



REPUBLIC OF KENYA



**Gaciumau v Ndungu (Civil Appeal E269 of 2024)
[2025] KEHC 3026 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3026 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E269 OF 2024
FN MUCHEMI, J
MARCH 13, 2025**

BETWEEN

GACHUCHA NDEGWA GACIUMAU APPELLANT

AND

JOHN THUO NDUNGU RESPONDENT

RULING

Brief facts

1. The application dated 8th October 2024 is seeking for orders of stay of sale by public auction of LR. No. Ruiru East Block 1/756 slated for 8th November 2024 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 23rd October 2024.

Appellant's/Applicant's Case

3. The applicant states that judgment in Thika Small Claims Court SCCCOMM No. E967 of 2023 was delivered on 25th October 2023 on admission in favour of the respondent in the sum of KShs. 1million. The applicant being unable to pay the debt deposited the title of his land L.R. No. Ruiru East Block 1/756 in court and agreed that the said property can be sold to recover the debt.
4. The applicant avers that he has got a well wisher to pay the amounts owed in three installments to save the said title.
5. The applicant argues that if the property is sold it will render him destitute as the same will be sold by public auction.



6. The applicant avers that he instructed his advocates to file an application for installments which he did on 2nd September 2024 but the trial court dismissed the application on 26th September 2024 thus denying him a chance to redeem his property.
7. The applicant states that on 11th September 2024 he was served with a notification of sale and a redemption notice indicating that the auction process had started.
8. The applicant avers that the instant application is made in good faith and will not occasion any prejudice to the respondent.

The Respondent's Case

9. The respondent opposes the application on the grounds that it is incompetent, premature, vexatious and fatally defective and an abuse of the court process.
10. The respondent states that the applicant ought to deposit security for costs being the decretal sum in court as condition for the grant of stay of execution pending appeal. The respondent further states that the judgment in the instant matter was entered on admission at the sum of Kshs. 1,002,630/- plus costs of Kshs. 71,200/-. The respondent states that upon the applicant failing to settle the said sum, he obtained warrants of arrest which were later stayed on condition that the applicant pay him Kshs. 300,000/- towards the settlement of the decretal sum.
11. The respondent states that on 11th June 2024 the applicant sought for more time to go and dispose of his land parcel LR. No. Ruiru East Block 1/756 and settle the judgment and he was granted three months to seek for a buyer for his land in order to settle the decretal sum but declined or failed to take any steps in that regard. Further, the respondent avers that he personally sourced a buyer for the said land who was ready and willing to purchase it at the tune of Kshs. 13 million but the applicant rejected the offer claiming that the same was too low.
12. The respondent states that on 21st August 2024 when they went back to court, the applicant had not secured any buyer and it is out of that deliberate refusal that the honourable court directed that the said land be sold by way of public auction with a view of settling the judgment due and further to conduct a valuation of the land and submit the valuation report within 14 days to court which he again failed to comply.
13. The respondent avers that the applicant's conduct amounts to a denial of his right to enjoy the fruits of the judgment and his appeal is merely a delaying tactic.
14. The respondent states that the applicant's proposal that a well wisher wishes to pay the said amount in three installments at the final stage of this matter is a waste of judicial time owing to the fact that the same order was given and was never complied with. Further, the applicant's claim of assistance from a purported well wisher is irrelevant as the said well-wisher is a stranger to the court and has not filed any affidavit in support of such allegation on settlement. No evidence has been adduced by the applicant or the alleged well wisher to demonstrate a genuine commitment to settle the decretal amount.
15. The respondent avers that the applicant has failed to show any goodwill or intent to resolve the matter in good faith but is instead frustrating him.
16. The respondent argues that the applicant has failed to demonstrate whether the appeal is arguable or has high chances of success. The respondent further states that the application ought to be dismissed and he proceeds with the execution process as the applicant is denying him the fruits of his judgment noting that judgment on admission was entered on 2nd November 2023 which is over a year now.



17. The respondent argues that the prayers sought to settle the decretal sum by way of installments had been sought severally before the trial court and none was ever complied with hence overtaken by events and res judicata.
18. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

19. The applicant relies on Order 22 Rule 57 of the Civil Procedure Rules and submits that the respondent has not followed the right procedures set down in Section 96 of the *Land Act* to sell the suit land by way of public auction. The applicant argues that the decree holder has not advertised the property as required by law. Further, there is no evidence produced in court to show how advertisement was done and when it was done. The applicant further submits that he has challenged the judgment of the court and selling his land will put him in a precarious position which shall render the appeal nugatory.

The Respondent's Submissions

20. The respondent relies on Order 42 Rule 6 of the Civil Procedure Rules and the case of Antoine Ndiaye vs African Virtual University [2015] eKLR and argues that the applicant has not satisfied the threshold required for the grant of stay of execution. The respondent further relies on the case of James Wangalwa & Another vs Agnes Cheseto [2012] eKLR and submits that the applicant has failed to demonstrate specific harm that cannot be compensated by way of damages. The respondent further submits that having secured a favourable judgment, he is entitled to enjoy the fruits of his labour.
21. The respondent submits that the applicant has consistently failed to comply with court orders, including the directive to seek a buyer for the subject land within three months and to provide a valuation report within 14 days. The respondent further submits that in good faith, he sourced a buyer offering Kshs. 12 million for the land but the applicant rejected that reasonable offer without presenting any alternative. The applicant's conduct demonstrates bad faith and amounts to a deliberate attempt to delay the execution of a valid court judgment denying the respondent the right to enjoy the fruits of the judgment.
22. The respondent submits that the applicant's claim of having secured assistance from a purported well wisher is both irrelevant and unsupported by any evidence. No affidavit has been sworn or filed by the alleged well wisher nor has any commitment to settle the decretal amount been demonstrated. The respondent argues that the lack of candor on the applicant's part, even after judgment was entered on admission, highlights the absence of genuine intent to resolve the matter. The introduction of a well wisher at the final stage appear to be a calculated attempt to delay the proceedings further which not only wastes the court's time but also denies the respondent timely justice.
23. The respondent relies on the case of Gianfranco Manenthi & Another vs Africa Merchant Assurance Company Ltd [2019] eKLR and submits that the applicant has not expressed whether he is ready and willing to offer security for costs. Further, the applicant has not even demonstrated the requirements necessary as to security for costs for the performance of the decree either through a bank guarantee or otherwise.
24. The respondent further relies on Section 27 of the *Civil Procedure Act* and the case of Party of Independent Candidate of Kenya & Another vs Mutula Kilonzo & 2 Others (2013) and submits that costs follow the event and the applicant should be condemned to pay costs.
25. The main issue for determination is whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.



The Law

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal

26. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-
1. “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
 2. No order for stay of execution shall be made under sub rule 1 unless:-
 - a. The Court is satisfied that substantial loss may result to the 1st 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.
27. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
28. Substantial loss was clearly explained in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR:-
- “No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
29. The applicant states that he stands to suffer substantial loss as his land will be sold which will leave him destitute and render the appeal nugatory.



30. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show how execution shall irreparably affect him or will alter the status quo to its detriment therefore rendering the appeal nugatory. In the instant case, the applicant deposited his certificate of title in respect of LR No. Ruiru East Block 1/756 to settle the debt he owes the respondent. Notably, the applicant admitted the debt of Kshs. 1 million and the trial court ordered the applicant to pay Kshs. 500,000/- before 1st December 2023 and Kshs. 50,000/- by way of monthly installments. The applicant failed to honour his pledge and warrants of arrest were issued against him. The applicant thereafter voluntarily deposited his as security for the debt owed which was his land aforementioned. The applicant was given time to look for a buyer of the suit property but he failed to get one. The respondent went ahead to get a buyer for the said property but the applicant rejected on ground that the offer of the price was too low. The trial court gave the applicant a second chance to procure a buyer and directed that in the event he failed to do so the court would issue warrants of sale. The applicant admitted owing the respondent the amount claimed and judgment was entered on admission. Thereafter, the court and the respondent have gone out of their to assist the applicant but it has not been possible.
31. Following the chain of events, the appellant paid KSh. 300,000 as part of settlement of the decretal amount. He then applied to be allowed to pay the balance of the decretal amount in instalments. The court refused to grant the orders in the said application.
32. The applicant in his supporting affidavit has not pleaded substantial loss. He has a duty to establish the fact that he will suffer substantial loss in the event that the orders sought herein are not granted. Having failed to do so and considering the background facts, this application has minimal chances of success.
33. Thus, it is my considered view that the applicant has not demonstrated the substantial loss he stands to suffer.

Has the application has been made without unreasonable delay

34. The ruling was delivered on 26th September 2024 and the applicant filed the instant application on 8th October 2024. Thus, the application has been filed timeously.

Security of costs

35. The purpose of security was explained in the case of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

36. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicant has not offered any security for the performance of the decree.



37. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

38. The court in granting stay has to carry out a balancing act between the rights of the parties. The issue that arises is whether there is just cause for depriving the respondent his right of enjoying his judgment. The applicant has admitted to owing the respondent Kshs. 1 million and judgment was entered to that effect on 25th October 2023/-. The applicant failed to comply with the judgment of the court in 2023 after being given a chance to pay the decretal amount in instalments. Warrants of arrest were issued. The applicant moved the court seeking for orders of staying execution in 2004. The decretal amount has not been paid to date despite the court being so lenient with the applicant. The decretal amount has not been satisfied for over two (2) years. Execution is a lawful process and ought to be allowed to take a place in the event that the judgment remains unsatisfied.

39. It is unjustifiable to deprive the respondent of enjoyment of the fruits of his judgment. Should the orders sought be granted, the respondent is likely to suffer in his long wait than the applicant. The balance of convenience tilts in favour of the respondent in this application.

40. I have further perused the grounds of appeal and without going into the merits of the appeal noted that the appeal has limited chances of success.

41. I find no merit in this application and it is hereby dismissed with costs to the respondent.

42. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 13TH DAY OF MARCH 2025.

F. MUCHEMI

JUDGE

