



REPUBLIC OF KENYA



Githaka v Kamau ((Suing as the Legal Administrator of the Estate of Francis Karanja Njau - Deceased)) (Civil Appeal E046 of 2023) [2023] KEHC 17766 (KLR) (24 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17766 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E046 OF 2023**

HM NYAGA, J

MAY 24, 2023

BETWEEN

DAVID MUNENE GITHAKA APPELLANT

AND

JACINTA MUTHONI KAMAU RESPONDENT

**(SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF FRANCIS
KARANJA NJAU - DECEASED)**

RULING

1. The Applicant David Munene Githaka filed this Notice of Motion dated 10th March, 2023, anchored under order 9 rule 9 (a), order 42, 45 of the [Civil Procedure Rules 2010](#), sections 1A, 1B, 3A, 63(6) and 80 of the [Civil Procedure Act](#) seeking for Orders:-
 1. Spent
 2. That an Order and leave is hereby granted to the firm of Kavraj Kaur & Associates Advocates to come on record on behalf of the defendant/Applicant and in place of Mongeri & Co. Advocates, who were on record.
 3. Spent
 4. That Judgement entered on December 7, 2022 and any other subsequent Orders thereto, be stayed pending the hearing of the substantive appeal.
 5. That an order of temporary injunction does issue against the Respondent/Decree holder and or any other person acting on their behalf, their agents, servants, employees and/ or representatives barring them from executing the Decree pending the hearing and determination of the instant application and Appeal.



6. That the costs of this Application be provided.
2. The Application is premised on grounds on its face and supported by an affidavit sworn by David Munene Githaka on the even date. He deponed that the Honourable court delivered the judgement on December 7, 2022 in favour of the Respondent wherein she was awarded a colossal sum of Kshs. 1,402,240/= together with costs and interests of the suit and that the respondent is likely to execute owing to the lapse of the 30 days' automatic stay of execution.
3. He contended that the process leading to the judgement was fraught with lapses and more particularly lack of information from his counsel, hence the same was entered without his knowledge and or proper defence being raised as required under the law, to which end demands for payment have been made by the Respondent's Advocate hence there is imminent likelihood of proclamation being levied against him in bad faith.
4. It was his further deposition that demand for costs have escalated the figure substantially and that he stands to lose irreparably should execution issue as his assets stand the risk of being attached and sold while there is demonstrated breach of process and want of service by the decree holder against him.
5. He averred that he shall abide by the conditions granted by the court to facilitate the appeal.
6. The Respondent opposed the application through her replying affidavit sworn on May 9, 2023. She deposed that the Application is misconceived, an afterthought, fatally incompetent, lacks merit, a serious affront and an abuse of the Process of this Honourable Court and ought to be dismissed with costs.
7. She averred that the Application is intended to delay this matter and to deprive her the fruits of her sound judgement and that the Application does not meet the threshold for stay of execution.
8. She deponed that the alleged Appeal is a non-starter as there is no Memorandum of Appeal and what has been attached and marked as DMG3 is a draft Memorandum of Appeal which document is strange and unfounded in law, and that even if the draft appeal was to be considered, the same is still fatally defective as it was filed outside the period within which to lodge an appeal and without leave of court noting that judgement in question was delivered on December 7, 2022.
9. It was her deposition that the application herein is premature since there is no evidence of threat of execution as no decree or warrants of attachment has been annexed.
10. She averred that this matter had first proceeded *ex parte* and before delivery of the Judgement, the defendant applied to have the judgement arrested and the matter to commence *de novo* which application was allowed by consent on condition that the Defendant do pay throw away costs of Ksh. 15,000/= on July 28, 2021.
11. It was her further averment that the Applicant's allegation that the proceedings leading up to judgement was fraught with lapses and lack of information are misleading, unfounded and amounts to lying under oath as the Applicant participated fully and testified as a sole defence witness.
12. The Respondent asserted that the Applicant's contention that costs are exaggerated are unfounded and unsubstantiated as no letter challenging the said costs have been written to the Executive officer as required under the law.
13. She contended that she stands to suffer great prejudice and loss of being denied the chance to enjoy the fruits of her judgement.
14. On May 10, 2023, the court directed parties to file submissions but none of them complied.



Issues for determination

15. After careful analysis of the above application and the supporting affidavit, in my view the main issues for determination are:
 - a. Whether the firm of Kavraj Kaur & Associates Advocates ought to be granted leave to come on record for the applicant.
 - b. Whether the applicants have met the prerequisite for grant of stay of execution pending appeal.
16. Order 9 Rule 9 of the [Civil Procedure Rules](#) provides:-

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court:-

 - i. Upon an application with notice to all the parties; or
 - ii. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
17. A perusal of the Application precisely the orders sought show that the firm of Mongeri & Co Advocates was on record for the Applicant. There is no evidence on record that the firm of Kavraj Kaur & Associates Advocates served the aforesaid firm of Mongeri & Co Advocates with the said application for leave and neither is there a consent filed between the outgoing and the proposed incoming advocate in this matter. As such, the firm of Kavraj Kaur & Associates Advocates did not comply with the requirement for leave to come on record for the applicants as required under order 9 rule 9 of the [Civil Procedure Rules](#). It was the duty of the new advocate to show the court that it was properly on record, even though the court had already granted him temporary relief, that of stay of execution pending the hearing of the application inter partes.
18. The affidavit of service filed by the said advocate further confirms that the firm of Mongeri and Company Advocates were not served with the application. This is a fatal mistake on the part of the applicant.
19. For reasons of non-compliance with mandatory provisions of the Rules, the order sought for the said law firm to come on record for the applicant is incapable of being granted.
20. There being no orders granted allowing the advocate to take over the matter after judgment, it is my view that the application was filed by a stranger, and ought to be struck out at this stage. However there are authorities that seem to suggest that striking out of such pleadings may not be the only course to be taken by the court at all times.
21. In [Violet Wanjiru Kanyiri v Kuku Foods Limited](#) [2022] eKLR the Court considered a similar situation. It held as follows;

“From the Application filed in Court there is no indication that the firm of Coulson Harney LLP Advocates served the firm of Nyandoro & Company Advocates with its application dated March 16, 2021. No mention has been made of any attempts to obtain consent of the said firm which was declined. There is further no affidavit of service of the application upon the further advocates. The Respondent/Applicant has not met the threshold as set



out in order 9 rule 9 of the [Civil Procedure Rules, 2010](#). This is sufficient reason to dismiss the application. I will however also consider the substantive prayers in the application.”

22. There is also an argument that an “appeal” is a new matter and that leave may not be necessary.
23. This was the case in [Tobias M. Wafubwa v Ben Butali](#) [2017] eKLR, where the court was of this view:

“We are of the same view, and would adopt the same approach in its entirety in matters concerning appeal. Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, where different rules may be applicable, for instance, the [Court of Appeal Rules, 2010](#) or the [Supreme Court Rules 2010](#). Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice to Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.

We would go further to add that, provided that where the failure to comply with the rule 9 did not undermine the jurisdiction of the court or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then, Article 159 of the [Constitution](#) and the overriding principles could be called upon to aid the court to dispense substantive justice through just, efficient and timely disposal of proceedings.”

24. Taking cue from the above decisions, I will proceed to look at the other issues raised.
25. The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 rule 6 of the [Civil Procedure Rules](#) stipulates:

“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 orders set aside.”

26. Thus under Order 42 rule 6(2) of the [Civil Procedure Rules](#), an applicant should satisfy the court that:
 - a. Substantial loss may result to him/her unless the order is made;
 - b. That the application has been made without unreasonable delay; and
 - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
27. These principles were enunciated in [Butt v Rent Restriction Tribunal](#) [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-
 1. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.



2. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
 3. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under order XLI rule 4(2) (b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.
28. Under the head of substantial loss, an applicant must clearly state what loss, if any, they stand to suffer. This principle was enunciated in the case of *Shell Ltd v Kibiru and another* [1986] KLR 410 Platt JA set out two different circumstances when substantial loss could arise as follows:-

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages....It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in order xli rule 4 (now Order 42 Rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts....”

29. The learned judge continued to observe that:-

“It is usually a good rule to see if order xli rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.

30. The Applicant in this matter contends that he stands to suffer irreparable damages as his assets will be attached and sold owing to the lapse of 30 days stay period.

31. In *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR the Court held;

“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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case



of *Mukuma v Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and rule 5(2) (b) of the *Court of Appeal Rules*, respectively, emphasized the centrality of substantial loss thus:

“...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.”

32. It is to be noted that there is no proper appeal filed herein. What the applicant filed was a draft memorandum of appeal, and is only an annexure to the application.
33. It should also be noted that the applicant has not sought leave to have his appeal admitted out of time, as the Judgment was delivered way back in December 2022.
34. The respondent is a valid decree holder and therefore entitled to execution. Merely stating the execution is likely to ensue as there is no stay of execution orders in place is not enough to demonstrate substantial loss.
35. Without an appeal, or application for leave to appeal, the application lacks the solid foundation it needs to warrant the grant of the orders sought.
36. I find that the applicant has failed on this particular limb.
37. On whether the application has been made without unreasonable delay, I have noted from the annexed Judgment that it was delivered on December 7, 2022 and that neither the applicant nor his advocate was present on the day of the judgment.
38. The present application was filed on March 14, 2023 close to three months after the date of the Judgment. The Applicant has attributed the delay to breach of process and want of service by the Respondent against the Applicant and lack of communication by his erstwhile advocate regarding this matter and entry of judgement.
39. According to the Respondent, the *ex parte* proceedings before the lower court were set aside by Parties' Consent that was adopted on 28th July, 2021 and the matter commenced de novo. That the Applicant participated and even testified as a sole defence witness and as such contention that he was unaware of the proceedings leading to Judgement is misleading.
40. The proceedings of the days in questions has not been annexed for this court to ascertain whether that was the correct position. However, I note that the Applicant has not controverted this position and can only mean that the same is true. In *Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another* [2016] eKLR the court stated *inter alia* that

“The Respondents have failed to refute specifically the allegations in the Petitioner’s sworn affidavit in support. Failure to file a Replying Affidavit can only mean that those facts are admitted.”
41. Similarly, in *Phillip Tirop Kitur v Attorney General* [2018] eKLR, the Court accepted the affidavit evidence, and ruled that in the absence of a replying affidavit or oral evidence from the Attorney General, the Petitioner’s evidence stood unchallenged.



42. The question of unreasonable delay was dealt with in the case of *Jaber Mohsen Ali & another v Priscillah Boit & another* E & L No. 200 of 2012[2014] eKLR where it was stated:

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of *Christopher Kendagor v Christopher Kipkorir*, Eldoret ELC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.”

43. The applicant has not explained/demonstrated when he learnt about this matter and when he lost communication with his Advocate on record. I find that three months is too long for a party not to have followed up on his/her matter. In the premises I find that the delay was unreasonable.

44. Regarding the issue of security for costs, the applicant has stated in his supporting affidavit that he is willing to abide by any conditions that the court may impose.

45. The determination of what amounts to a suitable security is a matter of court’s discretion. In *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, the court stated that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security....”

46. To succeed, an applicant in the circumstances of the applicant herein must satisfy all the three conditions for grant of stay. The Applicant herein has only succeeded on one limb of his application, that of offering security. The court in *Trust Bank Limited v Ajay Shah & 3 others*, [2012] eKLR at page 23 stated that :-

“The conditions set out in order 42 rule 6(2) (a) and (b) are cumulative. All the three must be satisfied before a stay can be granted. The Applicant only satisfied one condition and failed to satisfy the others. For the foregoing reasons, I find that the Plaintiff’s Notice of Motion dated 24th April, 2012 it without merit.”

47. Although the applicant offers security, the question is, what is being litigated upon, since as I stated earlier, there is no proper appeal before the court, or an application for leave to appeal out of time. The lack of that foundation leaves the offer of security in the high seas, so to speak, with no hope of reaching the harbour, which is the determination of the appeal itself.

48. Even if I were to consider the draft appeal as an appeal, I am not certain that it has any chances of success, for the following reasons. The applicant has embarked on a journey of faulting the process in which the judgment was arrived at. He suggests that the process was fraught with non service of the pleadings. What he has not told the court is the fact that indeed the ex parte judgment was set aside and he paid Ksh. 15,000/- ostensibly as thrown away costs, vide a cheque from his erstwhile advocates. That process is not the one that led to the judgment herein. This was as a result of a subsequent full hearing, as stated by the respondent. The applicant has not rebutted these averments. As far as I am



concerned, the grounds set out in the draft memorandum of appeal are irrelevant to the issues at hand, a lawful, regular judgment of the trial court.

49. I find that this application is founded on very unstable grounds that cannot hold it afloat.

50. In the end, I find that the application fails in its entirety and is hereby dismissed with costs.

51. The orders of stay of execution of the decree in the lower court that were in force pending the determination of this application are hereby vacated forthwith.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 24TH DAY OF MAY, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Mr. Yogo for Respondent

N/A for Applicant

