



**Kariuki & another v Mubia (Suing as the Administrator of The Estate of Mubia Gitahi (Deceased) (Civil Appeal E078 of 2021) [2022] KEHC 11991 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 11991 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E078 OF 2021  
FN MUCHEMI, J  
JUNE 30, 2022**

**BETWEEN**

**JOSEPH MURAGE KARIUKI ..... 1<sup>ST</sup> APPLICANT**

**JESSE WAHOME KARIMI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**BONIFACE GITAHU MUBIA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF MUBIA GITAHU (DECEASED)) ..... RESPONDENT**

**RULING**

**Brief Facts**

1. This application dated 16<sup>th</sup> December 2021 brought under Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* and Sections 3, 3A and 100 of the *Civil Procedure Act* seeks for orders of stay of execution of the proceedings and judgment and decree in Nyeri CMCC No. 109 of 2019, issued on 12<sup>th</sup> May 2021 pending the hearing and determination of the intended appeal.
2. In opposition of the said application, the respondent filed a Replying Affidavit dated 22<sup>nd</sup> December 2021.

**The Applicants' Case**

3. The applicants states that judgment was delivered on 12<sup>th</sup> May 2021 in favour of the respondent in the sum of Kshs. 735, 420/- being general and special damages. The applicants contend that they were not aware of the *ex-parte* proceedings and judgment and only discovered the same existed when their clerk perused the court file on 16<sup>th</sup> August 2021. Thus, the applicants state that they preferred to set aside the *ex parte* judgment as they had not participated in the trial and they consequently filed an application dated 19<sup>th</sup> August 2021 seeking to set aside the *ex parte* judgment. Unfortunately, the trial



court dismissed their application on 7<sup>th</sup> December 2021 and being aggrieved with the decision, the applicants have preferred an appeal against the ruling.

4. The applicants are apprehensive that the respondent will levy execution against them rendering the appeal nugatory causing the applicants to suffer irreparable loss and damage. Moreover, the decretal sum is of a substantial amount and if the respondent is paid the sum, the applicants will not be able to recover the same. Additionally, the respondent has not furnished the court with any documentary evidence to prove his financial standing.
5. The applicants state that they are ready and willing to furnish security in court by way of a bank guarantee from a reputable bank. Moreover, the applicants contend that the application is made in good faith and will not occasion any prejudice to the respondent. As such, the applicants state that in the interests of justice, the application is allowed as prayed.

### **The Respondent's Case**

6. The respondent states that the appeal on which the instant application is based is an appeal against a negative order of the trial court and it is therefore wrong for the applicants to file the instant application for stay of the decree whereas they have never challenged the decree of the trial court. The respondent contends that the court has no jurisdiction to consider the application for stay of execution of the decree of the lower court when there is no appeal against the decree of the lower court.
7. The respondent further states that the firm of Kimondo Gachoka & Co. Advocates came on record on 18/6/2020 and thus the hearing on 16/3/2021 was taken by consent by the parties. Moreover, by 16/3/2021, the said firm of advocates was on record for the applicants for over 9 months and thus the failure to attend court by the applicants and their advocates is inexcusable.
8. The respondent states that on 17/3/2021, his advocate served the applicants advocates with a mention notice for submissions scheduled for 13/4/2021. Moreover, the respondent states that his advocates sent a copy of submissions to the applicants' counsel on 31/3/2021. Furthermore, the respondent avers that his advocate sent to the applicants counsel a notice of entry of judgment dated 31/5/2021 on the same date. On 21/7/2021, the respondent contends that his advocate sent to the applicants' counsel the decree and certificate of costs and therefore the applicants advocates have always been kept up to speed on the development of the proceedings. The respondent avers that all the said service of process was sent via email provided by the applicants advocates being info@kghazina.co.ke
9. The respondent states that he shall be prejudiced if the application for stay is allowed. He contends that the instant application is an abuse of the court process aimed at frustrating him from receiving the fruits of the judgment. He further contends that the appeal has no chances of success as the order appealed against is a negative order of the lower court dismissing the application for stay of execution and setting aside of the judgment. In any event, the respondent contends that the application is incompetent as the applicants have not attached a copy of the order appealed against.
10. The respondent depones that there must be an end to litigation. He avers that he is able to refund the decretal sum in the event of the appeal succeeding. As such, the respondent prays that the application be dismissed.
11. Parties hereby disposed of the application by way of written submissions.



## The Applicants' Submissions

12. The applicants rely on Order 10 Rule 11 of the [Civil Procedure Rules](#) and the decision of *Patel vs E.A Cargo Handling Services Ltd* (1974) EA 75 and submit that the court has unlimited jurisdiction to set aside or vary a judgment entered in default of appearance of a party.
13. The applicants submit that their defence raises triable issues which ought to be ventilated at trial. They rely on the cases of Civil Case No. 3399 of 1992 [Fredrick Chege Kamenwa vs Aron K. Kandie](#); Civil Case No. 222 of 2010 [Winnie Wambui Kibinge & 2 Others vs Match Electricals Limited and Keipto Chemwolo](#) and [Mumias Sugar Co. Ltd vs Augustine Kubende](#) (1982-1988) KAR 1036 and submit that if the ex parte judgment would be left to stand, it would translate to the applicants being condemned unheard. The applicants contend that their defence raises triable issues on liability and quantum which need to be heard and determined on merits.
14. The applicants contend that the respondent has not demonstrated that he would suffer any prejudice if the orders are granted. Any damage or loss may be adequately compensated by way of damages. The applicants rely on the case of *Shah vs Mbogo* (1974) EA and submit that the court ought to do justice to all parties provided that no irreparable damage is suffered by the opposing party. The applicants submit that the respondent fixed the matter for judgment without notifying them. The respondent being fully aware that the applicants had entered appearance in the matter did not serve them with a mention of judgment notice and thus the respondent does not deserve equity. The applicants further submit that in the interests of justice, they are willing and ready to furnish the decretal sum as security by way of bank guarantee with Family Bank. The applicants urge the court to exercise its discretion in their favour and give them an opportunity to be heard on merit. They state that they have established a prima facie case with a probability of success at trial and/or demonstrated that they are likely to suffer irreparable harm which cannot be adequately compensated by way of damages. As such, the applicants pray that their application be allowed as prayed.

## The Respondent's Submissions

15. The respondent submits that the order being appealed against is a dismissal order, which is a negative order. As such, there can be no stay of execution where the order appealed against is a negative order. To support his contention, the respondent relied on the case of [Catherine Njeri Maranga vs Serah Chege & Another](#) [2017] eKLR and submits that the court held that a negative order is incapable of execution save for payment of costs.
16. The respondent further submits that the application seeks to stay the decree dated 14/7/2021 however no appeal has been filed against the said decree. The instant appeal is against the order of the lower court dated 7/12/2021 dismissing the application to set aside judgment. In the circumstances, the respondent contends that this court has no jurisdiction to entertain the application for stay of the decree where no appeal has been filed against the decree. The respondent relies on the case of [Abubaker Mohammed Al Amin vs Fidaus Siwa Somo](#) [2018] eKLR to support his contention.
17. The respondent relies on the case of [Jessikay Enterprises Ltd vs George Kaboto Muiruri](#) [2022] eKLR and submits that the decree herein is a money decree and he has sworn that he is able to repay the money in the event the appeal succeeds. Further, the respondent states that the decree has not been attached to the application for stay and urges the court to dismiss the application as was done in [Husseini Builders Limited vs Kyalo Kinyili](#) [2021] eKLR. The respondent contends that the application has not satisfied the requirements for grant of stay of execution and urges the court to dismiss the same with costs.



## Issues for determination

18. The main issue for determination is whether the applicants have met the prerequisite for grant of stay of execution pending appeal.

## The Law

19. As a rule of thumb, an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) *Civil Procedure Rules*. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-

1. "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.

2. No order for stay of execution shall be made under sub rule 1 unless:-

- a) The Court is satisfied that substantial loss may result to the 1<sup>st</sup> Applicant unless the order is made and that the application has been made without unreasonable delay; and
- b) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

21. Thus under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:

1. Substantial loss may result to him/her unless the order is made;
2. That the application has been made without unreasonable delay; and
3. 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.

22. These principles were enunciated in *Butt vs 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 as follows:-

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.

### Substantial loss

23. Under this head, an applicant must clearly state what loss, if any, they stand to suffer. This principle was enunciated in the case of Shell Ltd vs 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....”

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.

24. Earlier on, Hancox JA in his ruling observed that:-

“It is true to say that in consideration [*sic*] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would...render the appeal nugatory.

This is shown by the following passage of Cotton LJ in Wilson vs Church (No.2) (1879) 12 ChD 454 at page 458 where he said:-

“I wish to state my opinion that when a party is appealing, exercising his undoubtedly right of appeal, this court ought to see the appeal, if successful, is not rendered nugatory. “

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

25. The applicants have submitted that the decretal sum is colossal and they are apprehensive that if the respondent is paid the sum, he shall not be in a financial position to refund the same. It is further submitted that the respondent has not disclosed or furnished the court with any documentary evidence to prove his financial standing. The respondent on the other hand has stated in his affidavit that he is financially upright and in a position to refund the decretal sum in the event the appeal succeeds. I have noted that though the respondent has stated that he is financially able to refund the decretal sum, he has not attached any documentary evidence to show his financial capability. In that regard, I find



that the applicants have demonstrated that they shall suffer substantial loss if the decretal sum is paid to the respondent.

### **Has the application has been made without unreasonable delay?**

26. Notably, the applicants are seeking to appeal from the ruling of the trial court delivered on 7<sup>th</sup> December 2021 and not the judgment of the main suit delivered on 12<sup>th</sup> May 2021. The applicants have brought the present application on 16<sup>th</sup> December 2021. The application has been made without unreasonable delay as the ruling was delivered on 7<sup>th</sup> December 2021.

### **Security of costs.**

27. The applicant ought to satisfy the condition of security. In the persuasive case of *Gianfranco Manenthi & Another vs Africa Merchant Assurance Co. Ltd* [2019] eKLR the court observed:-

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal...

Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

28. Similarly in *Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated:-

“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 the 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.”



29. From the above persuasive decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same. Notably, the applicants have stated in their affidavit that they are willing and ready to offer security to secure the performance of the decree by way of a bank guarantee from a reputable bank.
30. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of Mohammed Salim t/a Choice Butchery vs Nasserpuria Memon Jamat (2013) eKLR where the Court upheld the decision of Portreitz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1991 and stated that:
- “That right of appeal must be balanced against an equally weighty rigid right that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”
31. Although the respondent states that the stay orders sought in this application are in respect of the ruling of the magistrate dismissing the application to set aside *ex parte* judgement, the prayers in the application include stay of the *ex parte* judgement pending hearing and determination of this appeal.
32. It is argued by the respondent that the ruling is a negative order because it dismissed the applicant’s application. The applicant was aggrieved by the dismissal of this application on grounds cited in this application. In my view, the dismissal of the application will lead to execution of the *ex parte* judgement in favour of the respondent. The end result is that if the orders are refused, it will render this appeal nugatory.
33. Considering the fact that substantial loss on part of the applicant has been established, it is in the interests of justice that this appeal be protected from being rendered nugatory. It is also important that the judgement in favour of the respondent be secured as required by the law.
34. It is my considered view that this application has merit and ought to be allowed. The application is allowed on the following terms:-
- a) That the orders for stay in favour of the applicant are hereby granted.
  - b) That the applicant do deposit half of the decretal amount in an interest earning account in the joint names of the advocates on record for the parties within thirty (30) days.
  - c) That in default of compliance with order (b) the stay orders shall lapse automatically.
  - d) That costs shall abide in the appeal.
35. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 30<sup>TH</sup> DAY OF JUNE, 2022.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through video-link this 30<sup>th</sup> day of June, 2022**

