



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gachanja v Morusoi (Civil Appeal E075 of 2024)  
[2025] KEHC 231 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 231 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CIVIL APPEAL E075 OF 2024  
JK SERGON, J  
JANUARY 23, 2025**

**BETWEEN**

**DANIEL MUGAMBI GACHANJA ..... APPELLANT**

**AND**

**CHEPKIRUI MORUSOI ..... RESPONDENT**

**RULING**

1. The application coming up for determination is a notice of motion dated 18th December, 2024 seeking the following orders;
  - (i) Spent
  - (ii) Spent
  - (iii) That this Honourable Court be pleased to grant an order of stay of execution of the default judgement dated 13.11.2024 and resultant decree and/or proceedings issued in Kericho Small Claims Court Case No. E349 of 2024 pending hearing and determination of the present appeal.
  - (iv) That the costs of this application be provided for.
2. The application is supported by grounds on the face of it and the supporting affidavit of Daniel Mugambi Gachanja the appellant herein.
3. The appellant avers that a default judgement dated 13.11. 2024 was entered against him and in favour of the respondent in Kericho Small Claims Court Case No. E349 of 2024. He avers that he informed his advocates to file an application to set aside the default judgment.



4. The appellant avers that an application dated 13.11.2024 was filed seeking to set aside the said default judgment by his advocates on record that his defence raised triable issues and the failure to file a response was a mistake occasioned by his previous advocates.
5. The appellant avers that he is aware that the trial court vide a ruling dated 16.12.2024 dismissed the said application hence exposing him to execution proceedings which are underway. He avers that he has been served with warrants of attachment and proclamation notices pursuant to the said default judgment dated 13.11.2024.
6. The appellant reiterates that the default judgment was improper as he was not afforded an opportunity to be heard despite having approached the court timeously and in good faith.
7. The appellant avers that being aggrieved by the decision of the Learned Trial Magistrate dated 16.11.2024 delivered in Kericho Small Claims Court Case No. E349 of 2024, he instructed his advocates to file the present appeal.
8. The appellant avers that the present appeal will be rendered nugatory in the likely event that the respondent proceeds with the execution proceedings and he will be condemned unheard in contrast to the principles of natural justice.
9. The appellant avers that the appeal is meritorious and raises several arguable grounds of appeal, it is therefore not frivolous.
10. The appellant avers that the application has been brought expeditiously and without unreasonable delay.
11. The appellant avers that the respondent's current financial position cannot guarantee that he will be able to repay the decretal sum and interests should the instant appeal succeed.
12. Chepkirui Morusoi the respondent herein filed a replying affidavit in response to the appellant's application for stay pending appeal dated 18.12.2024.
13. The respondent avers that the appeal emanates from a small claims case which has strict timelines and the appellant was privy to this.
14. The respondent avers that the default judgment pronounced by the trial court was proper since the appellant was granted an opportunity to participate in the proceedings and the appellant duly instructed an advocate to represent him in the said proceedings.
15. The respondent avers that the instant application is frivolous and should be dismissed with costs.
16. On 19.12.2024, this court directed that the parties file written submissions within set timelines. At the time of writing this ruling, the parties had not filed their submissions, therefore, this court considered the material on record to arrive at a fair and just determination.
17. I have considered the application for stay, grounds thereof, supporting affidavit and annexures. I have also considered the replying affidavit. The main issue for determination is whether the appellant has demonstrated that the orders for stay of execution pending the hearing and determination of the appeal are merited.
18. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides: "No order for stay of execution shall be made under subrule (1) unless—



- (a) the court is satisfied that substantial loss may result to the 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.
19. In the instant case, the appellant stands to suffer substantial loss of over Kshs. 944,000/= which is the decretal sum as well as costs and interests if a stay of execution is not granted. The appellant avers that the financial position of the respondent herein cannot guarantee that she will be able to repay the decretal sum, costs and interests should the instant appeal succeed. The respondent on her part was adamant that the appellant had not demonstrated substantial loss and that there would be reparations in the unlikely event the appeal succeeds.
20. This court is cognisant of the fact that the application was filed timeously, there was no inordinate delay in bringing the instant application for stay, the ruling which precipitated filing the appeal was delivered on the 16.12.2024 and the instant application for stay was filed on 18.12.2024.
21. As to security of costs, the appellant has not made provision for security, however, this court is not bound by the type of security offered by an applicant. In *Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another* [2018] eKLR the court observed as follows; “Where the Applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the Respondent the fruits of judgement. My view is that it is sufficient for the Applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.” Therefore this court can therefore make appropriate orders which serve the interests of justice.
22. In matters for stay of execution pending appeal, the courts are duty bound to balance the interests of the appellant and those of the respondent. In *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words: “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 judgement. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court, when granting the stay, however, must balance the interests of the Appellant with those of the Respondent.”
23. In the end, the motion dated December 18, 2024 is allowed.
24. Consequently:
  - i. An order for stay of execution of decree of the Small Claims Court is granted pending appeal.
  - ii. Costs of this application shall abide in the outcome of the appeal

**DELIVERED, SIGNED AND DATED AT KERICHO THIS 23RD DAY JANUARY, 2025.**

**J.K. SERGON**

**JUDGE**

In the presence of:

Court Assistant: Rutoh



No appearance for parties.

