



REPUBLIC OF KENYA



KENYA LAW
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**Joseph & another v Kimani (Civil Appeal E376 of 2023)
[2025] KEHC 10284 (KLR) (18 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10284 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E376 OF 2023
H NAMISI, J
JULY 18, 2025
FORMERLY KIAMBU CIVIL APPEAL NO. E419 OF 2023**

BETWEEN

NDIGIRI GATHIMA JOSEPH 1ST APPELLANT

JOSPHAT KINYANJUI KIBUNYI 2ND APPELLANT

AND

MARY MWIHAKI KIMANI RESPONDENT

RULING

Introduction

1. The Appellant/Applicant filed a Notice of Motion dated 1 December 2023 seeking the following orders:
 - i. (spent)
 - ii. That this Honourable Court be pleased to grant an interim order for stay of execution of the judgment and/or decree entered herein at Gatundu CMCC No. 452 of 2018 on 25 October 2023 pending the hearing and determination of this application inter partes;
 - iii. That this Honourable Court be pleased to grant an interim order for stay of execution of the judgment and/or decree entered herein at Gatundu CMCC No. 452 of 2018 on 25 October 2023 pending the hearing and determination of the Appellant's appeal, to wit, Kiambu HCCA E419 of 2023;
 - iv. That the costs of this Application be in the cause.
2. The Notice of Motion, which is supported by the Affidavit sworn by the 2nd Appellant, is premised on the following grounds:



- i. That the Respondent filed a civil suit in Gatundu Chief Magistrate's court claiming for recovery of general damages which suit was heard and determined on 25 October 2023;
 - ii. That in the judgment, the trial court assessed damages and awarded the Respondent a total sum of Kshs 4,243,346/-;
 - iii. That the Appellants, being aggrieved and dissatisfied with the said decision of the Honourable Court, have filed an appeal therefrom notwithstanding that there is no stay of execution of the judgement and resultant decree;
 - iv. That the appeal is meritorious with high probability of success;
 - v. That the appeal shall be rendered nugatory if the orders sought herein are not granted as the Respondent may proceed to execute the Decree and thereby attach and sell the Appellant's property in execution of the judgement/decree;
 - vi. That the Respondent's source of oncome is unknown and in the event of the decretal sums are paid out, and eventually the appeal is allowed, as likely, the Appellant shall face considerable difficulties in restitution;
 - vii. That the Appellant is willing and capable of furnishing security as this Honourable Court may order for the due performance of the decree pending the hearing and determination of the appeal and towards that end, the Applicants propose to furnish security in terms of a Bank guarantee.
3. The proceedings in the Court file make reference to a Replying Affidavit. Regrettably, the same is not available in the court file nor on the online filing platform. This Court will, therefore, determine the matter without the benefit of having read the Replying Affidavit. Similarly, the Supporting Affidavit is not available to the Court.
 4. Parties were directed to canvass the Application by way of written submissions. I have keenly read the Submissions filed by each party.

Analysis

5. The principles upon which the Court may grant stay of execution pending appeal are well settled. Order 42 rule 6 of the Civil Procedure Rules requires that an applicant seeking a stay of execution pending appeal must demonstrate that:
 - a. Substantial loss may result to the application unless the order is made;
 - b. The application was made without unreasonable delay; and
 - c. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as given by the applicant
6. In *Antoine Ndiaye -vs- African Virtual University* (2015) eKLR, Gikonyo, J opined thus:

“...stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under order 42 rule 6 of the Civil Procedure Rules...”



7. From the foregoing, it is evident that the power to grant stay of execution pending appeal is an exercise of the discretion of the Court on the Applicant meeting the conditions set out therein. It is noteworthy that the three conditions must be met simultaneously as they are conjunctive and not disjunctive.
8. In the time acclaimed case of *Butt-vs- Rent Restriction Tribunal (1982) KLR*, the Court gave guidance on the exercise of discretion in granting of stay of execution pending appeal. It was held that:
 - “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
9. The first consideration is whether the application was filed timeously. Judgement of the lower court was rendered on 25 October 2023. The Memorandum of Appeal was filed on 24 November 2023, well within the 30-day period.
10. The Applicants/Appellants contend that they will suffer substantial loss if the orders sought are not granted since the source of the Respondent’s income remains unknown. The Respondent, on the other hand, contends that the Applicants have not shown the substantial loss that will result if the stay is granted. Notably, the Respondent has not indicated how she would be able to refund the Appellants if their appeal were to succeed. A successful party should not be denied the fruits of his/her judgment. However, it is incumbent that the party rebuts the assertion that it would not be in a position to repay the sums paid in the event that the appeal is successful. No such rebuttal is forthcoming from the Respondent.
11. It is the duty of the applicant in an application for stay of execution to establish that they will suffer substantial loss if the orders sought are not granted. In *Machira t/a Machira & Company Advocates -vs- East African Standard [2002] KLR 63*, the Court of Appeal, in considering what amounts to substantial loss, held as follows:

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.”

12. On the third consideration, the Applicants depone that they are ready to meet any conditions on security as directed by the Court.

Disposition

13. The upshot is that the Appellants’ Notice of Motion dated 1 December 2023 is merited. There shall be a stay of execution of the judgement and decree of Hon. D. N. Musyoka, S.R.M (Mr.) delivered on 25 October 2023 in Gatundu CMCC No. 452 of 2018 pending the hearing and determination of the appeal on the following conditions:
 - i. The Appellants shall provide a Bank Guarantee for the sum of Kshs 4,000,000/=, as security for the decretal sum within 30 days of this Ruling;
 - ii. The Appellants shall file and serve the Record of Appeal within 30 days of this Ruling;
 - iii. In the event of failure to comply with order (i) above, the stay of execution orders shall automatically be vacated and the Respondent shall be at liberty to proceed with execution of the decree;
 - iv. The costs of this Application are in the cause

DATED AND DELIVERED AT THIKA THIS 18 DAY OF JULY 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Appellant/Applicant: Ms. Kitonga h/b Mr. Mumma

Respondent: N/A

Court Assistant: Libertine Achieng

