



REPUBLIC OF KENYA



KENYA LAW
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**Kuria v Kamau & another (Civil Appeal E303 of 2024)
[2025] KEHC 11116 (KLR) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11116 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E303 OF 2024
FN MUCHEMI, J
JULY 24, 2025**

BETWEEN

DANIEL GITAU KURIA APPELLANT

AND

ANN WAITHERA KAMAU 1ST RESPONDENT

DENNIS KAMAU MWAURA 2ND RESPONDENT

RULING

Brief Facts

1. The applications dated 6th November 2024 and 17th January 2025 are similar and seek for orders of stay of execution against the ruling in Ruiru Magistrate’s Court MCCC E055 of 2023 delivered on 22nd October 2024 pending the hearing and determination of the appeal.
2. The respondent opposed the application and filed a Replying Affidavit dated 5th December 2024.

Applicant’s Case

3. The applicant states that default judgment in Ruiru MCCC E055 of 2023 delivered on 21st September 2023 and upon instructing an advocate to apply to set aside the judgment, the application was granted on condition that he pays Kshs. 20,000/- thrown away costs and file a defence within a specified time. The applicant states that his advocate did not inform him on the timelines as directed by the court. He further states that he paid throw away costs but his advocate failed to file his defence within the stipulated time prompting the lower court to reinstate the default judgment entered against him. Being aggrieved with the said ruling the applicant states that he has preferred an appeal.
4. The applicant states that the respondent has taken out warrants of attachment against his property and have threatened to attach. Thus if status quo is not granted, the applicant argues that he shall suffer irreparable damage as the appeal shall be rendered nugatory.



5. The applicant argues that the respondent shall not suffer any prejudice if the orders sought are granted.

The Respondents' Case

6. The respondents state that they bought property from the applicant at a consideration of Kshs. 4,400,000/- vide sale agreement dated 10th September 2024. Thereafter one Muthoni Mbugua and her son Simon Kimani Mbugua claimed that the applicant had obtained the title to the said land fraudulently and sued the applicant and themselves in Thika Law Courts Case No. 16 of 2015. The court held that the applicant had obtained the said title fraudulently and ordered for its cancellation and ordered the applicant to pay the plaintiff and the respondents costs of the suit. Further, the respondents aver that the court held that they were not aware of the fraud and that they had recourse against the applicant. The applicant appealed the decision of the trial court to the High Court which upheld the lower court's decision.
7. The respondent state that they then filed a case Ruiru MCC E055 of 2023 for refund of the purchase price and damages. The applicant offered to sell them another plot of land but upon identifying one, they never heard from him again. Thus default judgment was entered and the applicant sought to have it set aside which the court allowed based on some conditions. The applicant never complied with the said conditions and his counsel at the time chose to withdraw from representing him out of frustrations.
8. The respondents state that the trial court thereafter reinstated the judgment and allowed them to proceed with execution and the applicant has once again rushed to Court to Appeal against the lower court's decision. It is evident that the applicant has been misusing the court to delay the course of justice.
9. The respondents aver that they are innocent purchasers who have been put to great loss by the applicant and request the court to put an end to it.
10. Directions were issued that parties put in written submissions and the record shows that only the applicant complied by filing submissions on 15th May 2025.

The Applicant's Submissions.

11. The applicant relies on Order 42 Rule 6 of the Civil Procedure Rules and the cases of Congress Rental South Africa vs Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & Another (Garnishee) (2019) eKLR and Machira t/a Machira & Co. Advocates vs East African Standard (No. 2) (2002) 2 KLR 63 and submits that the respondents have attached his property where his family call home for over 10 years. the property is not only peculiar but has also passed down to him by his parents and as such it cannot be compensated as it cannot be replaced being ancestral land. Thus if the court does not grant stay of execution he shall be rendered homeless.
12. The applicant submits that the ruling in the matter was delivered on 22nd October 2024 whilst the instant application was filed on 6th November 2024, a period of two weeks from the date of delivery of the ruling. Thus the application was filed timeously.
13. The applicant submits that he is willing to deposit a title deed of the property that is attached for sale as security in court and any additional security the court may elect.



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.

14. 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.

15. 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.

16. 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.



17. The applicant argues that he stands to suffer substantial loss as the respondents have attached his property which is his matrimonial and family home and cannot be replaced as it is situated on ancestral land. Thus he and his family shall be rendered homeless.
18. 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 that execution shall irreparably affect her or will alter the status quo to its detriment therefore rendering the appeal nugatory. In this appeal, the applicant has not shown that he stands to suffer substantial loss. The applicant has just averred that he and his family shall be rendered homeless as the respondents have attached his home where he lives with his family. The applicant has said he is ready to provide security being the title to the disputed piece of land. By offering the title deed in issue as security does not portray seriousness by the applicant. In the event that this appeal is not successful, the applicant stands to lose the land. It is trite that execution is a lawful process, the applicant has not shown that he stands to suffer substantial loss should execution be carried out. It is noted that for any loss suffered, the applicant can be compensated by way of damages. Accordingly, it is my considered view that the applicant has not demonstrated the substantial loss it stands to suffer.

Has the application has been made without unreasonable delay.

19. The ruling was delivered on 22nd October 2024 and the applicant filed the instant application on 6th November 2024. Thus the application has been filed timeously.

Security of costs.

20. 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.

21. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicant has offered his title deed to the property the respondents have attached as security for the due performance of the decree.
22. Additionally, grant of stay being a discretionary order, the court is expected to balance out the interests of the successful litigant and the applicant's unfettered right to file an appeal to fully ventilate her grievances. This was well stated in the case of M/s Porteitiz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1997 where the court held:-

That the right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.
23. Bearing the said balance in mind and considering the provisions of Order 42 Rule 6 of the Civil Procedure Rules, it is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal.



24. Accordingly, the applications dated 6th November 2024 and 17th January 2025 lack merit and are hereby dismissed with costs to the respondents.
25. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 24TH DAY OF JULY 2025.

F. MUCHEMI
JUDGE

