



**Nyoro Construction Co. Limited v Gichiro (Environment and Land Appeal  
E021 of 2023) [2023] KEELC 22150 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22150 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND APPEAL E021 OF 2023  
LN GACHERU, J  
DECEMBER 7, 2023**

**BETWEEN**

**NYORO CONSTRUCTION CO. LIMITED ..... APPLICANT**

**AND**

**HUMPHREY KIMARI GICHIRIRO ..... RESPONDENT**

*(Being an Appeal from the Judgement and Decree of the Learned  
Magistrate in Murang'a C.M.C Case No. E046 of 2022)*

**RULING**

1. What is before this Court for determination is a Notice of Motion Application dated 10th August 2023, brought under Order 42 Rules 6 & 7 of the Civil Procedure Rules. The said Application was filed by the Applicant/Appellant through R.M Mutiso & Co Advocates, seeking for the following orders;
  - a. That this Honorable Court be pleased to order stay of execution of the Judgement and subsequent Decree of the trial court delivered on the 7th June 2023, in Murang'a CMCC No. E046 of 2023, and all other consequential orders emanating therefrom pending the hearing and determination of the Appeal.
  - b. That costs of this application be provided for.
2. The application is supported by the Affidavit of Josiah Njoroge Njuguna, sworn on the 10<sup>th</sup> August 2023, deponing that the appeal would be rendered nugatory unless the stay of execution is granted and that the judgement debtor has no means of readily refunding the decretal amount, stressing that the Respondent is a peasant farmer without the financial wherewithal to refund the decretal sum should the appeal be successful.
3. . Further, the Applicant deponed that he is in the construction industry, building roads and other civil works and is likely to suffer substantial losses should the execution take place. Consequently, the



Applicant noted that the Company employs hundreds of workers who stand to suffer substantially should execution take place.

4. The Respondent filed a Replying Affidavit dated 18th August 2023, in which he deposed that the Affidavit sworn by the Appellant/Applicant is largely mounted on falsehoods and that in fact the Applicant had not filed any substantive appeal, a position previously upheld in the Court's directive.
5. The Respondent takes issue with the Notice of Motion Application citing that the Applicant had not tendered any evidence to prove that the Respondent does not have means to refund the decretal sum if the Appeal succeeds, and furthermore it is a monetary decree thus recoverable.
6. The Respondent opposed the Notice of Motion citing that the Applicant, after the delivery of judgement in the primary suit on 7th June 2023, was granted 30 days stay of execution as sought. However, upon lapse of the 30 days of stay of execution, the Applicant herein surreptitiously filed an application dated 3rd July 2023, seeking further stay of execution pending hearing and determination of appeal. This application was heard and allowed as prayed yet the said application was never served upon the Respondent.
7. The Respondent deposed that this was brought to his attention by his Advocate on record, who upon perusal of the file at the Murang'a Law Court Registry on 24th July 2023, he was taken aback when he discovered that the Applicant had filed the above-mentioned application and stay of execution orders pending appeal granted.
8. Immediately and in the interest of time, the Respondent filed a Notice of Motion Application dated 24th July 2023, under Certificate of Urgency seeking vacation and/or setting aside of stay of execution orders granted to the Applicant on 19th July 2023. This Application was heard on 25th July 2023, and was scheduled for inter-parties hearing on 8th August, 2023. However, at the Hearing date, Applicant's Counsel had not yet filed or served the Replying Affidavit and the trial Court placed the court file aside to allow Counsel to file and serve.
9. The Respondent deposed that when the matter came up again, the Replying Affidavit had not yet been filed or served. In light of these occurrences, the trial Court allowed the Respondent's application as prayed and stay of execution orders pending appeal were vacated/set aside.
10. Respondent also averred that the Applicant is not entitled to the orders sought in the instant Notice of Motion Application, citing, that the application had been brought in bad faith and is calculated to deny the Respondent a chance to enjoy the fruits of his judgement and the same should be dismissed with costs.

The Application was canvassed by way of written submissions.

11. As regards the applicable principles, the Applicant anchored his submissions on the provisions of Order 42 Rule 6 of the Civil Procedure Rules. It was submitted that the purpose of an application for stay of execution pending appeal is to preserve the subject matter so that the rights of the appellant exercising his undoubted right of appeal are safeguarded.
12. The Applicant further submitted that the judgement, subject matter is substantial and that if the Respondent is allowed to proceed with execution of the decree, the appeal, if successful will be rendered nugatory. The Appellant/Applicant submitted that its appeal raises triable issues with high chances of success.
13. It was the Appellant/Applicant's submissions that the Respondent had not filed any Affidavit of means to confirm his financial means or status thus affirming the risk of failure to compensate the Appellant should the appeal succeed.



14. Furthermore, the Applicant also submitted that through no fault of its own, the substantive appeal is yet to be filed for reason that they have not been supplied with certified copies of proceedings and judgement from the Court.
15. In conclusion, the Applicant submitted that it is ready and willing to provide security as a condition for stay of execution and the application ought to be allowed. Several decided cases were cited among them the cases of *Transport Workers Union Kenya v African Safari Diani Adventure (2013) eKLR*, where the Court stated that; -

“the Principles for grant of stay pending appeal are that the order is discretionary, that the Applicant may suffer substantial loss, that the application is made without unreasonable delay and on provision of such security as the Court may impose”.
16. On his part, the Respondent similarly based his submissions on the provisions of Order 42 Rule 6 of the Civil Procedure Rules.
17. The Respondent submitted that the monetary decree is yet to be issued therefore Appellant/Applicant’s allegation that he was threatening to execute is not tenable.
18. The Respondent also submitted that the Appellant/Applicant has not shown any willingness to give sufficient security for warrant of stay of execution orders. Further that this is a move for the Appellant/Applicant to escape depositing the full decretal amount of Ksh. 1,092,540/= as a security in an interest earning account in the joint names of the advocates on record for the parties herein as a sufficient security for warrant of stay of execution. This was substantiated by the cited decision in the case of *Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co Advocates & 2 others [2014] eKLR*.
19. The Respondent reiterated what he deponed in his Affidavit and implored the Court to dismiss the instant application dated 10<sup>th</sup> August, 2023 with costs.
20. After careful analysis, the Court finds issue for determination is whether the applicant has met the prerequisites for grant of stay of execution pending appeal.
  - (1) Whether the applicant has met the prerequisites for grant of stay of execution pending appeal?
21. The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 Rule 6 of the Civil Procedure Rules stipulates: -

“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.

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.
22. In line with Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant should satisfy the court that:
  1. Substantial loss may result to him 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.
23. It is common knowledge that once Judgment has been issued, execution will likely to happen any time. Therefore, a Judgment debtor if dissatisfied has a responsibility to at the soonest seek stay of execution of the judgement.
24. The impugned Judgment was issued on 7<sup>th</sup> June 2023, and on 5<sup>th</sup> July, 2023, the Applicant herein filed an application for stay of execution; which application was heard on 19<sup>th</sup> July 2023, and the same was allowed entirely.
25. However, on 24<sup>th</sup> July, 2023, the Plaintiff who is the Respondent herein filed an application seeking to set aside the stay of execution order on the basis that he was not served with the said application. The said application came for hearing on 8<sup>th</sup> August 2023, and since the Defendant/Respondent had not filed a Replying Affidavit to oppose the said application, the same was allowed and thus the stay Order was vacated.
26. Thereafter, the Appellant/Applicant filed the instant application on 10th August 2023. This Court does not understand why the Appellant/Applicant chose to bring the instant application to this Court instead of pursuing the stay at the trial Court.
27. However, it is evident that the instant application was filed about 65 days from the date of the Judgment. There is a Memorandum of Appeal attached to the instant application, which is undated and not bearing the Court's stamp. This Court is not sure if the same has been duly filed.
28. The principles to be considered in determination of an application for stay of execution have been elaborated in various Courts decisions which Courts have variously held that grant of stay of execution is discretionary and which discretion must be exercised judiciously.
29. The Courts too have held that they do not make a practice of depriving the successful litigant the fruits of his/her litigation and/or Judgement. However, Court too must ensure that the intended appeal is not rendered nugatory.
30. The Court of Appeal in the case of Butt VS Rent Restriction Tribunal (1982) KLR, held as follows: -
  - “ 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.”

31. In the case of *RWW Vs EKW (2019) eKLR*, the Court highlighted the importance of stay of execution and held as follows: -

“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.”

32. The Court being guided by the above principles for stay of execution and the holdings in the case of *Butt VS Rent Restriction Tribunal(Supra)* will now determine whether the Applicant has meet the threshold for grant of Orders of stay of execution.

33. It is evident that the Judgment was delivered on 7<sup>th</sup> June 2023, and the instant application was filed on 10<sup>th</sup> August 2023, which was more than 60 days. This means that the instant application was not filed immediately after the Judgment. There is no definite determination of what amounts to inordinate delay, but Courts have variously held that even a delay of one day amounts to delay. See the Case of *Utalii Transport Company Ltd. & 3 Others vs. NIC Bank Ltd & Another (2014) eKRL*, where the Court held;

“Whereas there is no precise measure of what amounts to inordinate delay, and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable”

33. However, there is evidence that a similar application for stay was filed on 5<sup>th</sup> July 2023, before the trial Court. That was within a period of 30 days and after being unsuccessful at the trial Court, the Applicant filed the instant application before this Court.



34. In the case of Cecilia Wanja Waweru VS Jackson Wainaina Muiruri & Another (2014) Eklr, the Court of Appeal held: -

“There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case”

In the instant case, though the application was filed after the 60 days, it is evident that the Applicant was involved in further proceedings before the trial Court and therefore the circumstances of this case point to the fact that there was no inordinate delay.

35. On whether the Applicant has demonstrated substantial loss, the Applicant averred that the Judgment is a monetary decree and that if no stay is granted, then the Respondent would be at liberty to extract the Decree and proceed to execute it against the Appellant/Applicants.

36. It was also submitted that the Respondent has no sufficient means of income that would enable him refund the Appellant in the event the appeal succeeds. However, this court is not satisfied that the lack of evidence of the Respondent's ability to refund the money is enough to prove that the Applicant will suffer substantial loss.

37. The fact that the Respondent is not a man of means is not enough to find that he cannot refund the decretal sum in the event the appeal is successful. See the case of Samvir Trustees Ltd VS Guardian Bank Ltd (Milimani) HCCC 795 of 1995 where the Court held: -

“It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss.”

38. Further as the Court determines the application, it will take into account that it should not deprive the successful litigant of the fruits of its Judgment while also ensuring the Appellant's right of appeal is protected and the intended appeal is not rendered nugatory. See the case of Butt vs Rent Restriction Tribunal (1982) KLR 417, cited with approval in High Court Nakuru, Civil Appeal 182 of 2005, Ngotho Commercial Agencies Limited vs George Wanjuki Gethi (Appendix 5) where the court noted as follows;

“It is the discretion of the Court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said the Court has a general rule ought to exercise its best discretion in a way so as not to prevent the appeal if successful being nugatory, per Brett L.J in Wilson vs- Church(No.2) 12 ChD (1879) 454 at P 459. In the same case Cotton L. J said at P 458 “I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory”

39. The Court note that the Judgment of the trial Court is a monetary Decree, which money can be recovered from the Respondent in the event the intended appeal would be successful.



40. On whether the appeal is frivolous or not, this Court will determine whether the appeal is arguable or not. An arguable appeal was determined in the case of Kiu & Another VS Khaemba & 3 Others (Civil Appeal Application E270 of 2021 (2021) KECA 318 (KLR) to mean
- “In law, an arguable appeal/intended appeal is one that need not succeed, but one that warrants the Court’s interrogation on the one hand and the Court’s invitation to the opposite party to respond thereto”.
41. Further on the case of University of Nairobi Vs Ricatti Business of East Africa [2020] eKLR it was held:
- “An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous”
42. The Court has seen a copy of Memorandum of Appeal dated 27<sup>th</sup> June 2023, which raises the Grounds of Appeal. The said three grounds raise an arguable appeal, and failure to issue stay of execution will not render the appeal nugatory.
43. The onus was on the Applicant to demonstrate that the appeal would be rendered nugatory. The Judgment of the Court being a monetary Judgment will not prevent the Applicant from carrying on with its construction work. Therefore, the Court finds that there is no evidence that the appeal will be rendered nugatory.
44. Having now carefully considered the instant Notice of Motion Application dated 10<sup>th</sup> August 2023, the Court finds that the Appellant/Applicant has not met the threshold for grant of stay of execution.
45. Consequently, the Court finds and holds that the Notice of Motion Application dated 10<sup>th</sup> August 2023, is not merited, and the said application is thus dismissed entirely with costs to the Respondent.

It Is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 7<sup>TH</sup> DAY OF DECEMBER 2023.**

**L. GACHERU**

**JUDGE**

**Delivered online in the presence of; -**

Ms Kabaina H/B for Mr. Mutiso for the Appellant/Applicant

Mr Kimani for the Respondent

Joel Njonjo - Court Assistant

**L. GACHERU**

**JUDGE**

**7/12/2023**

