



**Kamau v Kigutu (Miscellaneous Civil Case E170 of 2024)
[2025] KEHC 3038 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3038 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL CASE E170 OF 2024
FN MUCHEMI, J
MARCH 13, 2025**

BETWEEN

JOSEPH MUGAI KAMAU APPELLANT

AND

BERNARD MURIRA KIGUTU RESPONDENT

RULING

Brief facts

1. The application dated 6th November 2024 seeks for orders of stay of execution in respect of the ruling in Thika CMCC No. E006 of 2020 delivered on 29th October 2024 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 26th November 2024.

Appellant's/Applicant's Case

3. The applicant states that the ruling in Thika CMCC No. E006 of 2020 was delivered on 29th October 2024 whereby the court directed that he pays the respondent Kshs. 1,967,110/- owed to the respondent. Being aggrieved by the impugned ruling, the applicant states that he has filed an appeal challenging the said ruling.
4. The applicant states that for him to offset his debts, he plans to dispose of his property LR. No. 4885/116 from which he hopes to raise Kshs. 7,020,000/- which amount will be used to offset the entire debt owed to the respondent.
5. The applicant prays for 90 days to be able to offset the whole balance after execution of the sale agreement. The applicant argues that unless stay is granted, the appeal will be rendered nugatory. The applicant further states that he stands to suffer substantial and irreparable loss.



The Respondent's Case

6. The respondent avers that the application is singularly meant to bastardize the decree of the honourable court in his favour and reduce his fruits of the judgment to a mere paper decree. The respondent states that he was awarded a decree totaling to Kshs. 2,467,110/- wherein he engaged the services of Front Bench Auctioneers to execute the decree. The court through an order dated 6/2/2024 directed the applicant to pay the decretal balance of Kshs. 1,967,110/- in 6 months installments of Kshs. 327,852/-. Furthermore, the trial court directed the applicant to pay the auctioneers fees which are yet to be paid to date.
7. The respondent avers that the applicant has not been complying with the orders of the trial court as he has only received a total of Kshs. 460,000/- to date from the decretal sum, which is even short to two months installments that he was directed to pay.
8. The respondent states that the applicant further sought an extension of the payment period vide an application dated 21/7/2023 which the lower court dismissed with costs.
9. The respondent argues that the applicant by seeking a further extension of time by 90 days upon completion of the sale agreement, is a demonstration that the applicant's singular motivation is to frustrate the execution of the decree.
10. The respondent states that although the applicant has stated that he appealed the impugned ruling, he has not annexed the memorandum of appeal whereby the court can make an inference from in awarding stay of execution.
11. The respondent states that the pursuant to the applicant's sale agreement dated 22/11/2023, the applicant has had the capacity to offset the decree all along having received a deposit of Kshs. 3,980,000/- which was way above the decretal amount.
12. The respondent further states that the applicant is misleading the court as he has attached a deed of completion dated 10/6/2024 indicating the land reference number as LR No. 4885/116 (LR No. 248042) whereas the number indicated in the sale agreement is LR. No. 4885/116 (LR. No. 268046). Furthermore, the date of the sale agreement has not been included in the deed of completion leaving one to wonder which sale agreement the applicant is referring to.
13. The respondent states that the applicant ought to have paid half the decretal sum to show good faith between the period he sought for an extension of 6 months and currently when he seeks an extension of 90 days after completion.
14. The applicant filed a Supplementary Affidavit dated 10th December 2024 and states that so far he has paid the respondent Kshs. 1,300,000/- towards offsetting the decretal sum. The applicant states that he is ready and willing to clear the balance if granted stay of execution of the impugned ruling.
15. The applicant avers that the different connotations on the parcel of land can only be a typing error and the same should not be used against him as the correct parcel is LR. No. 4885/116 (LR 268046).
16. The applicant states that the court has discretion to grant him stay of execution pending appeal as he has already lodged the memorandum of appeal. The applicant further states that no prejudice will be occasioned upon the respondent if the orders sought are not granted.
17. Parties disposed of the application by way of written submissions.



The Applicant's Submissions

18. The applicant relies on Order 42 Rule 6 of the Civil Procedure Rules and the case of *Matata & Another vs Rono & Another (Civil Appeal E034 of 2024)* [2024] KEHC 2799 (KLR) (19 March 2024) (Ruling) and submits that he has fulfilled the conditions to warrant him the orders of stay of execution. The applicant argues that the respondent has began the wheels of execution which will be prejudicial to him as he is ready and willing to clear the decretal sum as he has already paid Kshs. 1,300,000/-. The applicant further submits that the respondent has already sought services of the auctioneers who have already proclaimed his property and if the same takes place he shall be highly prejudiced as the appeal shall be rendered nugatory. The applicant further submits that he has put up his property for sale and expects at least Kshs. 7,020,000/- which shall cover the entire balance.
19. The applicant submits that the application has been brought timeously as the impugned ruling was delivered on 29th October 2024 and the instant application was filed on 6th November 2024. Furthermore, the applicant submits that he is ready and willing to furnish such reasonable security as the court may deem fit for the due performance of the decree.
20. The applicant relies on the case of *DGM vs EWG* (no citation given) cited with approval in the case of *Party of Independent Candidate of Kenya & Another vs Mutula Kilonzo & 2 Others* [2013] eKLR and submits that he is deserving of costs as he successfully demonstrated that he ought to be granted stay of execution.

The Respondent's Submissions

21. The respondent relies on Order 42 Rule 6 of the Civil Procedure Rules and submits that the applicant has not attached the memorandum of appeal whereby the court can make an inference from, in awarding the stay of execution.
22. The respondent submits that he has a judgment in his favour and has gone to expensive lengths to realize his fruits of judgment. The respondent further submits that there is no basis upon which the court can exercise its discretion as there is no memorandum of appeal on record and the only reason evident is that the applicant's business is not doing well currently and therefore he has decided to sell his property LR. No. 4885/116 IR 248042 for Kshs. 7,020,000/- which amount is expected in 3 months but he has sought an extension of 6 months.
23. The respondent further argues that from the sale agreement, dated 22/11/2023, the applicant received a deposit of Kshs. 3,980,000/- from the sale which means that the applicant has had the capacity to offset the decree all along but decided not to. Furthermore, the deed of completion dated 10/6/2024 the title number indicated is LR. No. 4885/116 (LR No. 248042) whereas in the sale agreement is LR. No. 4885/116 (LR No. 268046) which the respondent argues is meant to mislead the court and deny him the fruits of his judgment.
24. The respondent relies on the case of *Shah vs Mbogo* [1967] EA 116 and submits that discretion being a judicial one must be exercised upon facts not on whims or caprice and therefore the instant application ought to be struck out.
25. The respondent submits that the applicant has already exhausted the provisions of the Civil Procedure Rules and thus by seeking a further extension of time within which to clear the decretal sum is a demonstration that the applicant's singular motivation is to frustrate execution of the decree.



26. The respondent argues that he has gone into expensive lengths to realize the fruits of his judgment including instruction auctioneers to compel the applicant to pay the damages and therefore it would be indeed be extremely prejudicial to disturb the ruling and orders of the lower court.
27. 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.

28. 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.

29. 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.

30. 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.



31. The applicant states that he stands to suffer substantial loss as the respondent shall proceed to execute the decree and has already sought services of the auctioneers who have already proclaimed his property and if the same takes place, it shall render the appeal nugatory.
32. 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 has not shown how he stands to suffer substantial loss. The applicant has only mentioned that should the respondent proceed with the execution, the instant proceedings and the appeal shall be rendered nugatory and an exercise in futility. 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

33. The ruling was delivered on 29th October 2024 and the applicant filed the instant application on 7th November 2024. Thus, the application was been filed timeously.

Security of costs.

34. 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.

35. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicant has only stated that he is ready and willing to furnish reasonable security for the performance of the decree.
36. 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.”

37. The court in granting stay has to carry out a balancing act between the rights of the two parties. The issue that arises is whether there is just cause for depriving the respondent its right of enjoying its judgment. The applicant has admitted to owing the respondent Kshs. 2,467,110/- and filed an application dated 9th July 2024 before the court seeking for extension a period of 6 months in which he



would pay the respondent the decretal sum of Kshs. 1,967,110/-. The applicant avers that he intended to sell his property for a consideration of Kshs. 7,020,000/- which would enable him offset the amounts owed to the respondent. I have perused the sale agreement which is dated 22nd November 2023 and noted that the applicant received a deposit of Kshs. 3,980,000/- for the said sale. It is therefore evident that the applicant had the capacity to offset the decretal sum but he chose to utilise the deposit paid to him in other ways other than settling the decretal amount. Furthermore from The record shows that, the applicant has paid to the respondent only Kshs. 460,000/- which is not a substantial amount compared to the full decretal amount of KSh.1,967,110/- It is therefore unjustifiable and unfair to deprive the respondent from the fruits of his judgment when the applicant is not desirous of paying the respondent his monies.

38. Although the applicant states that he filed a memorandum of appeal, the same has not been attached to this Miscellaneous application. The court can only make a conclusion that no appeal was lodged at the time of filing this application. The ruling having been delivered on 29th October 2024, the applicant would have to seek leave to file an appeal out of time as the statutory period has lapsed. This scenario translates to buying time by the applicant in order to delay execution of the decree.
39. There being no appeal in existence, the applicant has no basis of bringing this application for stay pending appeal. Order 42 Rule 6 applies to appeals already filed and serves in preventing such an appeal from being rendered nugatory through execution to satisfy the decree.
40. Accordingly, it is my considered view that the application dated 6th November 2024 lacks merit and is hereby dismissed with costs.
41. It is hereby so ordered.

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

F. MUCHEMI

JUDGE

