



Gatabaki & another (Suing as the Administratrixes of the Estate of Samuel Mundati Gatabaki - Deceased) v Muga Developers Limited & 4 others (Civil Case 151 of 2017) [2025] KEHC 6744 (KLR) (Commercial and Tax) (22 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6744 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 151 OF 2017**

PM MULWA, J

MAY 22, 2025

BETWEEN

NANCY WANJA GATABAKI 1ST PLAINTIFF

ESTHER SUSAN WANGARI GATABAKI 2ND PLAINTIFF

**SUING AS THE ADMINISTRATRIXES OF THE ESTATE OF SAMUEL
MUNDATI GATABAKI - DECEASED**

AND

MUGA DEVELOPERS LIMITED 1ST DEFENDANT

SURAYA SALES LIMITED 2ND DEFENDANT

SURAYA PROPERTY GROUP LIMITED 3RD DEFENDANT

EQUITY BANK LIMITED 4TH DEFENDANT

WATTS AUCTIONEERS 5TH DEFENDANT

RULING

1. The Applicants seek a stay of this Court's ruling and order issued on 19th September 2024, which directed the release of Kshs. 2,000,000/- held in court to the 4th Defendant, pending the hearing and determination of the intended appeal, and in the alternative, an order to maintain the status quo. This application is brought by way of a Notice of Motion dated 30th September 2024, made pursuant to Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Order 27 Rules 1 and 3, Order 40 Rules 1, 2 and 3 and Order 51 Rules 1 and 4 of the Civil Procedure Rules. It is supported by an affidavit sworn on the same date by Nancy Wanja Gatabaki, the 1st Applicant.



2. The grounds in support of the application are as follows: The applicant is aggrieved by the Court's ruling of 19th September 2024, which dismissed the applicant's application dated 31st October 2023 and ordered the release of the sum of Kshs. 2,000,000/- to the 4th Defendant. The Applicants contend that the Court proceeded on the mistaken belief that the 4th Defendant had obtained a certificate of taxation in respect of the disputed costs amounting to Kshs. 17,576,031/-. The applicant argues that the Court improperly exercised its discretion in directing the release of monies that had been deposited as security to settle costs in HCCC No. 30 of 2020. It is further deposed that the 4th Defendant is in the process of executing the said orders. The Applicants urge that, in the interest of justice, the said amount should remain deposited in court pending the determination of the intended appeal.
3. In response, the 4th Defendant opposes the application and filed grounds of opposition dated 24th October 2024, together with a replying affidavit sworn by Kariuki Kingori on 30th October 2024. In his affidavit, Mr. Kingori deposes that a certificate of taxation was issued by the Court on 5th September 2023, and that a copy of the said certificate was annexed to his earlier affidavit sworn on 3rd April 2024. He avers that, under a consent judgment entered in this matter, the Plaintiffs were required to pay the 4th Defendant's costs, which were either to be agreed upon or taxed in default of agreement.
4. The 4th Defendant contends that the applicants have failed to satisfy the legal threshold for the grant of stay orders, particularly by not demonstrating the substantial loss they would suffer if the stay is not granted. It is further asserted that the Plaintiffs have repeatedly abused the court process over the years by filing numerous applications across various court matters, thereby delaying the conclusion of the case.
5. The 4th Defendant emphasizes that it is a reputable commercial bank with the financial capacity to refund the sum of Kshs. 2,000,000/- in the event the Applicants succeed in their intended appeal.
6. The application was heard through written submissions, which I have considered alongside the supporting affidavit, the grounds of opposition and the replying affidavit. The key issue for determination is whether this court should grant a stay of execution of its ruling of 19th September 2024.
7. The applicant has invoked Order 63 of the Civil Procedure Rules, which empowers the Court to make such interlocutory orders as may appear just and convenient to prevent the ends of justice from being defeated. Specifically, Order 63(e) allows the Court to issue any such orders necessary to preserve the subject matter of the litigation.
8. Further, Order 42 Rule 6(1) provides that an appeal shall not operate as a stay of execution or proceedings unless the court so orders. Thus, the burden lies on the Applicants to satisfy the Court that the circumstances justify the grant of a stay pending appeal.
9. The principles governing the grant of stay pending appeal under Order 42 Rule 6(2) of the Civil Procedure Rules are well settled. The applicant must satisfy the Court that:
 - i. The applicant may suffer substantial loss if the stay is not granted;
 - ii. The application has been made without unreasonable delay; and
 - iii. The applicant has provided such security as the court may order for the due performance of the decree or order.



10. As to whether the application was made without undue delay, the record shows that the ruling was delivered on 19th September 2024, and the application was filed on 30th September 2024. Hence the application was filed promptly and without unreasonable delay.
11. On the issue of substantial loss, the applicants contend that they are likely to suffer irreparable loss if the stay is not granted, as the 4th Defendant may proceed to withdraw the sum of Kshs. 2,000,000/- deposited in court as security. They argue that the release of this sum would undermine the appeal and defeat its purpose.
12. In response, the 4th Defendant maintains that it is a reputable financial institution capable of refunding the amount in the event the appeal succeeds, and therefore, no substantial loss would arise.
13. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court expressed itself as hereunder:

“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...”
14. Applying the above principles to the present matter, this Court is persuaded by the averment by the 4th Defendant that the Applicants have not demonstrated the loss to be suffered which cannot be addressed by the 4th Defendant should the intended appeal succeed. The Court’s view is that there is no demonstrable likelihood of substantial loss if the status quo is not preserved.
15. In conclusion, it is my finding that the Applicants have not met the threshold for the grant of stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules. Accordingly, the Notice of Motion dated 30th September 2024 is bereft of merit and is dismissed with costs to the 4th Defendant.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF MAY 2025.

PETER M. MULWA

JUDGE

In the presence of:

Ms. Small h/b for Ms. Wanyonyi for Plaintiffs/Applicants

Mr. Adan h/b for Mr. Kungu Kimani for 4th Defendant

Court Assistant: Carlos

