



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gatinu & another v Chebet (Civil Appeal E152 of 2021)  
[2023] KEHC 24471 (KLR) (30 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24471 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E152 OF 2021  
SM MOHOCHI, J  
OCTOBER 30, 2023**

**BETWEEN**

**SAMWEL GATINU ..... 1<sup>ST</sup> APPELLANT**

**PETER OSIOTI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SHEILA CHEBET ..... RESPONDENT**

**RULING**

1. The Applicant by Notice of Motion pursuant to Sections 3A, 79G and 95 of the *Civil Procedure Act*, Orders 42 Rules 4, 6 & 7, Order 50 Rule 6 and Order 51 Rule 1 & 3 of the Civil Procedure Rules moves this Court for the following Orders;
  - a. Spent.
  - b. Spent.
  - c. That this Honourable Court be pleased to order a Stay of Execution of the Judgment delivered by the Trial Court on 12th May, 2023 pending the Hearing and determination of the Appeal herein.
  - d. Spent.
  - e. That the Appellants/ Applicants be allowed to furnish the Court with bank guarantee as security pending the hearing and determination of the intended appeal and the instant application.
  - f. That the costs of this Application abide the outcome of the Appeal.
2. The Application is supported by a sworn Affidavit of Peter Osioti dated 10<sup>th</sup> July 2023, and is based on the following grounds:



- a. That Judgment before the Trial Court was delivered on 12<sup>th</sup> May, 2023, and the Respondent was awarded Liability 100% and General Damages Kshs.120,000/-, Special Damages kshs 7,550 costs and interest.
  - b. That Appellants/ Applicants being aggrieved and dissatisfied with the said judgement on liability have preferred an Appeal.
  - c. That the trial Magistrate did not consider the defendant's evidence on liability and similar cited authorities.
  - d. That the Appellants/Applicants Appeal has high chances of success.
  - e. That the Application has been presented without inordinate delay.
  - f. That the Respondent is a person of unknown means hence Applicants/ Appellants is apprehensive that if the decretal sum is paid out, the appeal will be rendered an academic exercise.
  - g. That the Applicants has a strong arguable appeal which has high chances of success.
  - h. That the Application is made in good faith and the Respondent will not suffer any prejudice or any damage that cannot be compensated by way of costs if this Application is allowed.
  - i. That unless Stay of Execution is granted the Applicant's Application for stay pending hearing and determination of the intended Appeal will be rendered nugatory and the Applicant/ Appellant will suffer irreparable loss and Damage.
  - j. That the Appellants/Applicants are ready, willing and able to furnish such reasonable security in the form of a bank guarantee from the Family Bank for the entire decretal amount pending hearing and determination of this application and the intended appeal.
3. On the 17<sup>th</sup> July 2023, this Court directed that the Application was to be heard and determined on the basis of written submissions, and parties were to file and exchange their written submissions by the 13<sup>th</sup> of August 2023 and a ruling date was reserved for the 29<sup>th</sup> September 2023.
  4. The Applicants complied by filing their written submissions on the 6<sup>th</sup> October 2023 while the Respondent filed a Replying Affidavit in opposition and did not file any written submissions.

### **Applicant's Case**

5. The Applicants submit that, Rules 1 and 3 of the Civil Procedure Rules state the instances under which the Trial Court may order stay of execution of a decree or order pending appeal.
6. That the criteria for granting stay of execution are well founded in precedence as was held In Elena D. Korir Vs Kenyatta University [2012] eKLR, Justice Nzioki Wa Makau, who place reliance on the case of Halai & Another v Thornton & Turpin (1963) Ltd [1990] KLR 365 where the Court of Appeal Gicheru JA, Chesoni & Cockar Ag. JA (as they all were) held that: -

“The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely: - Sufficient cause, Substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay. In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted”



7. With regards to the Sufficient Cause Test, it is the Applicants submission that, they have met the conditions required for stay to be granted, that failure to grant the Applicants stay of execution would render the Appeal nugatory and an exercise in futility as the Respondent would have already executed the decree and attached the Applicants property motor vehicle which is their source of income and livelihood.
8. Reference is made to the case of Hassan Guyo Wakalo vs Straman EA Ltd (2013) eKLR and Hassan Guyo Wakalo Vs Straman FA Ltd [2013] eKLR in which it was held thus;

“In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”
9. With regards to the Substantial Loss Test, it is the Applicants' submission that, they will suffer prejudice if the Application is not allowed, as their properties will be attached and sold and further the appeal has high chance of success will be rendered nugatory.
10. That further, the appeal is on liability and the Applicants are apprehensive that if the Respondent is paid, they may deal with the same in a manner prejudicial to the Applicants and if the appeal is successful, the Applicants might not be able to recover the same from the Respondent.
11. The Applicants have undertaken to issue a bank guarantee with a reputable bank as attached in their application which goes to show that they are willing to abode to any condition of stay by depositing security.
12. Appellants are willing to satisfy stay conditions and offer security to the Respondent which would be fair and just to both parties and that the Respondent will not be in a position to refund the money paid to them if any in the event the appeal succeeds.
13. Reliance is placed on the case of Jackline Tabitha Kinyua v Jacob Mugo Nyaga & another [2019] eKLR where the Court stated:

“Regarding the proposal by the respondent that the applicant deposits the whole of the decretal amount with half of it being released to the Respondent it is my considered view that the interests of justice will not be served if such an order is granted, that refund cannot be guaranteed in the event of a successful appeal.”
14. That the Applicants have established that they will suffer substantial loss if the intended execution is not stayed and urge the Court to consider the cited authorities in allowing the application.
15. That the Applicants are ready and willing to furnish the Court with a bank guarantee which is reasonable security pending hearing and determination of the Appeal filed herein. The Court in Bernard Ontita Zebedeo Vs Julius Nyamwega Ontere [2022] eKLR allowed an application for stay on condition that they deposit a Bank guarantee as security. It held that:

“Consequently, an order for stay of execution pending appeal is granted on condition that the appellant provides a bank guarantee from a reputable bank as security for the decretal sum pending the hearing and determination of the Appeal. In default the stay order shall automatically lapse.”
16. That in the event the appeal succeeds the Applicants are apprehensive that the Respondent will not be in a position to refund the money to the Applicants which will be prejudicial to them. The Applicants



pray to be allowed to furnish the Court with a bank guarantee pending hearing and determination of the appeal.

17. In *Compliant International Security Ltd & another Vs Nicodemus Mulwa Muli* [2019] eKLR the Court expressed itself as follows in an application seeking extension of time way after the set timelines.

“...if the applicants are not given an opportunity to deposit the decretal Sums as ordered by the trial court then the appeal will be rendered nugatory and will only be there for academic purposes. There will be no prejudice suffered by the respondent if time is extended in order for the deposit to be made as had been directed by the trial Court.”

18. That the Appeal and the Application have been filed without any unreasonable delay and that it is in the interest of justice that the Application be allowed.

### **Respondents Case**

19. The Respondent opposed the Application by filing a Replying Affidavit dated 24<sup>th</sup> July 2023 urging that, she is advised by her advocates on record which advice she verily believe to be true that the Application herein offends the provisions of Order 42 Rule 6 of the Civil Procedure Rules.
20. That at the judgment made by the trial Court is very sound and the appeal has no chances of succeeding.
21. That the security suggested by the Applicants has already been overtaken by events since its duration was for a period of 12 months from 18<sup>th</sup> February, 2022 which duration has already lapsed.
22. That said bank guarantee as suggested by the Applicants has not been signed by the bank therefore making it incomplete if not defective. And therefore, pray that the same should be declined as a security in the matter herein.
23. That the Applicants intended appeal raises no triable issues and lacks any chance of success and in the circumstances pray that the Applicants' Application be dismissed with costs to the Respondents.

### **Analysis & Determination**

24. The principles upon which this Court may grant a stay of execution pending appeal are well-settled as enshrined in Order 42 Rule 6 of the Civil Procedure Rules, which requires an applicant seeking a stay of execution pending appeal to demonstrate that -
- 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 be binding on him as been given by the applicant.
25. A stay of execution of judgment/decree should only be granted where sufficient cause is shown. In *Antoine Ndiaye v African Virtual University* (2015)eKLR Gikonyo J opined that -

“....stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the Court should be guided by the three prerequisites provided under order 42 rule 6 of the Civil Procedure Rules...”



26. An Order of stay of execution pending appeal is a discretion of the Court. In *Butt v Rent Restriction Tribunal* (1982) KLR the Court gave guidance on how such discretion should be exercised and held that: –

- “ 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. 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 that appeal Court reverse the judge’s discretion.
3. 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. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. 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 for costs as ordered will cause the order for stay of execution to lapse.”

27. The Primary purpose of stay of execution is to preserve the status quo pending the hearing of the appeal. In *RWW vs. EKW* [2019] eKLR, it was observed that:

“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.”

28. The above are the principles are brought to bear in mind in determining this Application. The first consideration is whether the Application was filed timeously. The judgment of the trial Court in this matter was delivered on 12<sup>th</sup> May, 2023 and the memorandum of appeal filed with the Court on the 7<sup>th</sup> July 2023 pursuant to leave granted on the 4<sup>th</sup> July 2023. The Application under Certificate of Urgency was filed on the 14<sup>th</sup> July 2023, a cursory look indicates that the Applicant has moved this Court in a timely manner and without any delay.

29. The Applicant contends that he will suffer substantial loss if the orders sought are not granted as the Respondents will execute the Decree and thereby attach his motor vehicle that according to him is the source of his livelihood. The Respondents on the other hand contends that there is no loss to be suffered as non-has been demonstrated.

30. No Evidence of substantial loss has been tendered in support of the Application



31. It is the duty of the Applicant in an application for stay of execution to establish that he/she will suffer substantial loss if the orders sought are not granted. In *Machira t/a Machira & Co. Advocates v East African Standard (No 2) (2002) KLR 63* the Court of appeal considered as to what amounts to substantial loss and held that –

“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 ... 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. The other consideration is security. In the case of *Arun C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates (2014) eKLR* the Court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

33. The Applicant in this matter has offered security in the nature of a bank guarantee in the event that the appeal fails. The Court notes that the copy annexed to the Applicant’s Supporting Affidavit dated 10<sup>th</sup> July 2023 marked as “PO-02” is a copy of a bank guarantee dated 18<sup>th</sup> February 2022, referenced as FBL/003000033721 with a validity of twelve months with an option to renew.

34. The security thus offered by the Applicant is unenforceable, is in the name of a non-party to the Appeal, it is expired and no explanation is offered as to whether the same was renewed?

35. The three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. It is my finding that the Applicants herein, though they brought this Application without undue delay they have not adequately demonstrated the substantial loss that they would suffer and have failed to furnish security as stipulated by sub-rule 2b, however this Court in dispensing justice is of the considered opinion that, the Applicants stands a disadvantage should stay orders be declined before hearing and determination of the Appeal.

36. In the upshot of the above, this Court in the exercise of its discretion and in the interests of justice, grant the Applicant an Order for stay of execution of judgment/Decree in Nakuru CMCC No 999 of 2019 on the following condition;

- a. That the Applicants shall pay to the 1<sup>st</sup> Respondent Half (50%) the Decretal Amount in Judgment/Decree in Nakuru CMCC No 999 of 2019, within the next thirty (30) days from the date hereof.



- b. That the Applicants shall deposit, half the decretal amount in a joint interest-earning bank account to be held in the names of the Counsel for the Applicants and Counsel for the 1<sup>st</sup> Respondent within the next thirty (30) days from the date hereof.
- c. The Applicants shall set-down the Appeal for hearing within the next 45 days from the date hereof.
- d. The Costs of this Application is awarded to the Respondents.
- e. A default of Order (a) and/ or (b) above by the Applicants, shall automatically lapse the Order of Stay of Execution of Judgment/Decree granted.

It is so ordered.

**SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 30<sup>TH</sup> DAY OF OCTOBER 2023**

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**MOHOCHI S.M**  
**JUDGE**

