



Gacanja v Njuguna Kahari & Kiai & Co Advocates (Environment and Land Appeal E006 of 2025) [2025] KEELC 3059 (KLR) (2 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3059 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E006 OF 2025**

SM KIBUNJA, J

APRIL 2, 2025

BETWEEN

WILSON GACANJA APPELLANT

AND

NJUGUNA KAHARI & KIAI & CO ADVOCATES RESPONDENT

RULING

[Notice of Motion Dated 10th February 2025]

1. The appellant moved the court through the notice of motion under certificate of urgency dated 10th February 2025, seeking for inter alia stay of execution of the ruling and orders issued on 29th January 2025 by Hon. C. L. Yalwala, SPM, in Mombasa ELCL MISC. No. E045 of 2023 pending hearing and determination of this appeal. The application is predicated on the eleven (11) grounds on its face, and is supported by the affidavit of Wilson Gacanja, appellant, sworn on the 10th February 2025. It is the appellant's case that the Deputy Registrar disregarded his affidavit filed in response to the Notice to Show cause dated 30th October 2024, emanating from the taxing master's decision on the Advocate/ Client bill of costs dated 17th August 2023, that was taxed at Kshs.2,279,740, on the grounds that it was not filed within the seven day's granted on 20th November 2024. That his constitutional right to a fair hearing under Article 50 of the *Constitution* has been infringed as he was condemned unheard, after the court placed procedural considerations over substantive justice when the infraction was curable. That the respondent is in the process of extracting the warrant of arrest following the ruling of 29th January 2025 and executing it against him unless stay order sought is granted .
2. The application is opposed by the respondent through the replying affidavit of Paul Njuguna , managing partner, sworn on 24th February 2025, inter alia deposing that this court lacks jurisdiction to hear the application, and it should be struck out for being frivolous, vexatious, bad in law and contravention of Order 49 of the *Civil Procedure Rules*; that the appellant acted in breach of the Notice to Show cause by failing to attend court during its hearing, and is not deserving of court's discretion;



that the appellant has not come to court with clean hands as he has not complied with the order on the conditional stay.

3. The learned counsel for the appellant and respondent made their oral submissions on 24th February 2025, for and against the application, which the court has considered.
4. The issues for the determinations by the court are as follows:
 - a. Whether the court has jurisdiction to hear and determine this application.
 - b. Whether the application is frivolous, vexatious, bad in law and contravention of Order 49 of the Civil Procedure Rules.
 - c. Whether the appellant has met the threshold for stay of execution order pending hearing and determination of the appeal to issue.
 - d. Who pays the costs?
5. The court has carefully considered the grounds on the application, affidavit evidence, oral submissions by the learned counsel, the record and come to the following findings:
 - a. The CTS record confirms that the appellant commenced this appeal through the memorandum of appeal dated the 5th February 2025, filed on 9th February 2025, at 17:27:10, under receipt reference number E4CKJBLW of Kshs.1550. the instant application was filed on 10th February 2025, at 15:48:16 under receipt reference number E4CKJ46G of Kshs.2250. the respondent's deposition and submissions that no appeal had been filed upon which the application could be based is therefore not correct.
 - b. That the instant application for stay of execution pending hearing and determination of the appeal is not one that falls among those to be heard by the Deputy Registrar pursuant to the special powers conferred under Order 49 Rule 7(2)(b)(x) of the Civil Procedure Rules. Indeed the appellant has not based the application under Order 22 but Order 42 Rule 6(1), (2) & (4) and Order 51 Rule 1 of Civil Procedure Rules, and this court has jurisdiction to hear and determine it.
 - c. That having found that the memorandum of appeal dated 5th February 2025 was filed on the 9th February 2025, and the instant application was filed on 10th February 2025, the court should consider whether the appellant has met the threshold set under Order 42 Rule 6 of Civil Procedure Rules of substantial loss, show the application was filed without unreasonable delay, and provision of security for due performance of the decree. This being a money decree, execution would not otherwise amount to substantial loss unless it is shown that the respondent would likely fail to refund the amount if the appellant was successful. However, the fear of the appellant is that the respondent is likely to have warrants of his arrest issued and if executed, it will result to his being placed in jail, curtailing his liberty. This no doubts would amount to substantial loss, if stay order is not issued. The facts presented are clear that the Deputy Registrar delivered the impugned decision on 29th January 2025, and as this application was filed on 10th February 2025, then it cannot be said that there was unreasonable delay.
 - d. After the application was filed on 10th February 2025, the court certified it as urgent on the same date and issued ex parte interim order of stay of execution, on condition the appellant deposits the whole decretal sum in an interest earning bank account in the joint names of both parties' counsel, or with the court in ten days. The interim order of stay was extended on 24th February 2025 to the 2nd April 2025. That contrary to the contention by the respondent



that the appellant did not comply with that condition, I have confirmed from the CTS that Kshs.2,279,740 was indeed deposited with the court on the 19th February 2025. This deposit certifies the requirement for security for the due performance of the decree.

- e. The court does not need to make any final determinations on any questions of law and facts at this interlocutory stage. The issues relating to the merits or demerits of the appeal will have to wait to be determined after the merit hearing of the appeal. therefore, having found that the appellant has established the threshold required in applications for stay of execution pending hearing and determination of the appeal, the court grants prayer (3) of the notice of motion dated 10th February 2025.
 - f. Under the provision of section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the event unless where the court orders otherwise on good cause. In this instant, though the appellant has succeeded in the application, I am of the view that just will be better served by an order that costs abide the outcome of the appeal.
6. In view of the above conclusions in respect to the notice of motion dated the 10th February 2025, the court finds and orders as follows:
- a. That the application has merit and stay of execution order is granted in terms of prayer (3).
 - b. That the decretal sum deposited pursuant to the order of 10th February 2025 be retained as security provided by the appellant for the due performance of the decree.
 - c. The costs in the application to abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 2ND DAY OF APRIL 2025.

S. M. Kibunja, J.

ELC MOMBASA.

In the Presence of:

Appellant : Mr Atebe for M/s Kagoya

Respondent : Mrs Wambugu

Shitemi – Court Assistant.

S. M. Kibunja, J.

ELC MOMBASA.

