

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL NO. E041 OF 2026

EMILY JERUTO ROP APPELLANT/APPLICANT

=VERSUS=

KHETIA GARMENTS LIMITED 1ST
RESPONDENT

SIMON MUGAMBI MUTWIRI 2ND
RESPONDENT

GPL VENTURES LIMITED 3RD
RESPONDENT

FLAVOURS TOAST LIMITED 4TH
RESPONDENT

Coram: Before Justice R. Nyakundi
M/s Kigen W.J & Co. Advocates
M/s Kipkorir Cheruiyot, Chivai & Kigen.

RULING

- 1.** Before me for determination is a Notice of Motion dated 19th March, 2026 expressed under Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and sections 3, 3A & 63(e) of the Civil Procedure Act. The applicant seeks orders as follows:
 - a. Spent.*
 - b. That pending the hearing and determination of this application inter-partes there be a temporary order of stay staying the proceedings and/or any hearing in ELDORET CMCC No. E489*

of 2024 (Khetia Garments Limited =vs= Simon Mugambi & 3 others).

- c. That this Honorable court be pleased to issue an order of staying the proceedings and/or any hearing in ELDORET CMCCC No. E489 of 2024 (Khetia Garments Limited =vs= Simon Mugambi & 3 others) pending the hearing and final determination of the Applicants' appeal herein.*
- d. That costs of this application be provided for.*

2. The application is anchored on grounds that:

- a. That the Appellant/Applicant has filed an interlocutory appeal against the decision of the trial magistrate issued on the 28th October, 2025 in Eldoret CMCCC No. E489 of 2024 (**Khetia Garments Limited =vs= Simon Mugambi & 3 others**) Having been aggrieved by the aforesaid decision.
- b. That the lower court matter, from which an appeal has been preferred, is currently fixed for hearing of the main suit on the 9/4/2026 which is in a few days' time.
- c. That there is danger that should the instant application not be heard and determined expeditiously, the instant application and appeal will be rendered nugatory.
- d. That the appellant has prima facie appeal with chances of success as it raises weighty issues that ought to be heard and determined by this court.
- e. That this application has been filed in good faith and no prejudice will be suffered by the Respondents.

3. In response to the application, the 1st Respondent swore a replying affidavit in which he deposed as follows:

- a. That from the onset, I wish to state that the instant Application is manifestly frivolous, vexatious, devoid of merit and ought to be dismissed with costs forthwith for reasons outline hereunder;

- b. That in response to paragraphs 2-11 of the Supporting Affidavit, the same relates to the procedural history of this matter.
- c. That at the heart of the current Application is to stay the proceedings at the magistrate's court in **Eldoret CMCC NO. E489 OF 2024.**
- d. That the issues being raised by the Applicant/Appellant as regards visitation by the Court to examine the machineries is an element that can be sufficiently addressed by the Court without visiting the storage facility.
- e. That the Parties have supplied the Court with all the documentation that they intend to rely on and the court being clothed with the requisite law, facts and evidence, it can make an informed decision over the said issue.
- f. That this matter has been in Court from the year 2024 and it has a Hearing date of the 9th April 2026 and the Application only serves to delay the natural progression of this matter.
- g. That this Court is tasked with the duty of promoting justice and this includes expeditious disposal of matters which this Application curtails.
- h. That the Application serves to fundamentally disrupt the litigation process and yet the Applicant has not given any valid and sufficient reasons to warrant the stay of proceedings at the trial Court.
- i. That the Judiciary has already extended a fair share of its resources towards the movement of this matter and it is only fair that the same be allowed to be determined on its merits before the trial magistrate.
- j. That the Application is an abuse of the Court process as it seeks to stall a judicially, legally and procedurally founded process without any valid reason.

- k. That the Applicant has not adduced any evidence to the effect that the trial court is being oppressive or vexatious while conducting its proceedings.
 - l. That the Parties have been in corridors of justice for two years and it is only fair that they be allowed to go through the system for the matter to be determined on merit.
 - m. That the Applicant has not adduced any evidence to the effect that they shall suffer any prejudice which is otherwise denied if the matter shall proceed to its final conclusion/determination.
 - n. That the Applicant has not produced any evidence to the effect that they shall suffer either real/imagined loss which is otherwise denied and that the same cannot be adequately compensated by an award of damages.
 - o. That the threshold for grant of stay of proceedings is high which the Applicant has not dispensed with.
 - p. That it is therefore my humble prayer that the Applicant's Notice of Motion Application dated the 19th March 2026 be dismissed with costs.
- 4.** In further support of the application, the applicant filed a supplementary affidavit in which she deposed as follows:
- a. That I have read, perused and understood the contents of the 1st Respondent's Replying Affidavit sworn by PRAHLAD LAXIMSHANILER KHETIA on the 2nd day of April 2026 in opposition to my application dated 19th March 2026 and I wish to respond thereto as hereunder:
 - b. That I deny that my application is frivolous, vexatious or devoid of merit as alleged or at all, and I reiterate that my application is founded on sound legal and factual basis warranting the grant of the orders sought.
 - c. That I wish to bring to the attention of this Honorable Court that the lower court matter, being **ELDORET CMCCC No.**

E489 OF 2024 (Khetia Garments Limited =vs= Simon Mugambi & 3 Others), is now fixed for hearing of the main suit on the **9th April 2026**, being **within two (2) days** of the swearing of this Affidavit, making the instant application acutely and critically urgent.

- d. That unless this Honorable Court urgently and immediately intervenes by staying the said proceedings in ELDORET CMCCC No. E489 OF 2024, the trial in the lower court will proceed on the 9th April 2026 despite the pendency of this appeal before this Honorable Court, thereby rendering the instant application and appeal an academic exercise and a mere paper exercise.
- e. That the 1st Respondent in his Replying Affidavit at paragraph 6 thereof deposes that the issue of inspection of the machineries can be sufficiently addressed by the Court without visiting the storage facility. I wish to respectfully disagree with this position for the following reasons:
 - i. Both parties to the lower court suit have presented purchase receipts and invoices bearing contradictory and conflicting serial numbers and descriptions of the disputed machines. It is therefore impossible for the trial court to make an informed and just determination of the question of ownership of the machinery without first physically verifying and noting the actual serial numbers affixed on the machines themselves.
 - ii. The determination of the correct identity of the disputed machines goes to the very heart and the *substratum* of the lower court suit. A determination made on the basis of contradictory documentary evidence, without physical verification of the machines' identity, will result in a grave miscarriage of justice.

- iii. The 1st Respondent's position that documentary evidence alone is sufficient is contradicted by the very admission in the lower court record that both parties filed contradictory receipts and invoices, making physical inspection the only reliable means of establishing the truth.
- f. That contrary to the 1st Respondent's averments, my instant appeal raises serious, weighty and substantial questions of law and fact for determination by this Honorable Court, namely:
 - i. Whether the learned trial magistrate was correct in law and in fact in declining the application for a *locus in quo* visit for purposes of inspection and noting of serial numbers of the disputed machines.
 - ii. Whether the learned trial magistrate correctly applied Order 18 Rule 11 and Order 40 Rule 10 of the Civil Procedure Rules, 2010, in declining the said application.
 - iii. Whether the learned trial magistrate was obligated in law to give reasons for his refusal of the application for *locus in quo* visit, and whether his failure to give any reasons whatsoever rendered the ruling fundamentally defective.
- g. That these are not frivolous questions. They are substantial questions of law and procedure that deserve full ventilation and determination by this Honorable Court before the hearing of the main suit in the lower court proceeds, as a determination of the appeal in my favor will fundamentally alter the manner in which the lower court should proceed in the hearing and determination of the main suit.
- h. That the 1st Respondent at paragraph 8 of his Replying Affidavit states that this matter has been in court since 2024 and has a hearing date of 9th April 2026, suggesting that the

application serves to delay the matter. I wish to state, with the greatest respect, that the delay in the hearing of this matter has not been caused by me. The following chronology demonstrates the expedition with which I have acted at every stage:

- i. The lower court made its ruling on 28th October 2025;
 - ii. I instructed my advocates to file an application for leave to appeal on 4th November 2025, which was within days of the ruling;
 - iii. Leave to appeal was granted by the lower court on 10th March 2026;
 - iv. I promptly filed the Memorandum of Appeal on 16th March 2026, being within six (6) days of the grant of leave;
 - v. I filed the instant application for stay on 19th March 2026, being within three (3) days of the filing of the appeal. I have at every stage acted promptly, expeditiously and without delay.
- i. That the 1st Respondent at paragraphs 15 and 16 of his Replying Affidavit deposes that I have not adduced any evidence to show that I shall suffer prejudice or real/imagined loss if the lower court matter proceeds. I respectfully draw this Honorable Court's attention to the following:
- i. The entire purpose and substratum of my appeal is to secure a court inspection of the machines *before* the hearing begins. If the hearing proceeds on 9th April 2026 without stay and the lower court arrives at a final judgment on the question of ownership, then the question of whether there should have been a *locus in quo* inspection before hearing will become moot and entirely academic, regardless of how this Honorable Court ultimately decides the appeal.

- ii. In other words, the irreversible harm I shall suffer is not financial but procedural and substantive: I shall have been compelled to participate in a trial conducted on the basis of conflicting and unverified documentary evidence, without the benefit of a court inspection that I am entitled to seek. c) The appeal, if not supported by a stay, will be rendered nugatory in the most real and practical sense, a successful appeal will not undo the damage of a completed trial conducted in circumstances where the integrity of the evidence was compromised.
- j. That I am aware that the 1st Respondent at paragraph 17 of his Replying Affidavit contends that the threshold for grant of stay of proceedings is high. I respectfully submit that, as this Honorable Court will appreciate from the submissions filed herewith, the instant case presents circumstances that fully meet the applicable threshold as established by the superior courts of this jurisdiction.

Analysis and determination

- 5. I have read through the application and the attendant affidavits together with the submissions filed by the parties. The applicant essentially seeks stay of proceedings. The Court's inherent jurisdiction under Section 63(e) of the Civil Procedure Act to make such orders as may be necessary to meet the ends of justice remains a concurrent foundation upon which such relief may be granted.
- 6. The threshold for stay of proceedings can be gleaned from the following passages in ***Halsbury's Law of England, 4th Edition. Vol. 37*** page 330 and 332, where it states that:

"The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive

merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."

"This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases."

"It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case."

7. The high threshold must be understood against the constitutional backdrop. Article 159(2)(b) of the Constitution of Kenya, 2010 enjoins courts to dispose of matters expeditiously without undue regard to procedural technicalities. Sections 1A and 1B of the Civil Procedure Act, Cap 21, entrench the overriding objective of the Rules. The just, expeditious, proportionate and affordable resolution of disputes. In ***Christopher Ndolo Mutuku & Another v CFC Stanbic Bank Limited [2015] eKLR***, Gikonyo J observed that the right of appeal must be balanced against the respondent's constitutional right to have the case determined without unreasonable delay, and that proceedings should not be hindered without just and sufficient cause. That equilibrium between the appellant's right to prosecute the appeal and the respondent's right to proceed to trial on the merits is precisely what this Court is called upon to strike in the instant application.

8. In the case of ***Re Global Tours & Travel Limited (Nairobi HC Winding Up Cause No. 43 of 2000)***:

"As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order

appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously."

9. The Court of Appeal in *Raymond Ruto & 5 others v Stephen Kibowen* [2021] KECA 745 (KLR) exhorted that: -

"We acknowledge at the outset, that a court will sparingly and only in exceptional circumstances will it grant an order to stay of proceedings which essentially is an interruption of the other parties right to conduct their hearing...."

"The learned authors of; Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332, have also given some principles to bring to bear while considering whether or not a court should stay proceedings as follows: -

"The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.

"This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases..."

- 10.** The court is not mechanically applying conditions in the manner in which Order 42 Rule 6(2) demands in the context of stay of execution. Rather, it is conducting a holistic assessment of the justice of the case. The foregoing principles now fall to be applied to the facts of this application.
- 11.** On whether the appeal is prima facie arguable. The Appellant challenges the learned trial magistrate's refusal to conduct a *locus in quo* inspection of the disputed machinery under Order 18 Rule 11 and Order 40 Rule 10 of the Civil Procedure Rules, 2010, in circumstances where both parties have tendered purchase receipts and invoices bearing contradictory and conflicting serial numbers. She raised three grounds: the substantive correctness of the refusal, the correct application of the governing rules and the failure to furnish any reasons for the decision. The test at this stage is not whether the appeal will succeed, but whether it is arguable and whether it raises a bona fide question deserving serious consideration. I am of the considered view that where the identity of the very subject matter of the suit is in contest, and where contradictory documentary evidence makes physical verification the only reliable means of resolution, the decision to foreclose that avenue without explanation is a matter fit for appellate scrutiny. The ground concerning the absence of reasons carries some constitutional weight, the duty to give reasons being integral to the right to a fair hearing guaranteed under Article 50 of the Constitution. I am satisfied that the appeal clears the arguability threshold.
- 12.** The next ground is whether the application was brought expeditiously. The impugned ruling was delivered on 28th October 2025. Instructions to seek leave were given within days. Leave to appeal was obtained on 10th March 2026. The Memorandum of Appeal followed within six days and this application within three days thereafter. Whatever delay elapsed between November 2025

and March 2026 was consumed by the procedural requirement of obtaining leave and is not attributable to any delay on the part of the Appellant. I am satisfied that the Appellant has proceeded with expedition at every step.

- 13.** The character of this appeal is what distinguishes it from the ordinary interlocutory appeal that can safely await the outcome of trial. The Appellant does not merely challenge a ruling on costs, or on amendment of pleadings, or on some procedural question whose resolution will leave the substantive trial intact. The Appellant challenges the refusal of a court inspection that was sought precisely to establish the identity of the machines at the centre of the suit, before a single witness is heard on the question of ownership. Once the trial proceeds to conclusion without that inspection, the question whether the inspection ought to have been ordered becomes permanently moot. It does not matter how this Court ultimately decides the appeal. The evidence will already have been taken, the ownership question already resolved, and no order of this Court can then direct that the inspection be conducted as if the trial had not happened. The appeal will have been rendered a nullity not in theory, but in the most practical sense. That consequence, in my judgment, compels the grant of the stay.
- 14.** As I pen off, let me mention that the stay is of its nature temporary. It endures only until the appeal is heard. Given that the appeal is an interlocutory one raising discrete questions of procedure, it is susceptible of expeditious determination. The inconvenience to the 1st Respondent is real but proportionate, and is not of the same order as the injustice the Appellant stands to suffer if the stay is refused. This Court is required, in the language of *Re Global Tours & Travel Limited* (supra), to essentially weigh the pros and cons. Having done so, I find that the balance falls decisively in favour of the Appellant.
- 15.** As a result, the following orders shall abide:

- a. *Proceedings in Eldoret CMCC No. E489 of 2024 (Khetia Garments Limited v Simon Mugambi Mutwiri & 3 Others) are hereby stayed pending the hearing and final determination of this appeal.*
- b. *The Appellant shall, within thirty (30) days of this ruling, file and serve upon the Respondents the Record of Appeal together with written submissions and list of authorities.*
- c. *The Respondents shall, within twenty-one (21) days of service upon them of the Appellant's submissions, file and serve their respective written submissions and list of authorities in response.*
- d. *The Appellant shall, within thirty (30) days of this ruling, file and serve the Record of Appeal together with written submissions and list of authorities.*
- e. *Costs of this application shall be in the cause.*

16. Orders accordingly.

DATED AND SIGNED AT ELDORET THIS 28TH DAY OF APRIL, 2026

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R. NYAKUNDI
JUDGE