardship than when it is refused the court will not grant it.

(i) Where a stay is likely to render the rights sought to be protected null and void it will be refused

(j) Where an appeal raises issue of jurisdiction, it is a strong factor in support of stay orders.

19. The substratum of this Notice of Motion touches on the decision by the small claims court in which the learned trial magistrate has invoked the provisions of Section 38 and 40 of the Civil Procedure Act for the remedy of arrest and committal to civil jail of the Applicant/Intended Appellant. I must point out there is an ongoing jurisprudential debate on the jurisdiction exercised by the small claims court under Section 38 as construed with Section 40 of the Act. The issue of jurisdiction is a fundamental and a crucial one and where it

forms the basis of an appeal which a stay of proceedings hinges as in the instant case there is irresistible temptation to grant the order so prayed for by the Applicant/Intended Appellant.

20. In the end, therefore, the Motion dated 13/01/2026 is hereby allowed, giving rise to the following orders: -

- i. There shall be a stay of execution of the decree and all consequential orders in Eldoret Small Claims Court Case No. E1195 of 2025 on the condition that the Appellant/ Applicant herein deposits the entire decretal sum in an interest earning account to be held in the joint names of the parties' advocates/firm of advocates within (30) days from today, failing which the order for stay shall automatically lapse.*
- ii. Costs of the application to abide by the result of the appeal.*

21. It is so ordered.

**DELIVERED, DATED AND SIGNED VIA E-MAIL AND CTS THIS 31ST DAY OF
MARCH, 2026**

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R. NYAKUNDI
JUDGE