



**Gichana & another v Onsare (Civil Appeal E137 of 2023)
[2023] KEHC 26790 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26790 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E137 OF 2023
TA ODERA, J
DECEMBER 20, 2023**

BETWEEN

JOHN OMWATA GICHANA 1ST APPELLANT

JOSEPH GICHANA OMWATA 2ND APPELLANT

AND

JOYCE MORAA ONSARE RESPONDENT

RULING

1. By a Notice of Motion filed under Certificate of Urgency and dated 23rd November 2023 and filed through the firm of Kimondo Gachoka & Company Advocates and under Section 3, 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 42 Rule 6, Order 50 Rule 5, Order 51 Rules 1 & 3, Order 22 Rule 22 of the *Civil Procedure Rules*, the Appellants/Applicants herein seek the following orders:-
 1. Spent.
 2. That this Honourable Court be pleased to grant a stay of execution of the judgment/decree in Kisii Civil Suit No. 512 of 2019 delivered on 31st October, 2023 pending the hearing and determination of this application.
 3. That this Honourable Court be pleased to grant a stay of execution of the judgment/decree in Kisii Civil Suit No. 512 of 2019 delivered on 31st October 2023 pending the hearing and full determination of the appeal in Kisii High Court Civil Appeal No. E137 of 2023.
 4. That upon grant of prayer No. 3 above, this Honourable Court be pleased to order that the Applicant do provide sufficient security in the form of a suitable Bank Guarantee to secure the Judgment herein of KShs.357,525/=.
 5. That costs of this Application be in the cause.



2. The grounds on the face of the application are that Judgment was entered against the Appellants in the sum of KShs.357,525/=. The Appellants had since lodged an appeal Kisii High Court Civil Appeal No. E137 of 2023. The Applicants expressed apprehension that they would not be able to recover the decretal sum should the Appeal succeed hence render the appeal nugatory. They stated that the Respondent was a man of straw and would not be able to refund the decretal sum. They stated that they were ready and willing to furnish security in the form of a bank guarantee as security for the whole decretal sum.
3. The Application was supported by an Affidavit sworn by the 1st Appellant on 23.11.2023. He deponed that Judgment was entered against the Appellants in Kisii Civil Suit No. 358 of 2020 in the sum of KShs.357,525/=. He deponed that they were aggrieved by the said Judgment and hence filed Kisii High Court Civil Appeal No. E137 of 2023 which they posited had high chances of success. He further deponed that the decretal sum was of a substantial sum for which they expressed fear that they would not be able to recover from the Respondent. He deponed that he would suffer substantial loss if the orders sought were not granted and the appeal would be rendered nugatory. He deponed that the Respondent would not be prejudiced as the Appellants were ready and willing to provide a bank guarantee for the whole decretal sum.

Determination

4. I have considered the Application herein. I note that the Respondent did not participate in the proceedings and so, the Application is unchallenged.
5. The main issue for determination is whether the Appellants/Applicants have put forth a strong case for stay of execution pending appeal.
6. The law relating to stay of execution pending appeal is well espoused in Order 42 Rule 6 of the *Civil Procedure Rules*. The Applicants are required to satisfy the Court that:-
 - a. They will suffer substantial loss unless the order sought is granted.
 - b. The application has been brought without unreasonable delay.
 - c. Such security as the court orders for the due performance of such decree or order as may be ultimately be binding has been given by the applicant.
7. The power of a court to grant stay of execution is discretionary which discretion must not be exercised capriciously or whimsically. See *Butt vs. Rent Restriction Tribunal* [1979]
8. The purpose of stay was described by the Court of Appeal in *RWW vs. EKW* (2019) eKLR, where it was held as hereunder:

“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.
9. 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.”



9. On substantial loss, the Court of Appeal in the case of *Kenya Revenue Authority v Law Society of Kenya & 3 Others* (Civil Application E195 of 2023) [2023] KECA 1388 (KLR) (24 November 2023) (Ruling), held that “15. ... Substantial loss is the cornerstone for an application for stay, and the applicant must show or establish factors that show execution will create a state of affairs that will irreparably affect and/or negate the very essential core of the applicant as a successful party in an appeal.”
10. The Court in *Michael Ntouthi Mitheu v. Abraham Kivondo Musau* [2021] eKLR, the Court cited the case of *Samvir Trustee Limited vs. Guardian Bank Limited Nairobi* (Milimani) HCCC No. 795 of 1997 where the Court held that “...It is not enough to merely to put forward assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the Court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss.”
11. The case of *Kenya Shell Limited vs. Kibiru* [1986] KLR 410 is an authority oft cited on matters stay of execution. Gachuhi, Ag. JA (as he then was) at 417 held thus:-

“It is not sufficient by merely stating that the sum of Shs.20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment.”
12. In the case of *Michael Ntouthi Mitheu v. Abraham Kivondo Musau* (*supra*), Odunga J (as he then was) held that in a money decree, in considering whether the Appellant will suffer substantial loss, the financial position of the Applicant and the Respondent becomes a crucial issue (Par. 24). This is ideally because, in an application for stay of execution of a decree or order, the Court is called upon to balance the rights of the Decree Holder who should not be prevented from enjoying the fruits of their judgment unless under exceptional circumstances, and those of the Appellant to ensure that the appeal is not rendered nugatory.
13. In the present case, I have perused the Application and the Appellants/Applicant have stated that they are apprehensive that the Respondent would not be capable of refunding the decretal sum, which sum is not measly. Despite service, the Respondent did not participate in the proceedings and so, the allegation that she cannot refund the decretal sum is the appeal is successful, is uncontroverted.
14. In the case of *New Nairobi United Services Ltd. & Another v Simon Mburu Kiiru* [2021] eKLR, the Court cited the decision in *G.N. Muema P/A (sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another* [2018] eKLR, where the Court stated thus:

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would not have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.
15. It is my humble opinion that a possible inability to pay the decretal amount is reason enough to grant stay of execution pending appeal. I find that the Appellants have proven that there is indeed a possibility that the Respondent may not be in a position to refund the decretal sum.



16. On unreasonable delay, the present application was filed less than a month after the Judgement was rendered and therefore, and the same cannot be said to be unreasonable delay.
17. In *Michael Ntouthi Mithu v. Abraham Kivondo Musau* [2021] eKLR, the Court cited the case of *Gianfranco Manenthi & Another vs. African Merchant Assurance Company Ltd.* [2019] eKLR as relates the issue of security. I am persuaded by the said decision. The Court further cited the case of *Ndubiu Gitabi vs. Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 where the Court of Appeal held as follows:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgment has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reasons they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reasons in principle why they should not do so... The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest as court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it.”

18. I note that the Appellants have attached a copy of a Bank Guarantee given by Family Bank. I find the same sufficient in the circumstances.
19. In the end, the Appellants’ Application dated 23.11.2023 is allowed in the following terms:
- a. There shall be stay of execution of the decree pending hearing and determination of the Appeal.
 - b. The Appellants shall furnish a bank guarantee to pay the entire decretal sum.
 - c. The conditions to be met within 14 days from the date of this Ruling.
 - d. In default, the said conditions shall automatically lapse and the Respondent will be at liberty to execute.
20. Costs shall abide the outcome of the Appeal. Mention on 113.24

DATED, DELIVERED AND SIGNED AT KISII THIS 20TH DAY OF DECEMBER 2023.

TERESA ODERA

JUDGE

In the presence of:



N/A for the Appellant/ Applicant

N/A for the Respondent

Mwiti Court Assistant

