



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gab International Construction Company Limited v Ngung'u (Civil Appeal  
E032 of 2022) [2023] KEHC 22911 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22911 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E032 OF 2022  
DK KEMEL, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**GAB INTERNATIONAL CONSTRUCTION COMPANY  
LIMITED ..... APPELLANT**

**AND**

**ZACHARAY KABUCHO NGUNG'U ..... RESPONDENT**

**RULING**

1. The application for consideration before me is the Appellant's Notice of Motion dated 24<sup>th</sup> May 2023. The same is expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 42 rule 6(1) of the *Civil Procedure Rules, 2010*, Article 50 and 159 of the *Constitution of Kenya, 2010* seeking the following orders: -
  - i. Spent;
  - ii. Spent;
  - iii. That there be a stay of execution pending the hearing and determination of the Appellant's Appeal to the Court of Appeal.
  - iv. That the costs of this application be provided for.
2. The application is supported by the grounds presented on its body and the affidavit of Noor Haji Ali, the director of the Appellant/Applicant sworn on 24<sup>th</sup> May 2023. He avers that he commenced the determined appeal before this Court vide a memorandum of appeal dated 29<sup>th</sup> March 2023 seeking to challenge the decision of the subordinate Court delivered by Honourable D. Mutai on 21<sup>st</sup> June 2021 in Bungoma CMCC No. 303 of 2020. That the Judgment was delivered in 19<sup>th</sup> May 2023 dismissing the Appellant/Applicant's appeal. Aggrieved by the decision, the Appellant/Applicant intends to appeal the same to the Court of Appeal and has already filed its Notice of Appeal dated 23<sup>rd</sup> May 2023.



3. He depones that, the Advocate for the Respondent herein has already demanded payment of the decretal sums and even threatened execution of the lower Court's judgement and may at any moment move to execute.
4. He depones that the Appellant/Applicant's appeal is an arguable one with a likelihood of success and seeks for this Court to exercise its discretion by granting it the opportunity to prosecute and be heard on the same.
5. He depones that he had already deposited a security of Kshs. 500,000/= in a joint interest earning account in the name of both advocates for the parties herein as a pre-condition for the grant of orders of stay of execution of the lower Court's judgment pending the hearing and determination of its intended appeal before the Court of Appeal.
6. He depones that the application was filed without any unreasonable delay; the amount involved in the matter is a colossal sum which the Respondent will not be able to repay if all the Appellant/Applicant's indeed appeal to the Court of Appeal is successful.
7. He depones that the Respondent will suffer no prejudice at all if the application is allowed as the Appellant/Applicant is ready and willing to abide by any such condition as the Court may direct and that the Appellant/Applicant stands to suffer a grave injustice as its appeal will be rendered nugatory and would be denied an opportunity to be heard on merit.
8. On 6<sup>th</sup> June 2023, the Appellant/Applicant herein swore a supplementary affidavit averring that vide Bungoma CMCC No. 156 of 2018 he was ordered to pay a sum of Kshs. 8, 449, 400/= to which the Appellant/Applicant appealed but that the same was dismissed and was subjected to pay a debt of over 10,000,000/= plus costs in the lower Court file and appeal.
9. He depones that he is also serving bank loans and that KRA demands are diminishing the Appellant/Applicant's finances and if stay is not granted pending appeal to the Court of Appeal, the Appellant stands to suffer irreparably.
10. The Respondent opposed the application by filing a replying affidavit sworn on 10<sup>th</sup> June 2023. She avers that the Appellant/Applicant's application is frivolous, vexatious and an abuse of due process of Court and that the same has to fail with costs.
11. She depones that based on the judgement of the Court delivered on 19<sup>th</sup> May 2023 the decree issued being not a money decree and that no special circumstances have been established here to warrant the order of stay of execution.
12. She depones that Kshs. 500,000/= was a conditional security in the High Court and that this appeal having been determined then the same sum cannot be used as security for grant of stay pending appeal to the Court of Appeal.
13. She depones that there is no draft annexed to this application and hence the issue of intended appeal being arguable is imaginary.
14. She depones that she has the means to make good the decretal sum should the appeal succeed as she is currently running a business whose investment is over 15 million, a fact that is within the knowledge of the Appellant/Applicant.
15. She depones that should the grant of stay of execution be granted, she will suffer irreparable damage as the claim that gave rise to the appeal involved a contract that her late husband entered into with the Appellant/Applicant whereby the Appellant/Applicant took over the Respondent's motor-vehicle



- registration No. KAW 743 X for use in its construction business in 2016 and that the same is still in their possession and use to date.
16. She depones that the Appellant/Applicant's application fails to meet the set requirements set out under Order 42 Rule 6 of the Civil Procedure Rules, 2010 and that the orders sought cannot be granted.
  17. She depones that the supplementary affidavit filed by the Appellant/Applicant was done without the leave of this Court and that the same ought to be expunged from the record.
  18. Further to her replying affidavit dated 10<sup>th</sup> June 2023, the Respondent filed a supplementary affidavit sworn on 21<sup>st</sup> June 2023, where she depones that at the moment the Appellant/Applicant has a total of four applications, one before the Court of Appeal and two before this honourable Court and one before the Chief Magistrate's Court all seeking similar orders of stay of execution of decree. She urged this Honourable Court to dismiss the application dated 24<sup>th</sup> May 2013.
  19. Vide directions issued by this Court on 20<sup>th</sup> June 2023, the application dated 24<sup>th</sup> May 2023 was canvassed by way of written submissions. Both the parties filed and exchanged their written submissions.
  20. I have considered the rival affidavits and the submissions filed. It is my considered view that the sole issue for determination herein is whether or not, in the circumstances, I ought to grant stay of execution of the Judgment issued on 19<sup>th</sup> May 2023 pending the hearing of the Appellant/Applicant's appeal at the Court of Appeal.
  21. Order 42 Rule 6 of the *Civil Procedure Rules, 2010* specifies the circumstances under which the Court may order stay of execution of a decree or order pending an Appeal. It provides that an Applicant must demonstrate the following: -
    - a. Substantial loss may result to the Applicant unless the order was made;
    - b. The application was made without unreasonable delay; and
    - c. Such security as the Court orders for the due performance of such decree or order as may ultimately binding on him has been given by the applicant.
  22. From the above provision, it is clear that the Court must be satisfied that there is "sufficient cause" to grant a stay. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the *Civil Procedure Rules, 2010* cannot be severed. The key word is "and". It connotes that all three (3) conditions must be met simultaneously.
  23. The above finding notwithstanding, we cannot lose sight of the fact that the Judgment that the Applicant seeks to stay is the Judgment of this Court issued on 19<sup>th</sup> May 2023 dismissing the Applicant's appeal. It was thus a negative order.
  24. Having said so, this Court notes that the Judgment it granted was not a positive order. As rightly submitted by the Respondent, a negative order is incapable of being stayed as the Appellant seeks. I am guided by the Court of Appeal's erudite decision in the case of *Kaushik Panchatia & 3 Others versus Prime Bank Limited & another* [2020] eKLR. As the Court reiterated and which I fully adopt, that;

“...that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants.”



25. Similarly, in the case of *Western College Farts and Applied Sciences versus Oranga & Others* [1976] KLR 63, the Court whilst considering whether an order of stay can be granted in respect of a negative order, and which i fully adopt, stated inter alia as follows: -

“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”

26. Gab International Construction Co. LTD “the Applicant” was the Defendant while Zachary Kabucho Ndungu “the Respondent” was the Plaintiff in the trial court. An interlocutory Judgement was entered against the Applicant on 21<sup>st</sup> January 2021 for failure to enter appearance and file defence. The Respondent proceeded to extract a decree and obtained warrants of attachment and sale of the Applicant’s moveable property. Upon service with the aforesaid decree and warrants of attachments of its moveable property, the Applicant moved the court vide a notice of motion application dated 19<sup>th</sup> July 2021 seeking to have the default judgment entered against it on 21<sup>st</sup> January 2021, set aside on the ground that it was irregular and deserving to be set aside as a matter of right as the Appellant had never been served with any summons to enter appearance and only learnt of the existence of the suit when it was served with the warrants of attachment and sale of its moveable property. Vide a ruling delivered on 15<sup>th</sup> October 2021, the Hon. C.A.S Mutai-SPM noted that although service was not properly effected upon the Applicant, the Applicant had none the less appeared to have admitted to the claim in the Plaintiff’s suit and he proceeded to set aside the interlocutory judgement entered on 21<sup>st</sup> January 2021 on conditions that: a third of the decretal sum be deposited in a joint interest earning bank account under the names of both Advocates on record; Kshs. 60,000/= be released to the Advocates for the Plaintiff as deposit for costs; 30 days’ period of compliance and failing which stay orders will lapse. Further, the auctioneers who had been tasked with execution of the interlocutory judgement filed a bill of costs which the trial Magistrate proceeded to tax to a tune of Kshs. 325, 511/= and that the Applicant was ordered to pay. Aggrieved by the ruling delivered on 15<sup>th</sup> October 2021, the Applicant moved the lower Court vide a notice of motion application dated 25<sup>th</sup> November 2021 seeking a review of the said conditions on grounds that the interlocutory judgement having been found irregular other subsequent events taken as a consequence of the irregular judgement including the auctioneers were irregular and deserving to be set aside. Vide a ruling delivered on 18<sup>th</sup> March 2022, the Honourable lower Court dismissed the Appellant’s application on grounds that no new and important evidence was tendered by the Applicant to warrant a review. Aggrieved by the ruling of the lower Court delivered on 18<sup>th</sup> March 2022, the Appellant preferred an appeal vide Bungoma High Court Civil Appeal No. E032 of 2022 wherein this Court held that it found no merit in the Appellant’s appeal filed on 3<sup>rd</sup> November 2022. The Court further held that as per section 80 of the *Civil Procedure Act* and Order 45 Rules 1 and 2 of the *Civil Procedure Rules, 2010* which makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order. Thus, the Applicant exhausted the process of review and could not go back to the same order it sought review of and failed and to try its luck with an appeal. Aggrieved by the judgement of this Court delivered on 19<sup>th</sup> May 2023, the Applicant proceed to lodge notice of appeal at the Court of Appeal vide No. 059 of 2023 at Kisumu Court of Appeal. The Applicant also filed a stay of execution application which was later withdrawn.
27. Accordingly, there is nothing to stay in the present case. This court in the Judgment dated 19<sup>th</sup> May 2023 merely dismissed the appeal with costs to the Respondent. Therefore, the only execution which



can flow from the said Judgment is with respect to costs. It therefore, follows that in light of the above discussion, this court has no mandate to grant a stay order in the manner prayed for by the Appellant/Applicant.

28. I have also not lost sight of the arguments by the Appellant/Applicant in its supplementary affidavit sworn on 6<sup>th</sup> June 2023, as this Court did not grant the Appellant/Applicant any leave to file the same. The applicant has not even seen it fit even to seek to be deemed as duly filed and hence the same has no effect as the same was filed without leave of the court. Further, in view of the fact that the stay sought is against a negative order, the same is not tenable in the circumstances.
29. For the foregoing observations, it is my finding that the Appellant/Applicant's application dated 24<sup>th</sup> May 2023 and filed on 25<sup>th</sup> May 2023 lacks merit. The same is hereby dismissed with costs to the Respondent.

It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2023**

**D.KEMEI**

**JUDGE**

**In the presence of:**

Sabwan for Lirembe for the Applicant

Bw' Onchiri for the Respondent

Kizito Court Assistant

