



**Githinji v Irungu (Civil Appeal E061 of 2024)  
[2024] KEHC 13178 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13178 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E061 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 05<sup>th</sup> 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 E049 of 2021 on 27<sup>th</sup> 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 applicant had filed a similar application in which Hon. Judge Mwongo granted a stay to last until 22<sup>nd</sup> August 2024 on condition that the applicant deposits the decretal amount in court. That the applicant filed a similar application and it went before Hon. Judge Wakiaga who directed that the applicant complies with the orders of Hon. Judge Mwongo. It was his argument that the applicant is forum shopping and he is trivializing court orders and undermining the authority of the court. That no appeal operates as a stay and that the application herein is an abuse of the court process. He deposed that the appeal does not raise any arguable issues and it is frivolous and that the applications are repugnant to timely administration of justice. He urged the court to apply its discretion against the applicant.
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 applicant has filed a myriad of applications which are targeted to waste the court's time and deny the respondent the fruits of his judgment. That the orders sought have already been granted by other judges and it is unjust for the applicant to bring the same issues before this court. He relied on the cases of Muchanga Investments Ltd v. Safaris Unlimited (Africa) Ltd & 2 others (2009) eKLR and Republic v Ahmad Abolfathi Mohammed & another (2018) eKLR and urged that the applicant was under obligation to obey the court orders issued on the stay application.
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. The applicant filed a notice of motion dated 18<sup>th</sup> July 2024 seeking stay of execution of the judgment in Embu CMCC no E049 of 2021. The trial court awarded Kshs.500,000/= as general damages and Kshs.3,500/= as special damages together with costs. The applicant withdrew that application citing typographical errors on its face. He then filed another application dated 05<sup>th</sup> August 2024 seeking stay of the same judgment and the matter was placed before Hon. Judge Mwongo who was on duty since vacation had begun. The Judge granted the applicant interim stay on condition that the full decretal amount be deposited in court on or before 9.00 a.m on 22<sup>nd</sup> August 2024.
10. The applicant did not comply with this condition and instead, he filed another application dated 16<sup>th</sup> August 2024 seeking review of the orders given by Hon. Judge Mwongo and he offered security in the



form of a title deed for parcel number Ngandori/Kirigi/9021. Since the court was still on vacation, the matter was placed before Hon. Judge Wakiaga, being the duty court, and he reiterated the orders of Hon. Judge Mwango and ordered the applicant to comply. The applicant did not comply.

11. In the process of all these applications, the applicant had also filed applications dated 06<sup>th</sup> August 2024 and 16<sup>th</sup> August 2024 seeking that the applications dated 05<sup>th</sup> August 2024 and 16<sup>th</sup> August 2024 be heard during vacation. These applications have since been overtaken by events. The application dated 05<sup>th</sup> August 2024 seeking stay of execution was placed before this court and the matter was heard on 26<sup>th</sup> August 2024 when the court directed the parties to file their written submissions, that culminates into the decision herein.
12. From the foregoing, it is evident that the orders of Hon. Judge Mwango were interim orders which have since lapsed. The respondent's claim that the order for stay was already granted, does not hold water since the same were interim orders which also compelled the applicant to serve the application. The orders were to apply before interparties hearing of the application.
13. The stay application was filed about 1 month after the impugned judgment was issued. This application was filed timeously. 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 to 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.
14. 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.”
15. 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.
16. 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 E049 of 2021 delivered on 27<sup>th</sup> 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 E049 of 2021 delivered on 27<sup>th</sup> June 2024, that is Kshs.251,750/=, less Kshs.125,875/= already deposited, 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.

17. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 30<sup>TH</sup> DAY OF OCTOBER, 2024.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant Applicant

.....for the Respondent

