



**Gulet v Gachehe & another (Civil Appeal E557 of 2024)
[2025] KEHC 2811 (KLR) (Civ) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2811 (KLR)

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

CIVIL

CIVIL APPEAL E557 OF 2024

JN MULWA, J

MARCH 13, 2025

BETWEEN

MOHAMED ABDI GULET APPELLANT

AND

PETER NJOROGE GACHEHE 1ST RESPONDENT

SHADRACK MULANDO 2ND RESPONDENT

RULING

1. For determination is the Notice of Motion dated 3/4/2024 brought by Mohamed Abdi Gulet premised on the provisions of Article 53,159 and 165(6) and (7) of *the Constitution*, sections 1A,1B & 3A and 78 of the *Civil procedure Act*, Order 42, Rules 6 and Order 51 Rules 1 & 15 of the *Civil Procedure Rules* and further supported by his affidavit of an even date together with grounds on its face.
2. It is the applicant's deposition that he came to know the existence of the trial court case by a letter dated 29/11/2022 from the Respondents advocates informing him of a judgment in the trial court delivered on 4/11/2022 where he was a party, yet he had never been served with any court process.
3. He further stated that thereafter, by a motion dated 6/11/2023 he sought to set aside the Ex parte judgment but the motion was dismissed on 4/4/2024 despite glaring trial issues having been raised; and that if orders of stay of execution pending hearing and determination of the appeal, he will suffer substantial loss and render the appeal nugatory, as the respondent will move to execute decree thus denying him a chance to be heard on merit. It is for the said reasons that the applicant in this motion seeks that the order of the trial magistrate dated 4/4/2024 be set aside or varied as well as the stay of execution of the decree be granted pending hearing and determination of the appeal.



4. In opposing the Motion, the Respondents relied on the replying affidavit sworn by its advocate Musili Mbiti, on 29th May, 2024 which the court has carefully considered including the parties submissions.

Issues for determination

- a. Whether the order/ ruling in Milimani Commercial court dated 4/4/2024 should be set aside, and
 - b. Whether an order of stay of execution of the decree should be granted pending hearing and determination of the appeal.
5. On the onset the court finds the applicants prayer number i incompetent in that what is before the court is not hearing of the appeal, but the interlocutory application seeking stay of execution of the impugned ruling denying him an order to set aside the exparte judgment. That said, prayer number 1 is struck out as it cannot be sustained at this stage.
 6. On the stay of execution order, conditions for grant of such an order are set out under Order 42 Rule 6 of the Civil procedure Rules requiring an applicant that the application has been brought without delay, a demonstration that the applicant would suffer substantial loss and damage if the orders are not allowed; and finally, that the applicant offers security for the due performance of the decree.
 7. Upon perusal of the impugned ruling as against the instant application the court is not satisfied that the application was filed within reasonable time. A Period of unexplained six months from the date of delivery of the ruling cannot be said to be reasonable without any explanation.
 8. The court takes guidance from the case of *Korir Salat v IEBC and 7 others Nicholas Kiptoo Arap* [2014] eKLR, wherein the court held that where there is unreasonable delay the delay should be explained to the satisfaction of the court.

The record is clear that nowhere has the applicant said anything about the six months delay.

9. Further the applicant has failed to demonstrate what loss it would incur if the orders are not granted. It is not enough to state. Evidence or explanation ought to be rendered for the court's consideration. See the cited decision above.
10. Security for due performance of the decree must be offered to secure the decree should the appeal not be successful. The Applicant has yet again failed to offer any security.

All in all, the Applicant has failed to comply with the provisions of Order 42 Rule 6 CPR to persuade the court to grant him stay orders.

11. In conclusion, the court finds that both parties herein have gone to substantial lengths to submit on the merits and demerits of the pending appeal and ignored what is before the court, the application for stay of execution pending hearing and determination of the appeal.

Though unfortunate especially for the applicant who is duly represented by an Advocate, the court has no option but to find no merit in the application dated 3/4/2024. It is dismissed with costs.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF MARCH, 2025

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JANET MULWA.
JUDGE

