



REPUBLIC OF KENYA



KENYA LAW
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**Muge v Lotodo (Civil Appeal E127 of 2025)
[2025] KEHC 11965 (KLR) (11 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 11965 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E127 OF 2025
RN NYAKUNDI, J
AUGUST 11, 2025**

BETWEEN

PHILEMON KIPRONO MUGE APPLICANT

AND

TERESA CHEROP LOTODO RESPONDENT

RULING

1. What is pending before this Court for determination is a Notice of Motion Application dated 12th June 2025 in which the Applicant is seeking the following orders:
 - a. Spent
 - b. The honorable Court be pleased to stay all proceedings henceforth in Eldoret CM's Court Civil Case No. E787 of 2022 between *Dr. Teresa Cherop Liole Lotodo versus Philemon Kiprono Muge* pending the hearing and determination of this application *inter partes*.
 - c. The honorable court be pleased to stay all proceedings henceforth in Eldoret CM's Court Civil Case No. E787 of 2022 between *Dr. Teresa Cherop Liole Lotodo versus Philemon Kiprono Muge* pending the hearing and determination of this appeal.
 - d. Costs of this application be in the cause
2. The Application is made on the following grounds on the face of it among others;
 - a. That the Respondent herein instituted the instant suit against the appellant/applicant alleging that he had fraudulently obtained from her a substantial amount of money.
 - b. That the Appellant/Applicant duly instructed the firm of Anassi Momanyi & Company Advocates to enter appearance and defend him in the suit, but the said firm of Advocates never acted as per the said instructions.



- c. That subsequently, the Appellant/Applicant discovered that the matter had proceeded *ex-parte* and that consequently an *ex-parte* judgment had been entered on 23rd February, 2023 against him, as well as a Warrant of Arrest in Execution being issued against him.
- d. That the Appellant/Applicant is adamant that all along, he had never been served with any pleadings, statements, mention or hearing notice, submissions and/or notice of entry of judgment.
- e. That in the circumstances, the Appellant/Applicant instructed the firm of Emmanuel Kipkurui & Company Advocates who made an Application dated 7th November, 2023 seeking, *inter-alia*, to stay the execution of the said *ex-parte* judgment delivered 23rd February, 2023.
- f. That the Learned Trial Magistrate namely Hon. Richard O. Odenyo delivered a Ruling on 29th August, 2024 allowed the Appellant/Applicant's prayer for staying the execution of the aforementioned *ex-parte* judgment but on condition that the Appellant/Applicant deposits 50% of the decretal sum (being Kshs. 3,500,000/=) into an interest-earning account in the names of both counsel of the Appellant/Applicant and the Respondent within 45 days from the date of the Ruling.
- g. That the Appellant/Applicant while willing to abide by any reasonable court terms, found the condition of depositing the said sum of Kshs. 3, 500, 000/= within 45 days as being impossible to adhere to and/or implement.
- h. That in the circumstances, the Appellant/Applicant made an Application dated 29th August, 2024 seeking to move the Honorable Court to review its said ruling issued on 29th August, 2024 which allowed the Appellant/Applicant's prayers for stay, albeit with extremely harsh terms, and accordingly prayed for more reasonable terms.
- i. That shortly thereafter, the trial Magistrate namely the Hon. Richard Odenyo (PM) was subsequently transferred and the matter proceeded before Hon. O. Mogire.
- j. That upon the hearing the said Application dated 29th August, 2024, the later trial Magistrate delivered a Ruling dated 13th May, 2025 declining to grant the Appellant/Applicant's prayers for review primarily on the ground that the trial court lacked the jurisdiction to review its own Ruling.
- k. That the trial Magistrate clearly erred in concluding that it lacked the powers of reviewing its own ruling.
- l. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate that the Appellant had a strong, arguable defense that is worthy of a full hearing.
- m. That the Learned Trial Magistrate demonstrated poor judicial discretion in failing to appreciate that Article 159 (2) (d) of the Constitution of Kenya dictates that courts should always place their duty of delivering substantive justice at the forefront and not to be fettered by procedural technicalities.
- n. That the Learned Trial Magistrate demonstrated open bias and hostility in failing to review a harsh, oppressive, unreasonable and unjust Ruling delivered on 29th August, 2024.
- o. That additionally, the Appellant/Applicant was, and still very much remains, extremely keen, desirous and intent on defending all the allegations directed at him in the trial suit.



- p. That in the circumstances, justice demands that this Honorable Court stays the proceedings at the trial Court, sets aside, reviews and/or varies the aforementioned Rulings and directs that the trial court proceeds to hear both parties and allows the matter proceeds to its logical conclusion after both parties have presented their sides of the story.
 - q. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate and acknowledge that the by arriving at the said Ruling dated 13th May, 2025 the court unnecessarily infringed on the above-named Appellant's constitutional right to fair administrative action, right to access to justice and right to a fair hearing as enshrined in Articles 47, 48 and 50 of the Constitution of Kenya.
 - r. That the Learned Trial Magistrate in arriving at the said Ruling dated 13th May,2025 and denying the Appellant an opportunity to defend the allegations against him, essentially amounted to condemning him unheard which is contrary to the Tenets of Natural Justice as well as prevailing legal principles.
 - s. That unless the proceedings at the trial Court are stayed, the Court will proceed to issue orders that will be prejudicial to the Appellant such as striking out the Appellant's defence and reinstating the *ex-parte* judgment, which move would render the appeal nugatory.
3. The Application is supported by the annexed affidavit dated 12th June 2025 sworn by the Appellant who avers as follows;
- a. That I am a male adult of sound mind and the Appellant/Applicant herein, and being well versed with all pertinent facts surrounding this case, I am competent and authorized to swear this Affidavit.
 - b. That the Respondent herein instituted the instant suit against me alleging that I had fraudulently obtained from her a substantial amount of money.
 - c. That I duly instructed the firm of Anassi Momanyi & Company Advocates to enter appearance on my behalf and defend me in the suit, but the said firm of Advocates never acted as per my express instructions.
 - d. That subsequently, I discovered that the matter had proceeded *ex-parte* and that consequently an *ex-parte* judgment had been entered on 23rd February, 2023 against me, as well as a Warrant of Arrest in Execution being issued against me.
 - e. That all along, I had never been served with any pleadings, statements, mention or hearing notice, submissions and /or notice of entry of judgment.
 - f. That it was then that I decided to employ the services of the firm of Emmanuel Kipkurui & Company Advocates who made an Application dated 7th November, 2023 seeking, *inter-alia*, to stay the execution of the said *ex-parte* judgment delivered on 23rd February, 2023.
 - g. That the Learned Trial Magistrate namely Hon. Richard O. Odenyo delivered a Ruling on 29th August, 2024, and while he allowed my prayer for stay the execution of the aforementioned *ex-parte* judgment, he did so on condition that I deposit 50% of the decretal sum (being Kshs. 3, 500, 000/=) into an interest-earning account in the names of Counsel of both the Respondent and I within 45 days from the date of this ruling. (See annexed a copy of the said ruling marked as "PKM-1")



- h. That while I was willing to abide by any reasonable court terms, I found it impossible to abide by the condition of depositing the said sum of Kshs. 3, 500,000/= within 45 days especially given the current hard economic times, and also because I am a farmer who does not have the said sum lying idly around.
 - i. That given this fact, I elected to make an Application dated 29th August, 2024 seeking to move the Honorable Court to review its said Ruling issued on 29th August, 2024 which allowed my prayer for stay of execution, albeit with extremely harsh terms. Hereby I was seeking for more reasonable terms of security.
 - j. That shortly thereafter, the trial Magistrate namely the Hon. Richard Odenyo (PM) was subsequently transferred to another Court station and the matter proceeded before Hon. O. Mogire.
 - k. That upon the hearing the said Application dated 29th August, 2024, the later trial Magistrate delivered a Ruling dated 13th May, 2025 declining to grant my prayer to review primarily on the ground that the trial court lacked the jurisdiction to review its own Ruling.
 - l. That I have appealed against the said Ruling.
 - m. That I wish to categorically state that I am, and have always been, extremely keen, desirous and intent on defending all the allegations directed at him in the trial suit.
 - n. That in the circumstances, justice demands that this Honorable Court stays the proceedings at the trial Court.
 - o. That my Advocate on record has advised and informed me, whose advice and information I have no doubt is true and correct in law, that unless the proceedings at the trial Court are stayed, the trial Court will proceed to issue orders that will be prejudicial to me such as striking out my defence and reinstating the *ex-parte* judgment, which move would render my Appeal nugatory.
 - p. That this Application has been filed promptly in good faith and in the interest of justice.
4. The application is opposed vide a Replying Affidavit dated 23rd June 2025 sworn by the Respondent who deponed on oath as follows;
- a. That the contents of the Application dated 12th June, 2025 together with the supporting affidavit with the annexures thereto have been read and explained to me by my Advocate on record, and having understood its content and import, I wish to respond as follows.
 - b. That the Application is bad in law and ambiguous as there is no clarity in the prayers sought in the Application and in the main Appeal and thus the Court is not directed as to what Orders the Appellant is seeking.
 - c. That I am advised by my Advocate on record that the Appellant already lodged an Application for review at the trial Court, and the said Application was dismissed.
 - d. That I am thus advised by my Advocate that The Application, and the antecedent appeal offends the provisions of Section 80 of the *Civil Procedure Act* which provides that where a party opts to apply for review, such a party cannot after the review is rejected exercise the option to appeal against the same order he sought review of.



- e. That notwithstanding, the trial Court in Eldoret Civil Case No. 787 of 2022 rendered itself on the issues therein and delivered its judgment on 23rd February, 2023 and a decree was issued on 10th March, 2023.
- f. That subsequently, and upon the Appellant failing to satisfy the decree, a warrant of attachment was issued in execution of the said Judgment after the Appellant failing to show cause why execution should not issue.
- g. That thereafter, the Appellant filed an Application dated 29th March 2023 at the Subordinate Courts seeking for Orders of stay and that the Judgment be set aside.
- h. That the said Application dated 29th March, 2023 was dismissed and upon failing to show cause why execution should not issue, warrants of arrest were issued on 7th November, 2023.
- i. That thereafter, the Appellant lodged another Application dated 27th September, 2023 through the Firm of Ombego and Company Advocates seeking similar Orders as the ones in the Application by the Firm of Anassi Momanyi and Company Advocates dated 29th March, 2023.
- j. That later on, and after realizing that there were irregularities in the said Application dated 27th September, 2023, the Appellant filed another Application through the firm of Emmanuel Kipkurui & Company Advocates dated 7th November, 2023 seeking similar Orders as the two previous Applications Marked C & E in the annexures herein.
- k. That through my Advocate, we filed an application seeking to dismiss all the three Applications seeking to set aside the judgment.
- l. That the Court made a ruling on the four applications before it and ordered the Respondents to pay 50% of the decretal sum within 45 days as a condition for grant of the Orders sought.
- m. That to this day the condition imposed by the Court has not been satisfied and the Orders have never been complied with.
- n. That to further delay enjoyment of my Judgment, and despite the Appellant having been given conditional stay, the Appellant again moved the Court via an Application dated 29th August, 2024 seeking for Orders to review the ruling made on 29th August, 2024 by Honorable Odenyo.
- o. That upon considering the said Application dated 29th August, 2024, and the evidence thereof, the Court made a determination on 13th May, 2025 and by a ruling delivered on the same day, dismissed the said Application.
- p. That to this day, the Appellant has not satisfied the decree of the Court, and he has demonstrated indolence and laxity in obeying Court Orders.
- q. That I am advised by my Advocate on record that the Appellant's memorandum of appeal constitutes an abuse of the process of the Court and the same must definitely fail. The Appellant had its day in Court when it chose to seek a review of the order that it now wishes to appeal against. Litigation must come to an end and for the Appellant, the end came when it applied for review and the Application was determined. Litigation cannot be conducted on the basis of trial and error. That is why there are provisions of the law and the procedure to be adhered to.



- r. That it is evident that the instant Application is an afterthought, and an attempt by the Appellant to deny me the enjoyment of my fruits of the Judgment.
 - s. That it is clear in the circumstances that the Applicants' Application dated 12th June, 2025 is incompetent, premature and unmerited and as such, the same must fail, be dismissed with costs and reliefs sought therein be declined and/or disallowed.
 - t. That what is deponed to hereinabove is true and correct to the best of my knowledge, information and belief.
5. Further to the above a notice of preliminary objection was filed by the learned counsel Mr. Oyaro for the respondent premised as follows:
- a. The Application, and the antecedent appeal offends the provisions of Section 80 of the [Civil Procedure Act](#) which provides that where a party opts to apply for review, such a party cannot after the review is rejected exercise the option to appeal against the same order he sought review of.
 - b. The Appellant/Applicant already exercised his option for review of the impugned Order at the trial Court, and cannot prefer an appeal against the same Order that was a subject of review.
 - c. Order 45 rule 1(a) and (b) in addition to setting out the conditions that an Applicant in an application for review must satisfy in order to get the application granted, reiterates the proviso of Section 80(a) and (b) which makes it plainly clear that the options of a review and an appeal are not simultaneously available to an aggrieved party.
 - d. The Appellant's memorandum of appeal constitutes an abuse of the process of the Court and the same must definitely fail. The Appellant had its day in Court when it chose to seek a review of the order that it now wishes to appeal against. Litigation must come to an end and for the Appellant, the end came when it applied for review. Litigation cannot be conducted on the basis of trial and error. That is why there are provisions of the law and the procedure to be adhered to.
 - e. That this Honorable Court is thus deprived of Jurisdiction to hear and determine the said Application.
6. In support of the appellant on the matter filed written submissions are on record in support of the application dated 12th June 2025 and in opposition to the preliminary objection dated 23rd June 2025. He placed reliance on the following authorities to invite the court to exercise discretion to grant stay of proceedings before the CM's Court in Civil Case No. E87 of 2022 pending the hearing of the intended appeal. (See [Kenya Wildlife Service vs James Mutembei](#) (2019) eKLR, [Global Tours & Travels Limited; Nairobi HC Winding up Cause No. 43 of 2000, Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd](#) (1989) EA 696, [Mebbu Gelan Kelil Andoters vs. Abdul Kadir Shariff Abdirhim & Others](#) (2015) eKLR, [Agnes Mukami & 5 Others vs. Ngewahi & Co.](#) (2005) eKLR, Supreme court of Kenya in Application No. 8 of 2017, [Parliamentary Service Commission v Martin Nyaga Wambora & others](#) (2018) eKLR and [HA vs LB](#) (2022) eKLR).
7. Likewise, the respondent relied on her written submissions dated 10th July 2025 with the first legal shot that the application and the antecedent appeal offends the provisions of section 80 of the [CPA](#) which provides that were a party opts to apply for review, such a party cannot after the review is rejected exercise the option to appeal against the same order he sought review of the matter. learned counsel for the respondent in support of the typology to oppose the application based reliance on the following



legal provisions and case law; *Gab International Construction Co. Ltd v Ndungu*, Civil Appeal E032 of 2022 [2023] KEHC 17549 (KLR), Section 80, *Ndabi v Kimotho & Another* (Civil Appeal 16 of 2023) [2023] KEHC 17717 (KLR), *Re Global Tours & Travel Limited* (Nairobi) HC Winding up Cause No. 43 of 2000 quoted with approval in Meru Civil Appeal 40 of 2018 *Kenya Wildlife Service vs. Mutembei* (2019) eKLR and *Ibrahim Ahmed v Halima Guteti* High Court at Mwanza No. 128 of (1967) 1968 THCD

Analysis and Determination

8. Principally, from the affidavits and submissions filed by the parties, one discerns a dilemma as to whether the predominant issue before this court is an appeal or a review jurisdiction against the impugned ruling in CM's Court No. E787 of 2022. The doctrine of jurisdiction, put at its highest, is that the right of a party to elect to move the court either by way of an appeal or a review cannot exist in isolation; it is always incidental to, and dependent on, the enforcement of substantive rights, which usually though not invariably take the shape of a cause of action. If the underlying right itself is not subject to the jurisdiction of the Kenyan courts, then the court should not exercise its powers of adjudication by way of an appeal or review.
9. The grievances in my view to address errors of facts, mistake, or law arising out of a ruling or judgment delivered by the session judge/magistrate are as provided for under section 80 of the *Civil Procedure Act* as read with Order 45 Rule 1 of the *Civil Procedure Rules*. As a matter of procedural law generally speaking review jurisdiction is primarily a reserve of the session court. This court in exercising revision jurisdiction over subordinate court or tribunals should not be equated with review jurisdiction as envisioned by the legislature under section 80 of the *Civil Procedure Act* & Order 45 Rule 1 of the *Civil Procedure Rules*. The question of jurisdiction is of a paramount importance in any adjudicatory process and the court must make a founding of it in the first instance. This court has the jurisdiction to deal with points of law to be raised in the intended appeal, and I presume that the questions to be canvassed by the applicant are of such a nature that only the appeal process can settle. There is no conflict I suppose between appellate and review jurisdiction.
10. From the record of this case, the respondent raised an issue of jurisdiction with regard to review, which they argued should bar the applicant from ventilating any rights before this court. My position is that it is trite law that a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication from a pleading or an application before the court, and which, if argued as a preliminary point, may dispose of the suit. From my appreciation of the record, the applicant intends to approach this court by way of an appeal. There is no High Court decision in Kenya that has addressed the issues arising from the decision of the subordinate court in this matter. The preliminary objection therefore fails.
11. For those reasons the applicant's application succeeds in so far as it relates to this court exercising appellate jurisdiction. In the interim, stay of execution is granted in terms of Order 42 Rule 6 (1) of the *Civil Procedure Rules*. The pleadings to the appeal be filed within 30 days' from today's date. Status conference on 24th September 2025. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH AUGUST 2025

.....

R. NYAKUNDI

JUDGE

Representation:



M/s Emmanuel Kipkurui & Co Advocates

M/s Oyaró & Co Advocates

