



REPUBLIC OF KENYA



**Gateri & another v Gatura & another (Civil Appeal E741 of 2021)
[2022] KEHC 14273 (KLR) (Civ) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14273 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E741 OF 2021

JK SERGON, J

OCTOBER 21, 2022

BETWEEN

PETER MUKIRI GATERI 1ST APPLICANT

PEMUGA AUTO SPARES LIMITED 2ND APPLICANT

AND

WINFRED W GATURA 1ST RESPONDENT

MARTIN NGINJIRI TAITI 2ND RESPONDENT

RULING

1. This ruling is premised on the Notice of Motion brought by the 1st and 2nd appellants/applicants herein dated July 8, 2022 and supported by the grounds established on its face and the facts stated in the affidavit of the 1st applicant. The applicants sought the following orders:
 - i. Spent.
 - ii. That the firm of M/S Gordon Ogola, Kipkoech & Co Advocates be granted leave to come on record for the appellants/applicants in place of the firm of M/S Kamau Kuria & Co Advocates.
 - iii. Spent.
 - iv. That this Honourable Court be pleased to review, vary and/or set aside the condition and/or order issued by this Honourable Court in the ruling delivered on the 17th of June, 2022 directing the applicants to deposit the entire decretal sum in an interest earning account in the joint names of the parties' advocates and instead allow the applicants to deposit the sum of Kshs 1,500,000 as security in an interest earning account in the joint names of the parties' advocates.



- v. That in the alternative to prayer (iv) above, this Honourable Court be pleased to grant an order directing the applicants herein to transfer half an acre of all that parcel of land known as Thika Municipality Block 13/723 to the respondent and/or to deposit the title deed of that parcel of land known as Thika Municipality Block 13/723 in court pending the hearing and determination of the main appeal.
 - vi. That this Court be pleased to make all such further orders and/or directions as it may deem fit.
 - vii. That costs of the application be borne by the respondents herein.
2. The Motion is opposed by way of the replying affidavit sworn by the 1st respondent on July 15, 2022 on her behalf and on behalf of the 2nd respondent, to which the 1st applicant and the 1st respondent thereafter rejoined with further and replying affidavits they swore on July 21, 2022 and July 26, 2022 respectively.
 3. At the hearing of the instant Motion, the parties' respective advocates made brief oral arguments to echo the averments made in the affidavits.
 4. I have considered the grounds presented on the face of the Motion as well as the affidavit in support thereof. I have likewise considered the affidavits put in response thereto.
 5. It is clear that the orders sought in the Motion are two (2)-fold in nature.
 6. The first order is on change of advocates for the applicants.
 7. In his supporting affidavit, the 1st applicant states that he has instructed the firm of M/S Gordon Ogola, Kipkoech & Co Advocates to take over from the firm of M/S Kamau Kuria & Co Advocates.
 8. Upon my perusal of the record, I observed that the firm of M/S Kamau Kuria & Co Advocates was at all material times on record for the applicants in the appeal proceedings.
 9. Upon my further perusal of the record, I observed that the firm of M/S Gordon Ogola, Kipkoech & Co Advocates filed the notice of change of advocates dated July 8, 2022 indicating their intention to take over from the erstwhile advocates and that this notice is further backed by the authority sworn by the 1st applicant and annexed to the instant Motion.
 10. In view of all the foregoing circumstances, I see no reason to decline to grant the order for leave sought for the current advocate to come on record.
 11. The second order sought is that for review, varying and/or setting aside the ruling delivered by this court on June 17, 2022.
 12. The germane principles to guide this court in deciding whether to review its earlier order are found under Order 45 of the [Civil Procedure Rules, 2010](#) and are set out in the following manner:
 - a. the discovery of new and important matter or evidence, or
 - b. some mistake or error apparent on the face of the record, or
 - c. any other sufficient reason.
 13. The applicants' Motion rides on the position that from the time this court granted the order for a stay of execution sought on the condition that the applicants deposit the entire decretal sum in the sum of Kshs 4,800,000/= in a joint interest earning account, the applicants have not been able to raise the decretal sum in full and have only managed to raise the sum of Kshs 1,500,000/= and that the timelines for compliance were about to lapse as at the time of bringing the instant Motion.



14. The applicants further state that at the time of prosecuting the application which was the subject of the ruling delivered on June 17, 2022 their former advocate had mistakenly failed to bring to the attention of this court that they were at all material times willing to deposit the title documents relating to the property known as Thika Municipality Block 13/723 (“the subject property”) and to transfer half of the subject property to the respondents.
15. The applicants are of the view that unless the orders sought are granted, the respondents will proceed to execute the decree, thereby rendering the appeal nugatory.
16. For the foregoing reasons, the applicants urge this court to vary the amount of security downwards.
17. On the part of the respondents, it is stated that the instant Motion is a mere afterthought since the issue of transfer of the subject property was raised before the trial court and that the value of the subject property is way below the decretal sum owing to them.
18. It is also stated by the respondents that they are desirous of receiving a refund of the decretal sum and are disinterested in having the subject property transferred to them in any event.
19. Upon my perusal of the record, it is apparent that the Motion was brought following the lapse of the timelines set for compliance by this court on June 17, 2022 and I am therefore satisfied that the Motion has been brought without unreasonable delay.
20. Upon my consideration of the reasons given for urging a review of this court’s earlier conditions for granting an order for a stay of execution and upon my perusal of the record, I observed that contrary to the claims being made by the applicants, the decree in question is monetary in nature.
21. Having determined the above, the question remains whether the type of security being offered is appropriate.
22. When it comes to decrees of a monetary nature, it is expected that security provided ought to be commensurate to the decree which is to say that the same should be of a monetary nature.
23. In this instance, a title deed has been offered. In my reasoned view, this would not constitute an appropriate security given that should the appeal ultimately fail, the process of recovering the security will likely be a long and tedious one, involving a range of proceedings.
24. On the same note and on the subject of transfer of a share of the subject property, it is apparent from the record that the applicants did not avail a valuation report to indicate the value thereof and hence it is not possible to tell whether the share would be able to satisfy the decretal amount herein.
25. Moreover, it is apparent from the record that the issue of the subject property was also a subject for consideration before the trial court and also forms part of the subject of appeal according to the draft memorandum of appeal.
26. In view of all the foregoing circumstances, I am hesitant to vary the conditions set for compliance with the order for a stay of execution.
27. Nevertheless, in the interest of substantive justice, I will extend the time required for compliance with the conditions earlier set for granting the order for a stay of execution.
28. The upshot therefore is that the Notice of Motion dated July 8, 2022 partially succeeds and is hereby allowed giving rise to issuance of the following orders:



- i. The firm of M/S Gordon Ogola, Kipkoech & Co Advocates be and is hereby granted leave to come on record for the appellants/applicants in place of the firm of M/S Kamau Kuria & Co Advocates.
- ii. The timeline for compliance with the conditions for granting the order for a stay of execution order issued on June 17, 2022 and is extended so that the applicants should deposit the entire decretal sum in an interest earning account to be held in the joint names of the advocates and or firms of advocates appearing in this appeal within 45 days from today, failing which the order for stay shall automatically lapse.
- iii. Costs of the application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the 1st and 2nd Appellants/Applicants

..... for the 1st and 2nd Respondents

