



REPUBLIC OF KENYA



KENYA LAW
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**Gicharu v Waweru (Civil Appeal E1403 of 2024)
[2025] KEHC 2565 (KLR) (Civ) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2565 (KLR)

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

CIVIL

CIVIL APPEAL E1403 OF 2024

TW CHERERE, J

FEBRUARY 13, 2025

BETWEEN

ANTHONY KARIUKI GICHARU APPELLANT

AND

WINFRED WANGECHI WAWERU RESPONDENT

RULING

Ruling On Application For Stay Of Execution

1. The Appellant has filed a Notice of Motion dated 17th January 2025, under Order 42 Rule 6 of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act*, seeking an order of stay of execution of the judgment delivered on 14th May 2024 in SCCC No. E5370 of 2023, pending the hearing and determination of his appeal.
2. The application is supported by the affidavit of Anthony Kariuki Gicharu, the Appellant herein sworn on 17th January 2025, in which he avers that the appeal is arguable and that he is willing to deposit security for the due performance of the decree. The Appellant further contends that his insurer, XPLICO Insurance Company was placed under statutory management on 08th December 2023, and the imposed moratorium has affected his ability to settle the judgment sum.
3. The Respondent, Winfred Wangechi Waweru opposes the application through her replying affidavit sworn on 28th January 2025. She argues that the moratorium on XPLICO Insurance does not exonerate the Appellant from liability, asserting that execution should proceed against the Appellant, who may ultimately seek indemnity from his insurer once the moratorium is lifted.



Analysis and Determination

4. The principles for a stay of execution pending appeal under Order 42 Rule 6(1) Civil Procedure Rules (Rules) were enunciated by the Court of Appeal in *Butt v Rent Restriction Tribunal* [1979] eKLR and they require the court to satisfy itself that:
 - a) The application has been made without unreasonable delay
 - b) The applicant has an arguable appeal with a probability of success
 - c) The applicant shall suffer substantial loss if the stay is not granted; and
 - d) The security for due performance of the decree has been provided.
5. The impugned judgment was delivered on 14th May, 2024, and this application for stay was filed on 17th January, 2025 which is 8 months from the date of the judgment and 3 months from 08th November, 2024 when the trial court dismissed an application for stay of execution. Considering the circumstances, this duration does not in my considered view constitute an unreasonable delay.
6. The threshold for an arguable appeal is not whether the appeal will succeed but whether it raises a bona fide issue that ought to be fully ventilated before the appellate court. *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR held that:

“On arguability, an arguable appeal must not necessarily succeed, but one which ought to be argued fully before the court; one that is not frivolous. In addition, one ground of appeal can sufficiently fulfill this condition.”
7. The Appellant contends that the judgment is unenforceable against him because his insurer, XPLICO Insurance, is under statutory management. However, the Court takes judicial notice of the legal position as laid down in *Blue Shield Insurance Company Limited (Under Statutory Management)* [2017] eKLR, where it was held that:

“My understanding of Section 67C (10) of the *Insurance Act* is that declaration of a moratorium can only be made on payment to the policyholders and the creditors as it is meant to protect the insurer against the policyholders and the creditors but not to shield them from meeting their liabilities to third parties.”
8. Based on the above, the argument raised by the Appellant does not constitute a bona fide issue that would form the basis of a successful appeal. The Appellant has, therefore, failed to demonstrate that he has an arguable appeal.
9. The burden of proving substantial loss lies with the Appellant. As held in *Standard Assurance Co. Ltd v Alfred Mumea Komu* [2008] eKLR:

“Substantial loss, in its various forms, is the cornerstone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”
10. The Appellant has not provided any evidence to show that he stands to suffer substantial loss if execution proceeds. Mere assertions of hardship are insufficient in law. In the absence of such evidence, there is no justification for keeping the Respondent from enjoying the fruits of her judgment.



11. The Appellant has conceded that he is willing to deposit security for the due performance of the decree. In *Gianfranco Manenthi & Another -vs- African Merchant Assurance Co. Ltd* [2019] eKLR, the court held that:

“Under this condition, a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security.....”

12. The provision of security is a mandatory requirement under Order 42 Rule 6(2)(b). However, security alone is not sufficient to justify granting a stay where the other requirements have not been met.

13. The power to grant or refuse a stay of execution is discretionary. However, as observed in *Butt v Rent Restriction Tribunal*, (supra) the discretion should be exercised in a manner that ensures that a successful appeal is not rendered nugatory. The Court of Appeal stated:

“The power of the court to grant or refuse an application for a stay of execution is discretionary, and such discretion should be exercised in such a way as not to prevent an appeal, if successful, from being rendered nugatory. 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, if successful, may not be rendered nugatory.”

14. In the present case, the Appellant has failed to demonstrate that he has an arguable appeal or that he stands to suffer substantial loss. These two factors weigh against the issuance of stay orders.

15. In the premises, I find that the Appellant has not met the threshold for an order of stay of execution pending appeal. Consequently, it is hereby ordered:

1. The Notice of Motion dated 17th January 2025 is found lacking in merit and it is dismissed
2. Mention before the Deputy Registrar of this court on 20th March 2025 to confirm filing of record of appeal and for further orders
3. Costs shall be borne by the Appellant

DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ubah

For Appellants - Mr. Bore for K. Itonga & Co. Advocates

For Respondent - Mr. Chahilu for ESK Advocates LLP

