



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Gichihi (Civil Appeal E009 of 2024)
[2024] KEHC 14776 (KLR) (25 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14776 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E009 OF 2024
PN GICHOHI, J
NOVEMBER 25, 2024**

BETWEEN

JOHN KARANJA MWANGI APPELLANT

AND

JEREMIAH KAMAU GICHIHI RESPONDENT

RULING

1. By a Notice of Motion dated 27/10/2024 and filed under Order 50 Rule 1 and Order 42 Rule 6 of the Civil Procedure Rules 2010, the Applicant seeks orders that:
 1. Spent
 2. Spent
 3. There be of stay of execution of the judgment of the Judgement of Hon. Edward Oboge (RM) Delivered on 30th September, 2024 pending the hearing and final determination of HCCOMMA E009 of 2024 (John Karanja Mwangi Vs Jeremiah Kamau Gachihi) against the said Judgement.
 4. Costs of this application be in the cause.
2. The grounds are on the face of the application supporting by the Affidavit sworn by the Applicant on 27/10/2024. He states that the Appeal raises several issues which are meritorious with high chances of success. He further states that there is eminent execution that is likely to grossly affect his business. He also states that he is willing to furnish reasonable security for due performance of the decree and costs.
3. Pursuant to the directions issued by this Court on 31/10/2024, the Application herein was duly served upon the Respondent. However, he did not file any response and did not attend Court on 6/11/2014 as scheduled. That left the application unopposed.



4. In the circumstances, Ms. Langat Advocate, for the Applicant made oral submissions and urged this Court to allow the application and grant stay of execution pending appeal as prayed.
5. In regard to furnishing security, Counsel submitted that the decretal sum was Kshs. 400,000/- but costs are yet to be certified by the Court. Counsel therefore estimated the costs of suit as Kshs. 75,000/- and stated that the Applicant is ready and willing to deposit in Court Kshs 475,000/- within 30 days.

Analysis and Determination

6. Having looked the application and the Memorandum of Appeal dated 27/10/2024 and the application herein, the only issue for determination is whether the Applicant has satisfied the principles governing stay of execution pending appeal as set out under Order 42 Rule 6 (2) of the Civil Procedure Act as follows: -

- “(2) No order to stay of execution shall be made under sub-rule (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.”

7. Accordingly, the Applicant is obliged to satisfy that: -
 1. Substantial loss may result to the Applicant unless the order is made.
 2. The application has been made without unreasonable delay, and;
 3. The Applicant has given security for the due performance of such decree or order as may ultimately be binding on him (Applicant).
8. The above elements have been time and again reiterated by superior courts as seen in classic case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 where Madan JA (as he was then) held:-

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 459: “I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

9. In this case, the Applicant has stated that execution of the decretal sum will grossly affect his business. Even though he has not expounded on the issue, it is critical that the Applicant’s right of appeal is not prejudiced in the circumstances herein where the loss may render the appeal nugatory. There being no participation by the Respondent in this application, there is nothing to show his financial capabilities to refund the decretal sum in the event the Appeal succeeds.
10. In any event, the security offered by the Applicant in terms of such deposit would ensure the Respondent’s easy access to the decretal sum in the event the Appeal does not succeed.



11. With regard to delay, the impugned judgement was delivered on 30/9/ 2024 and this application was filed on 31/10/2024 and therefore, a delay of one day cannot be termed inordinate.
12. In order to balance the rights of both parties in the circumstances herein, it is in the interest of justice that this Court grants the following orders: -
 1. Stay of execution of judgment in Nakuru SCC COMM. No. E 855 of 2024 be and is hereby granted pending the hearing and determination of the Appeal.
 2. The Applicant to deposit in court the entire decretal sum and estimated costs all totalling to Kshs. 475,000 within 30 days from the date of this Ruling.
 3. In default of (2) above, the stay of execution shall automatically lapse.
 4. Costs of the application to abide the outcome of the Appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 25TH DAY OF NOVEMBER, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Ms Langat for Applicant

N/A for Respondent

Ruto - Court Assistant

