



**Kabiru & another v Njeru (Civil Appeal E068 of 2024)  
[2024] KEHC 13181 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13181 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E068 OF 2024  
LM NJUGUNA, J  
OCTOBER 30, 2024**

**BETWEEN**

**HENRY KARINA KABIRU ..... 1<sup>ST</sup> APPELLANT**

**GRACE MWANGI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**AGNES RUGURU NJERU ..... RESPONDENT**

**RULING**

1. The applicants filed a notice of motion dated 27<sup>th</sup> July 2024, through which they seek the following orders:
  1. Spent;
  2. Spent;
  3. That pending hearing and determination of the appeal, stay of execution do issue against the judgment delivered on 24<sup>th</sup> July 2024 and subsequent decree in Embu Small Claims Court no. E046 of 2024;
2. The application is supported by the grounds on its face and in the supporting affidavit thereof. The applicants have lodged an appeal against the decision of the trial court and it is their argument that the appeal has high chances of success. It is their case that judgment has been entered against them through a misunderstanding of facts, which matter will be determined in the appeal. That the application herein has been brought without delay and if the orders are not granted, they stand to lose because the respondent is out to extort them through execution yet they do not owe her anything.
3. Through a replying affidavit, the respondent deposed that the applicants failed to attend court despite being summoned for the viva voce hearing. That they admitted to the debt through their pleadings and



- the trial court entered judgment against them. she urged the court to disallow the application since no form of security has been offered and that the application is an abuse of the court process.
4. The applicants filed a supplementary affidavit in which they deposed that the matter at the trial court was never fixed for hearing due to reluctance by the respondent. They also denied the respondent’s allegations that she is owed any money and they urged the court to allow the application.
  5. The application was canvassed by way of written submissions.
  6. The applicants submitted that if the respondent is left to execute for the decretal amount, they will suffer substantial loss and he relied on the cases of *Tropical Commodities Suppliers Ltd and Others v. International Credit Bank Limited (in liquidation)* (2004) E.A. LR 331, *Matata & Another v. Rono & Another* (2024) KEHC 2799 (KLR) and *Gitabi & another v. Warugongo* [1988] eKLR. They urged that the court to allow the application and if necessary, impose a reasonable condition regarding security.
  7. The respondent submitted that the court should allow her to execute because whatever loss the applicants might incur can be compensated by way of damages. She relied on the case of *Macharia T/ A Macharia & Co. Advocates v. East African Standard* (2002) eKLR and urged the court to let her enjoy the fruits of her judgment since the appeal itself is frivolous. Further reliance was placed on the case of *Fran Investments Limited v. G4S Security Services Limited* (2015) eKLR.
  8. The issue for determination is whether the application meets the threshold for granting stay of execution.
  9. Stay of execution is provided for under Order 42 Rule 6 of the *Civil Procedure Rules* which provides:
    1. 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 order set aside.
    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.”
  10. Further, in the case of *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR, the court held that:
 

“The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who



should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.””

11. The application for stay of execution was promptly filed 5 days after the impugned judgment was delivered. The applicants stated that they do not owe the respondent any money as held by the trial court and if she is left to execute, she will take away their money unjustly. In rebuttal, the respondent stated that she should not be denied the fruits of her judgment since the applicants refused to defend their cause at the small claims court. The applicants’ apprehension is that the respondent will execute for the decretal amount. Execution does not suffice as substantial loss as was held in the case of [\*James Wangalwa & Another v. Agnes Naliaka Cheseto\*](#) (2012) eKLR.
12. However, in light of Article 48 of *the Constitution*, it is my view that there is an appeal properly filed on record and stay of execution will give the appellant a fair chance to be heard. Moreover, the relief sought may be granted at the court’s discretion.
13. Therefore, I find that the application has merit. Prayer (3) of application is allowed as prayed on condition that the applicants deposit the total decretal sum in Court within 30 days from the date of this ruling.
14. It is so ordered.

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

**L. NJUGUNA**

**JUDGE**

..... for the 1st Appellant/Applicant

.....for the 2nd Appellant/Applicant

.....for the Respondent

