



**Ngugi v Mburu & another (Suing as the Personal Representatives
of the Late Simon Njuguna Gachuhi - Deceased) (Civil Appeal
E215 of 2024) [2025] KEHC 11548 (KLR) (5 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 11548 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E215 OF 2024
DO CHEPKWONY, J
MAY 5, 2025**

BETWEEN

JOSHUA NJIHIA NGUGI APPELLANT

AND

**MILKA WANJIKU MBURU & JOHN GACHUHI NJUGUNA (SUING AS THE
PERSONAL REPRESENTATIVES OF THE LATE SIMON NJUGUNA GACHUHI
- DECEASED) RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Honourable P. Muholi in Githunguri
Chief Magistrate's Civil Case No.E053 of 2022 delivered on 14th November, 2024)*

RULING

1. For determination before this Court is the Notice of Motion application dated 11th December, 2024 filed under Certificate of Urgency in which the Appellant seeks the following orders:-
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of the appeal herein, this Honourable Court be pleased to grant an order of stay of execution of the Judgment delivered on 14th November, 2024 by the Honourable Magistrate, P. Muholi, PM, in Githunguri Civil Case No.E050 of 2022.
 - d. That costs of the application be provided for.



2. The Application is based on the grounds as set out on its face and the Supporting Affidavit of Joshua Njihia Ngugi sworn on the instant date. The Applicant holds that the trial court delivered Judgment on 14th November, 2024 which he is aggrieved with which led to the filing of the present appeal.
3. The Respondents opposed the application through their Replying Affidavit sworn on 16th December, 2024 holding that is misguided, frivolous and abuse of court process and thus it should be struck out.
4. The court directed the application to be canvased by way of written submission which the Applicant filed his dated 12th February, 2025 and the Respondent dated 17th December, 2024. The grounds advanced by either party for and against the application in their respective affidavits and submissions together with cited authorities will be analysed and considered in the determination of the application.

Analysis and Determination

5. To determine the application filed herein, the court has read through the grounds set out in its face and Supporting Affidavit thereof, the Replying Affidavit, Further Affidavit alongside the two sets of submissions filed by the parties herein, and finds that the main issue for consideration is whether the Applicant has satisfied the conditions set out by the law to warrant the orders sought be granted.
6. The law on stay of execution is enshrined under Order 42 Rule 6 of the Civil Procedure Rules which states as follows:-
 - “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 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”
7. From this provision, it is trite that for a court to grant stay of execution, a party seeking the same must meet the following conditions which were enunciated in the case of Butt -vs- Rent Restriction Tribunal[1979]eKLR as follows:-
 - a. The application has been made without unreasonable delay.
 - b. The Applicant will suffer Substantial loss unless the order is made.
 - c. The Applicant has offered security for due performance of the decree.
8. With regard to filing the application without unreasonable delay, it is worth noting that the Judgment herein was delivered on 14th November, 2024 and the present application filed on 11th December, 2024 which is within reasonable timelines hence the Applicant has satisfied the first condition.
9. On the second condition requiring the Applicant to demonstrate the substantial loss he is likely to suffer, the Applicant has stated that he is apprehensive the Respondent might extract a Decree and proceed to execute the same against his assets if the order for stay of execution is not granted and yet it is unlikely that the Respondent will be in a position to refund the said decretal sum if it is paid to him in the event the appeal succeeds. The Respondent, in opposing the Applicant’s prayer has submitted that the Applicant has not attached any Decree to show that execution is imminent and neither has he demonstrated the financial loss he is likely to suffer. The Respondent submitted that she is a business lady and therefore able to refund the decretal amount if paid.



10. It is this Court's finding that even though the Applicant has not demonstrated imminent execution of Decree, or financial loss, considering the period the appeal may take to be heard and determined, the Respondent is likely to more and extract the Decree for execution if the Applicant is not offered any protection and the appeal may be rendered nugatory.
11. In the case of Kenya Shell Limited –vs- Benjamin Karuga Kibiru & Another [1986] eKLR, the Court had the following to say on what substantial loss is:-

“Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the Respondents should be kept out of their money”
12. Lastly on the issue of security for the due performance, the Applicant has stated that he is ready and willing to furnish reasonable security as shall be guided by the court even though the Respondent has opposed the grant of the orders sought, she has appreciated the court's discretion and submitted that if the court is inclined to grant the same, it should do so on condition that the Applicant deposits the entire decretal sum in court pending the hearing and determination of the appeal. In the case of Gianfranco Manenthi & Another –vs- Africa Merchant Assurance Company Ltd [2019] eKLR, the Court in addressing the issue of depositing security provided for a situation where, in the event the appeal fails, a party in proceedings that involve money decree does not have to initiate execution proceedings which just go on to delay litigation. The Court held:-

“... the Applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his Judgment in case the appeal fails...”
13. In an application for stay of execution pending appeal, the court should be more concerned with preserving the rights of both parties since there is a Judgment issued which may be affirmed or set aside on appeal. In the case of RWW –vs- EKW [2019] eKLR, held:-

“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 nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
14. Having considered whether the Appellant has satisfied all the conditions set out in law to warrant grant of orders of stay of execution, the Court finds that it will be in the interest of justice to allow the application dated 11th December, 2024 but on the following terms:-
 - a. That there be a stay of execution of the Judgment and Decree in Githunguri Civil Case No.E050 of 2022 on condition that the full decretal sum be and is deposited in a joint interest-earning account in the names of both counsel for the parties within forty-five (45) days from the date hereof.



- b. The Appellant/Applicant to file and serve a Record of Appeal within thirty (30) days from the date of this ruling.
- c. The Deputy Registrar to call for and avail the original Record of Proceedings in Githunguri CMCC No.E050 of 2022.
- d. Failure to comply with orders (a) and (b) will render the application dismissed and the Respondent be at livery to execute.
- e. Mention on 16th June, 2025 before the Deputy Registrar for parties to confirm compliance and take further directions on hearing of the appeal.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 5TH DAY OF MAY , 2025.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Mwangi counsel for Applicant

Mr. Oleva holding brief for Mr. Njuru counsel for Respondent

