



REPUBLIC OF KENYA



**Gichuru v Kilinga (Civil Appeal E020 of 2023)  
[2024] KEHC 1031 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1031 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CIVIL APPEAL E020 OF 2023  
AC MRIMA, J  
FEBRUARY 8, 2024**

**BETWEEN**

**STEPHEN NJARAMBA GICHURU ..... APPELLANT**

**AND**

**JOAB AMBAKA KILINGA ..... RESPONDENT**

**RULING**

1. This ruling is in respect of an application by way of a Notice of Motion dated 25<sup>th</sup> May, 2023. It was filed by the Appellant herein.
2. The application sought the following reliefs: -
  1. That this application be certified as urgent and be heard *ex parte* in the 1<sup>st</sup> instance.
  2. That the Honourable Court be pleased to grant orders of stay of execution of the decree dated 16/10/2019 in KCMCC No.267 OF 2014 pending the hearing and determination application *inter partes*.
  3. That the Honourable Court be pleased to grant orders of stay of execution of the decree dated 16/10/2019 in KMCC NO.267 OF 2014 pending the hearing and determination of this appeal.
3. The application was supported by the grounds on its face and further by the duly sworn Affidavit of the Appellant herein.
4. The gist of the application was that by the judgment of the trial Court delivered on 16<sup>th</sup> October 2019, the Respondent herein succeeded in his claim on damages arising out of a road traffic accident in Kitale



Chief Magistrates Civil Suit No. 267 of 2014 Joab Ambaka Kilinga vs. Stephen Njaramba Gichuru & Another (hereinafter referred to as 'the suit').

5. In the said judgment, the trial Court found the Defendants wholly jointly and severally liable for the accident and assessed damages as follows: -
  1. Liability at 100% against the Defendants.
  2. Special damages at Kshs. 306,810/=.
  3. General Damages at Kshs. 2,000,000/=.
  4. Dentures and special shoe at Kshs. 120,000/=.
6. On learning of the outcome of the suit, the Appellant was wholly dissatisfied with the judgment and filed a Notice of Motion dated 28<sup>th</sup> November, 2022 in the suit where he sought to set-aside the impugned judgment.
7. The application was dismissed vide a ruling delivered on 24<sup>th</sup> April, 2023. The Appellant then preferred this appeal by filing a Memorandum of Appeal dated 5<sup>th</sup> May, 2023. He also filed the instant application on 6<sup>th</sup> June, 2023.
8. The Appellant posited that he was apprehensive that there was imminent threat of execution by the Respondent such that if the stay orders are not granted, he will suffer substantial loss and will be condemned unheard, hence, prejudiced. In the main, the Appellant contended that he was never aware of the suit and that he was not the owner of the offending motor vehicle.
9. The Appellant filed submissions in support of the application. He also referred to several decisions. He pleaded that the application be allowed.
10. The application was opposed by the Respondent. He filed a Replying Affidavit to that end. On his part, the Respondent contended that the Appellant was fully aware of the suit, that he was in fact represented by Counsel and that the judgment was regular and not ex-parte.
11. The Respondent also filed written submission in urging this Court to dismiss the application.
12. Order 42, Rule 6 of the [Civil Procedure Rules](#) provides that an Applicant must satisfy the following conjunctive requirements for the grant of stay of execution pending appeal; that is to say: -
  - i. The application has been made without unreasonable delay;
  - ii. Substantial loss may result to the Applicant unless the order is made; and
  - iii. That the Applicant is willing to furnish such security as the court order for the due performance of such decree.
13. It is not lost that the purpose of stay pending appeal as held in the case of [RWW vs. EKW](#) [2019] eKLR, is as follows: -

... 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... Indeed, to grant or refuse an application for stay of execution pending appeal is



discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.

14. The application shall, hence, be determined under the three parameters captioned above.

**Whether the application has been filed timeously:**

15. This can be determined from the transpirations in the matter.
16. Judgment at trial was entered on 16<sup>th</sup> October, 2019. Thereafter, the Appellant filed an application to set-aside the judgment on inter alia grounds that he was never aware of the suit. The ruling was rendered on 24<sup>th</sup> April, 2023. The Appellant then filed the Memorandum of Appeal before this Court on 5<sup>th</sup> May, 2023. The instant application was filed on 6<sup>th</sup> June, 2023. The application was, therefore, filed around a month after the delivery of the ruling.
17. This Court, therefore, finds and hold that the period taken to file the application was not inordinate considering the fact that the Appellant had to liaise with Counsel and accordingly give instructions.

**Whether the Applicant will suffer substantial loss:**

18. The aspect of substantial loss was discussed in *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR 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.

19. The principal contention by the Appellant in the application is that he was not aware of the proceedings in the suit and was also not the owner of the offending vehicle. As such, satisfying the decree would be unfair and he stood to lose irreparably.
20. This Court would restrain itself from expressing its position on the above issues which are subject of the main appeal. However, in the event the Appellant succeeds in the appeal and also in the suit, then he would not be liable to satisfy the decree. Conversely, if he fails, he would have further delayed the Respondent's realization of the fruits of the judgement. In such a case, a balance ought to be struck.

**Furnishing of security:**

21. The Appellant's position on this issue was that since the impugned judgment was irregular, then it ought to be set aside as of right and as such there was no need of him furnishing security.
22. As said above, this Court is not dealing with the main appeal at this point in time. The issues raised by the Appellant shall be at the heart of the appeal.
23. In stay of execution applications, the Court has discretion to order parties to furnish security in appropriate instances.



24. On a consideration of the above conditions, and for equity sake, it is this Court's position that a conditional stay of execution order be granted in the unique circumstances of this matter.
25. Having so said, the application is determined in the following manner: -
- a. There be a stay of execution of the judgment and decree in Kitale CMCC No. 267 of 2014 on condition that the sum of Kshs. 500,000/= (Kenya Shillings Five Hundred Thousand Only) be deposited in Court within 30 days of this ruling.
  - b. In the event of default on the part of the Appellant, the order of stay of execution of the judgment and decree will automatically lapse and the Respondent shall be at liberty to execute for the entire decretal sum.
  - c. Since the proceedings in the suit are typed, certified and ready for collection, this appeal is hereby admitted into hearing.
  - d. The appeal shall be heard by way of written submissions.
  - e. The Appellant shall file and serve a Record of Appeal together with written submissions within 30 days of this ruling.
  - f. Once served, the Respondent shall file and serve his written submissions within 14 days of service.
  - g. Matter shall be fixed for further directions on a date to issue.
26. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**A. C. MRIMA**

**JUDGE**

Ruling No.1 virtually delivered in the presence of:

No appearance for Mr. Kimani, Learned Counsel for the Appellant/ Applicant.

No appearance for Mr. Mafumbo, Learned Counsel for the Respondent.

Duke – Court Assistant.

