



**Njuguna & another v Gathanga & another (Civil Appeal E955 of 2024)  
[2025] KEHC 2273 (KLR) (Civ) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2273 (KLR)

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

**CIVIL**

**CIVIL APPEAL E955 OF 2024**

**TW OUYA, J**

**FEBRUARY 13, 2025**

**BETWEEN**

**STEPHEN GAITA NJUGUNA & ANOTHER & ANOTHER & ANOTHER &  
ANOTHER & ANOTHER & ANOTHER & ANOTHER ..... APPELLANT**

**AND**

**ESTHER WANDIA GATHANGA ..... 1<sup>ST</sup> RESPONDENT**

**PETER KARIUKI WANYOIKE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This Application emanates from the judgement of C.K. Cheptoo Principal Magistrate in Milimani CCC No. 3561 of 2022 delivered on 26<sup>th</sup> July, 2024. *Vide* a notice of motion application brought under Certificate of Urgency dated 23<sup>rd</sup> September 2024, the applicant seek extension of stay of execution orders of the judgement orders delivered on 23<sup>rd</sup> August, 2024 and the consequent decree thereon be extended pending the hearing and determination of the appeal herein.
2. The Application is supported by affidavit sworn by Edinah Masanya on 23<sup>rd</sup> August 2024 to the effect that judgement was delivered in favor of the Plaintiff/Respondent and for Kshs. 4,222,250 together with costs and interests as against the Defendants/Applicants and that the Applicant is aggrieved by the said judgement and has filed an appeal. The applicant believes that the appeal raises triable and weighty issues that may well lead to the appeal being allowed.
3. The gist of the application is that the stay orders granted by the court earlier lapsed on the 25<sup>th</sup> August 2024 and that the applicants are likely to suffer grave prejudice if the execution takes place before the intended appeal is heard and determined. They are willing to provide security for performance of the judgement and to deposit the same in court pending hearing and determination of the pending appeal. The applicants aver that they are ready, able and willing to comply with the courts directions as to



security for stay of execution believe that the Respondent will not suffer any prejudice if the present application is allowed.

4. The Applicant avers that this application is timeous and within the period of institution of the appeal. It is their prayer that it is lawful, fair and just that the application is heard and orders granted forthwith.
5. The respondent has filed a replying affidavit averring that what is pending in this appeal is the filing of written submissions which can be fast tracked, heard and determined. That he is not opposed to the application so long as the applicant has satisfied the requirement to deposit reasonable security in an interest earning account to be held by the counsel for both parties.
6. This Application has been canvassed by way of written submissions by counsel for both parties. The Applicant's position is that the initial application for stay was necessitated by the delay in obtaining proceedings from the lower Court. The Applicant seeks for extension of the same orders pending hearing and determination of the appeal being that the record has been filed and the appeal is ready for hearing. He relies on the authority of *Butt v Rent Restriction Tribunal* (1982)KLR where the court guided that stay of execution is a discretionary power which should be used in such away as not to prevent an appeal or to render an appeal nugatory should that appeal reverse the judge's discretion. For the above reasons, the applicant submits that his prayer for stay of execution should be granted so as to preserve the status quo pending hearing of the appeal.
7. The Applicant submits that there may be no need for orders for security for due performance as the applicants have shown utmost good faith as they prosecute the current appeal.
8. Counsel for respondent submits that the application is meant to delay the respondent from enjoying the fruits of his judgement and that the applicants have not demonstrated that the appeal has got high chances of success. Counsel states that the applicants are not willing to comply with the conditions of stay by depositing the decretal amount as security for performance. That the applicants have also not demonstrated that they will suffer substantial loss if the orders sought are not granted.
9. This court has considered the application, affidavit and annexures together with submissions by counsel for both parties. The legal provision guiding the grant of stay of execution is premised on Order 42 rule 6 of the *Civil Procedure Rules* and were restated in the case of *Hamisi Juma Mbaya v Amakecho Mbaya* [2018] eKLR where it was held: -
  - “The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:
    1. Substantial loss may result to the applicant unless the order is made.
    2. The application has been made without unreasonable delay, and
    3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.
10. The application herein is for extension of interim stay orders that had been granted earlier by this court. The application for extension was necessitated by the delay in obtaining certified record of proceedings and judgement for purposes of compliance to file the record of appeal. At the time of hearing this application, the record of appeal has since been filed and the appeal is ready for hearing. This court had earlier directed that the Applicant to deposit half the decretal amount in court within 45 days from 25<sup>th</sup> November 2025. This application in my view is timeous as it has been brought pursuant to an existing order which, at the time of the application was due to lapse.



11. It is now for this court to consider whether the applicant has demonstrated the likelihood to suffer substantial loss if the orders of stay are not granted. The Applicants are apprehensive that the appeal which is now ready for hearing may be rendered nugatory if the orders sought for are not granted. At the same time the issue of likelihood to suffer substantial loss cannot be addressed in isolation from the issue of protection of the substratum of an appeal. In *RWW v EKW* (2019)eKLR the court laid down the principle that:

“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 “

12. By dint of order 42 rule 6 of the *Civil Procedure Rules* the grant of orders for stay of execution is discretionary and can be ordered by the court as may deem just. In my view it is in the interest of justice to grant this application for stay in order to preserve the substratum of the appeal and to ensure that the appeal is not rendered nugatory.

13. Based on the above, this court hereby orders that:

- i. Stay of execution orders are granted pending hearing and determination of this appeal
- ii. That order no. i. above is subject to appellant depositing half the decretal amount in court within 21 days from the date hereof.
- iii. That this matter be mentioned before the Deputy registrar for compliance and to be set down for hearing on or before 6<sup>th</sup> March 2025.
- iv. Costs to be in cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13<sup>th</sup> DAY OF FEBRUARY, 2025**

**ROA**

**HON. T. W. OUYA**

**JUDGE**

**23/01/2025**

For Applicant: Herman Tambo

For Respondent...N/A

Court Assistant..... Martin Korir

