



**Mwangi v Njau (Suing as a Legal Representative of the Estate of)
Grace Wairimu Muthoni - Deceased) & another (Civil Appeal
E088 of 2022) [2023] KEHC 403 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 403 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E088 OF 2022
RB NGETICH, J
JANUARY 26, 2023**

BETWEEN

GIBSON MWANGI APPELLANT

AND

**DAVID NGANGA NJAU (SUING AS A LEGAL REPRESENTATIVE OF THE
ESTATE OF) GRACE WAIRIMU MUTHONI - DECEASED) ... 1ST RESPONDENT**

STANLEY GACHOMOH KARIUKI 2ND RESPONDENT

RULING

1. This is a ruling on application dated 12th May 2022 seeking a stay of execution of the judgment/decree of 19th September, 2019 in Kikuyu CMCC No. 365 of 2017 and a stay of sale of Motor Vehicle KBW 654X.
2. The application is supported by the annexed affidavit of Christine Momanyi Counsel for the applicant sworn on 10th May, 2022. She deposes that judgment in the trial court was irregular; the applicant's Motor Vehicle KBW 654X had been advertised for sale in execution of the ex-parte judgment issued in Kikuyu CMCC No. 365 of 2017. The trial court declined to issue orders of stay of execution pursuant to the applicant's application dated 28th April, 2022.
3. That the applicant intends to appeal against the trial court ruling and unless stay orders are issued, the Respondent will proceed to execute the decree as the Respondent had obtained proclamation; and warrants and the appeal herein will be rendered nugatory and the applicant will be prejudiced if stay orders are not granted.
4. In response, Daniel Nganga swore an affidavit filed on 27th June, 2022. He deposes that the applicants were aware of the primary suit Kikuyu SPMCC No. 365 of 2017 as they were first represented by the firm of Kairu & Mccourt and they filed an application dated 9th September 2019 to set aside



the interlocutory judgment which they failed to prosecute and later changed advocate to Kimondo Gachoka Advocates who also sought orders to set aside the interlocutory judgment, which was granted but the applicants only filed the defence and did not comply with the court's directions.

5. Counsel for the Respondent proceeded to issue warrants of attachment and sale to Mbusera Auctioneers and after the proclamation, the applicants sought and were granted stay orders on condition that half the decretal amount is paid. They failed to comply with the orders. That the appeal is not arguable and the applicant's intention is to deny the Respondent the right to enjoy the fruits of his judgment; that the application is an abuse of the court process.
6. The application proceeded through written submissions. Counsel for the applicant filed submissions while counsel for the 1st and 2nd Respondent opted to rely on the replying affidavit filed.
7. This matter was consolidated with Kiambu HCA No E091 of 2022.

Applicant/Appellant's Submissions

8. Counsel for the Appellant filed submissions on 16th August 2022. She submitted that the intended appeal is arguable and the applicant will suffer substantial loss if the stay orders are not granted since the Respondent may proceed and execute. Counsel submitted that the applicant had provided security by depositing half the decretal amount into the court. There is no unreasonable delay in bringing the application to the court. The applicant had satisfied all the conditions set out in Order 42 Rule 6 of the [*Civil Procedure Rules*](#).

Analysis and Determination

9. Order 42 Rule 6 of the [*Civil Procedure Rules*](#) sets out the condition for granting a stay of execution. An order of stay of execution is the discretion of the court upon having satisfied itself that the conditions stipulated in Order 42 Rule 6 have been complied with.
10. The applicants contend the intended appeal is arguable and if the stay of execution is not granted, the applicants will be prejudiced as the Respondent will proceed to execute yet the application was brought without unreasonable delay.
11. The court in granting stay of execution orders is required to balance between the rights of the applicant who seeks to maintain the status quo and the rights of the Respondent who wishes to enjoy the fruits of the judgment. In [*RWW Vs. EKW*](#) (2019) eKLR the court of appeal stated as follows: -

“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.”

12. Record show that the Applicants filed several applications in the trial court since the inception of the matter seeking to set aside interlocutory judgment and stay of the execution of the orders of the court but despite the orders being issued, the applicants failed to comply with the orders; they slept on their



rights and only wake up every time the Respondent proceeded to execute and rush to court to stop the Respondent from execution.

13. The applicants have not rebutted the fact that they were served with the trial court's proceedings; from the record they were aware of the suit in the trial court and proceeded to set aside the trial court's judgment but only filed the defence and failed to comply. The actions by the applicants are not in good faith. Counsel for the applicants have been indolent in prosecuting this matter.
14. Orders of stay of execution are discretionary and the court should be satisfied that the applicant has satisfied the conditions for stay before deciding on whether to grant or deny stay orders.
15. The conduct of the Applicants herein demonstrate that they do not deserve the orders of stay of execution. I do not see any merit in the application herein.

Final Orders:

1. Application dated 12th May 2022 is hereby dismissed.
2. Costs to the Respondent.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 26TH DAY OF JANUARY, 2023

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RACHEL NGETICH

JUDGE

In the presence of:

Martin – Court Assistant

Ms. Chepng'eno for Applicant/Appellant

Mr. Ngigi for Respondent

