



**Githinji v Irungu (Civil Appeal E060 of 2024)
[2024] KEHC 13104 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13104 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E060 OF 2024
LM NJUGUNA, J
OCTOBER 30, 2024**

BETWEEN

JEREMIAH NGARI GITHINJI APPELLANT

AND

PETERSON WAWERU IRUNGU RESPONDENT

RULING

1. Vide a notice of motion dated 05th August 2024, the appellant/applicant seeks for the following orders:
 - a. Spent;
 - b. Spent;
 - c. Spent;
 - d. That this honourable court be pleased to grant stay of execution of the judgment issued by Hon. D. Endoo in Embu CMCC E197 of 2021 on 27th June 2024 pending hearing and determination of the appeal herein; and
 - e. That the costs of this application be provided for.
2. The application is premised on the grounds set out on its face and in the supporting affidavit thereof. The applicant urged that he has lodged an appeal which has high chances of success, thus the stay orders are necessary so that he does not suffer substantial loss. He stated that he risks being committed to civil jail for debts he has accumulated during the period when his salary had been stopped. That if he is committed to civil jail, he may altogether lose his job as County Attorney thus he would be unable to secure legal representation hence his right to fair hearing would be jeopardised. He stated that he is willing to offer security for performance in whatever form the court will order.



3. The application was opposed through a replying affidavit in which the respondent deposed that the decree in question is a money decree and that the appeal filed cannot be rendered nugatory. That the respondent's rights to the judgment and that the appellant's right to appeal should be balanced before the court considers the orders sought herein. That there is no risk of the applicant suffering irreparable harm if the orders are not granted but the respondent will suffer great prejudice. He termed the application as an obstruction to the course of justice and he urged that if the court should allow the application, the applicant should deposit the full decretal amount in court as security.
4. The application was canvassed by way of written submissions.
5. In his submissions, the applicant relied on the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* and the case of *Nyatera v. Nyakundi* [2023] KEHC 24532 (KLR). He argued that he is currently unable to make good the decretal amount and that he risks being committed to civil jail. In place of the decretal amount, he offered security in the form of title deed for land parcel number Ngandori/Kirigi/9021 which is valued as Kshs.1,200,000/=. In the alternative, the applicant offered to pay the decretal amount in 4 instalments of Kshs.52,500/=. He relied on the case of *Nzuki & another v Musyoki* [2023] KEHC 26712 (KLR).
6. The respondent submitted that the court should consider the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* in determining the application. He relied on the cases of *Mohamed Salim t/a Choice Butchery v. Nasserpuria Memon Jamat* (2015) eKLR and *Teresia Kimani v. Githere Investment Ltd* (2004) eKLR. It was his case that fear of execution if not sufficient proof of substantial loss as was stated in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR. Further reliance was placed on the cases of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR, *RWW v. EKW* (2019) eKLR, *Arun C. Sharma v. Ashana Raikundalia & 5 others* (2015) eKLR and *Total Kenya Limited v. Emmanuel Ndithya* (2021) eKLR. He submitted that Order 42 Rule 6 of the *Civil Procedure Rules* does not make room for security in the form of a title deed as proposed by the applicant. He urged the court to exercise its discretion in favour of the respondent.
7. The issue for determination is whether the application meets the threshold for issuance of orders for stay of execution.
8. In considering whether or not to grant stay of execution, the court is expected to look at the circumstances of the case and test them against the provisions of the law before applying its discretion on the matter. I am guided by Order 42 Rule 6(2) of the *Civil Procedure Rules* which provides:
 - (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the 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.
9. First, the court must establish whether the application for stay was filed promptly. The impugned ruling was delivered on 27th June 2024 and the application herein was filed on 06th August 2024. It is evident that the application was filed promptly. Secondly, the court must satisfy itself that the applicant has made a case for substantial loss if the application is not allowed. The applicant argued that he has recently been reinstated in his position as County Attorney through a law suit and that he is still paying off the debts he incurred during the period when he was not being paid his salary. That he is not able to raise the decretal amount as security all at once and if the respondent is left to execute, he risks being committed to civil jail.



10. His apprehension is that the respondent may proceed to execute for the decretal amount, which has been held not to be proof of substantial loss. In the case of James Wangalwa & Another v Agnes Naliaka Cheseto (2012) eKLR, the court held that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

11. The respondent submitted that stay orders are meant to preserve the subject matter but in this case the applicant faces a money decree, thus the subject matter of the suit cannot be lost. He relied on the case of RWW v. EKW (2019) eKLR. I do agree with this position. On the issue of security, the applicant stated that he is willing to comply with whatever conditions that will be set by the court. In general, the applicant has failed to persuade this court that he is deserving of the orders sought. However, it is in the interest of justice that stay of execution be granted to enable the applicant to expedite his appeal. This does not mean that the court undermines the rights of the respondent to enjoy the fruits of his judgment.

12. Therefore, the order for stay is hereby granted in the interest of justice under Article 48 of the constitution and through the discretion of the court under Article 159 of the constitution. The following orders shall consequently issue:

- a. The applicant is hereby granted stay of execution of the judgment in Embu CMCC E197 of 2021 delivered on 27th June 2024, pending hearing and determination of the appeal herein;
- b. Order (1) above is granted on condition that the applicant deposits half of the decretal amount in the judgment in Embu CMCC E197 of 2021 delivered on 27th June 2024, that is Kshs.105,000/= in court within 30 days of the date of this ruling failing which, the stay order shall lapse.
- c. Costs shall abide the outcome of the appeal.

13. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF OCTOBER, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant/Applicant

..... for the Respondent

