



Gateri v Otuke (Civil Appeal E045 of 2025) [2025] KEHC 8631 (KLR) (19 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8631 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E045 OF 2025
EM MURIITHI, J
JUNE 19, 2025**

BETWEEN

ESTHER GATERI APPELLANT

AND

SAMSON OINO OTUKE RESPONDENT

RULING

1. The applicant filed a Notice of Motion dated 4th April 2025 seeking the following orders:
 1. Spent.
 2. Spent.
 3. That this honourable court do grant the applicant a stay of execution of Small Claims Court No. E001 of 2025 dated 25th march 2025 pending hearing and determination of the appeal/
 4. That costs of this application be granted.
2. The application is based on the principal ground that the Small Claims Court had no jurisdiction to entertain the suit.
3. The Applicant in her supporting affidavit of 7/4/2025 depones that the respondent has threatened to execute the judgment even before expiry of the period prescribed for appeal has lapsed and that the appeal would be rendered nugatory and she would suffer substantial loss.
4. The Respondent filed a Replying Affidavit sworn on 25/4/2025 indicating that the applicant had not raised the issue of jurisdiction at the trial court and it was only raised post judgment with a view to avoid the applicant's legal obligation of settling the decretal sum.



5. The trial Court’s framing of the issue for determination indicates its understanding of the dispute before the Court as follows:

“Issues, Analysis and Determination

8. As stated earlier, it is common ground that the Respondent received a sum of Ksh.130, 000/- from the claimant to lease a portion of her land from a car wash business. The parties do not agree on the terms of the agreement. Thus the issues for determination before this Court are:
- a. Whether there was an oral agreement between the parties;
 - b. What the terms of the agreement were;
 - c. Who is in breach of the agreement; [and]
 - d. What remedies should be granted.”
6. The Memorandum of Appeal dated 4/4/2025 set out the primary ground of appeal in terms that “the learned Magistrate erred in law by handling a lease matter while the court had no jurisdiction to do so hence a miscarriage of justice was occasioned.”
7. By Order 42 Rule 1 of the Civil Procedure Rules an appeal to the High Court shall be by way of a Memorandum of Appeal filed as follows:

- “(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
- (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”

8. The Memorandum of Appeal was filed within time in accordance with Section 79G of the [Civil Procedure Act](#) provides that:

“79G. Time for filing appeals from subordinate courts

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

[[Act No. 10 of 1969](#), Sch.]”

Whether stay of execution should be granted

9. The Court’s power to grant an order for stay of execution is provided for under Order 42 rule 6 (1) and (2) of the Civil Procedure Rules as follows:

- “(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 order 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 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.

10. The appeal was filed within the 30 day period prescribed under section 79 G of the [Civil procedure Act](#) and the application for stay was filed on 7/4/2025 without unreasonable delay.
11. The appellant has an arguable case as to the jurisdiction of the Small Claims Court as the matter concerns lease of land and an arguable case does not mean a case that must eventually succeed. The issue isolated by the trial court concerned the interpretation of the terms of an agreement for lease of land, which fell through prompting the Respondent to sue for monies paid under the agreement in the “suit for refund the sum of Ksh.130,000/- together with interest and costs.”
12. Section of 13 of the Environment and [Land Act](#) provides for the jurisdiction lies with the Court and magistrates to whom such jurisdiction is delegated over the matters:
 - “(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;”
13. The present suit is distinguishable, it would appear, as a suit for refund of monies paid under an agreement for lease of land rather than a suit for specific performance or enforcement of obligations under the lease.
14. Without expressing a concluded view at this stage it would appear that the case for the refund of money is one that the Small Claims Court as distinguished from the magistrate’s court on a land may dealt with. However, an arguable case does not mean one that must succeed, and the existence of one point of an arguable case is sufficient to support an application for stay of execution pending appeal.
15. If the decree for the payment of the sum of Ksh.160,700 is executed in the meantime, and the appeal eventually succeed, the appeal will have been rendered nugatory. The applicant will have suffered substantial loss if he is not able to recover the amount paid, although there is nothing in the Affidavits to show that the respondent Officer of the Court would not be able to refund the sum.
16. However, the Respondent has himself suggested a deposit of the decretal sum in into Court rather than payment in part or whole of the decretal sum.



Orders

17. Accordingly, the Court finds merit in the application for stay of execution dated 4th April, 2025 and the same is granted as prayed subject to the conditions as to security and filing of the Record of Appeal set out hereinbelow.
18. The appellant shall deposit the entire decretal sum of Ksh.160,700/= into court within fourteen (14) days.
19. The Record of Appeal shall be filed within 14 days.
20. In default of any of the above conditions the stay herein granted shall lapse and be of no effect, and the respondent shall be at liberty to execute the decree.
21. Directions as to hearing on 8/7/2025.
22. The costs of the application shall be costs in the appeal.

Orders accordingly.

DATED AND DELIVERED THIS 19TH DAY OF JUNE 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Munene Muriuki for the Applicant.

Mr. Ouke the Respondent.

