



**Ndubi v Gituma (Sued as the Legal Representative of the Estate of Jeneny Mwihaki Gituma - Deceased) (Environment and Land Appeal E005 of 2023) [2023] KEELC 21514 (KLR) (8 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21514 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E005 OF 2023  
CK NZILI, J  
NOVEMBER 8, 2023**

**BETWEEN**

**TIMOTHY KINYUA NDUBI ..... APPELLANT**

**AND**

**ERIC MWARANIA GITUMA (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JENENY MWIHAKI GITUMA - DECEASED) .. RESPONDENT**

**RULING**

1. By an application dated July 12, 2022, the court is asked to stay the execution of the lower court decree pending the hearing and determination of this appeal. The grounds are set on the face of the application and a Supporting and Supplementary Affidavit by Timothy Kinyua Ndubi, sworn on July 13, 2023 and October 5, 2023, respectively. The applicant avers that the effect of the decree at the lower court via judgment delivered on June 21, 2023, means he has to refund the respondent Kshs.170,000/= plus liquidated damages of Kshs.900,000/=.
2. It is averred that the appeal is arguable, and if the orders sought are not granted, the applicant will suffer greatly, and his appeal will be rendered nugatory. The applicant avers that he is ready to meet any considerations set by the court, including offering the suit land as security; hence, there will be no prejudice and damage to the respondent.
3. The application is opposed through a Replying Affidavit sworn by Erick Mwarania Gituma on September 22, 2023. It is averred that the decretal sum stands at Kshs.1,241,125/= as per the attached decree and certificate of costs marked EMG – 01 (a) & (b). The respondent avers that the application is a delaying tactic to stop him from enjoying the fruits of his judgment, following the default to excise and transfer 40 ft by 50 ft from LR No. Abothuguchi/Gaitu/2234 bought at Kshs.170,000 and paid eight years ago. The respondent says the applicant has been having his cake and eating it simultaneously.



4. Further, the respondent avers that there is no demonstration of substantial loss; the application is, in general terms, sketchy in details, lacks specific details or particulars of substantial loss, and has expended a lot of time and resources so far to secure the decree.
5. On the security, the respondent avers that the applicant has not provided a valuation report of the suit land to show that it was worth the amount decreed. He urged the court to find the application a waste of court time and as falling short of meeting the conditions set in order 42 rule 6 of the [\*Civil Procedure Rules\*](#).
6. In a Supplementary Affidavit sworn on October 5, 2023, the applicant avers that the Memorandum of Appeal raises arguable or trial issues and that he will be prejudiced since he has been in occupation of the suit land, which is likely to be sold in execution of the decree rendering him homeless. The applicant avers the respondent is not in a position to return the land to him if the appeal succeeds, for he will have sold it. The applicant urges the court to preserve the status quo pending the appeal, for he was willing to deposit the title deed as security.
7. In written submissions dated October 5, 2023, the applicant states he has met the conditions for the grant of stay since he applied less than a month after the judgment; his appeal has merits; he is in occupation of the land, which risks auction to meet the decretal sum; the respondent may not return his land and that he was willing to provide security by way of a title deed. Reliance was placed on [\*RWW vs EKW\*](#) (2019) eKLR 1 and [\*Focin Motorcycle Co Ltd vs Ann Wambui Wangui & another\*](#) (2018) eKLR.
8. A party seeking a stay of execution must apply without inordinate delay, demonstrate substantial loss; offer security for the due realization of the decree, and lastly, establish that it is in the interest of justice to grant the orders sought.
9. The applicant filed this application on July 13, 2023 before the decree was extracted, together with a certificate of costs on August 2, 2023. The decree is for a liquidated sum. It arises out of an aborted sale agreement dated April 7, 2015. The default clause indicated that should there be a breach, the defaulting party must pay liquidated damages and refund the expenses and costs accruing to the other party. The applicant says that he risks having his land sold by the decree-holder to recover the debt, which shall render him homeless, on top of prejudicing his arguable appeal. The applicant avers that the respondent will not be able to return his land if he sells, it should his appeal succeed.
10. In [\*James Wangalwa & another vs Agnes Cheseto\*](#) (2012) eKLR, the court said the execution was a legal process and a party should show how the execution will create affairs likely to negate the very core of the appeal. In [\*Getbi vs Getbi\*](#) (2008) eKLR, the court said it was not enough for a party to allege that he was occupying the suit land but must show other factors why the court should stop the decree-holder from enjoying the fruits of his litigation.
11. In [\*NIC Bank Ltd & others vs Mombasa Water Products Ltd\*](#) (2021) eKLR, the court said an arguable appeal must not necessarily succeed but ought to be argued fully before the court so long as it was not frivolous. Further, the court cited with approval [\*Stanley Kangethe Kinyanjui vs Tony Keter and 5 others\*](#) (2013) eKLR, stating that nugatory means worthless, futile, invalid, or trifling.
12. The court further cited [\*Housing Finance Corporation of Kenya Ltd vs Sharok Kber Mohamend Ali Hirji and another\*](#) (2015) eKLR, that undue hardship was a factor to consider in granting a stay in a money decree, out of proportion to any suffering the respondent might undergo while waiting for the applicant's appeal to be heard and determined. In [\*Michael Ntoiti Mitheu vs Abraham Kivondo Musau\*](#) (2021) eKLR, the court cited with approval [\*Visbham Ravji Halai vs Thorton & Turpin\*](#) (1990) KLR 365 that the court has unfettered discretion to grant stay orders and the courts over and above order 42 of the [\*Civil Procedure Rules\*](#) has to consider the overriding objective of the court under sections 1A



and 1B of the Civil Procedure Act on the principle of proportionality and equality of arms which are aimed at placing the parties before the court on equal footing and see where the scales of justice lie because it is the business of the court so far as possible to ensure any transitional motion before it is not rendered nugatory, the ultimate end of justice. The court said it should always opt for the lower rather than the higher risk of injustice.

13. In Samvir Trustee Ltd vs Guardian Bank Limited (2007) eKLR, the court said that while an aggrieved party to a decision has an undoubted right of appeal, the court, in determining whether to stay the decree, must establish if there were exceptional circumstances to sway its discretion while at the same time balancing or weighing the scales to ensure is not impeded from enjoying the fruits of his judgment, more so when the judgment has defined his rights. The court said there must be tangible, empirical, or documentary evidence of substantial loss other than mere assertions.
14. In Kenya Shell Ltd vs Kabiru Karuga (1986) KLR 410, the court said that evidence must be put as to why the respondent should be kept out of their money and that it was not enough to merely state the decretal amount was substantial or if the applicant would suffer loss if the money were paid and that there must be justification for holding that there was the likelihood that the respondent would not repay the decretal sum should the appeal succeed. In Caneland Ltd & others vs Delphis Bank Ltd C. A No. Nai 344 of 1999, the court said that the burden was on the applicant to prove that the respondent could not refund to the judgment debtor any sum paid in satisfaction of the decree. In Ndubiu Gitabi vs Warugongo (1988) KLR 621, the court said security may take the form of a bank guarantee or payment into court so long as it is adequate.
15. Applying the preceding binding caselaw to this application, the decree is about money, not the suit land. There is nowhere that the respondent has stated that the only way to execute the decree is by auctioning the applicant's land. The applicant has not even attached the title deed to the alleged land or stated the nature and value of his developments. There is no evidence that the land has been attached as security or put under the execution process. In a money decree, a judgment debtor has to show his bonafide sources of income and the undue hardship he was likely to suffer, if execution were to proceed. No exceptional circumstances have been demonstrated before the court why the decree-holder should be kept away from the fruits of his labor eight years after he paid Kshs.170,000/= for the aborted sale of the land agreement. The applicant has not even offered to deposit a reasonable proportion of the decretal amount as security. As indicated in the Replying Affidavit, the status and value of the proposed security have not been disclosed.
16. The applicant wants to have it both ways. Security for the due satisfaction of the decree since, in civil matters, a decree is like a debt has not been offered. The applicant has offered no way forward. The applicant is not making it better for either himself or the decree-holder for this court to weigh the scales and find him deserving of the orders of stay. The upshot is that I find that it is not in the interest of justice to grant the orders sought. The Notice of Motion is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 8<sup>TH</sup> DAY OF NOVEMBER 2023**

**In presence of**

C.A Kananu/Mukami

Gachohi for applicant

Muthomi for respondent

**HON. CK NZILI**



**ELC JUDGE**

