



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyambura v Gichia (Civil Appeal E173 of 2022)  
[2023] KEHC 949 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 949 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E173 OF 2022  
RB NGETICH, J  
FEBRUARY 16, 2023**

**BETWEEN**

**SUSAN NYAMBURA ..... APPELLANT**

**AND**

**FRANCIS NGURU GICHIA ..... RESPONDENT**

**RULING**

1. The application before the court for determination dated 27<sup>th</sup> July 2022, seek stay of execution of the judgment/ Decree of Thika SCC Comm No. E169 of 2022 pending the hearing and determination of the appeal. The application is supported by the annexed affidavit of Susan Nyambura sworn on 27<sup>th</sup> July 2022. She deposes the 30% penalty is enforceable but the contract of sale is null and void. She admitted to owing the Respondent Kshs. 231,000/=, which she urges the court to allow her to pay in instalments of Kshs. 30,000/= monthly. She is willing to deposit a security of Kshs. 200,000 in court.
2. In response, the Respondent filed a replying affidavit sworn on 13<sup>th</sup> October 2022. He deposes that the trial court did not err in treating the debt admitted by the appellant as a civil debt and the appellant should not avoid payment of the interest. He further stated that the applicant is deceitful to the court in her inability to repay the debt as she has offered a similar amount owed to the Respondent as security to the court and the applicant has come to court with unclean hands; the application is frivolous, vexatious and a pure waste of the court's time.
3. In addition to grounds of opposition, the Applicant filed notice of preliminary objection on the following grounds: -
  - a. The Respondent sued successfully at the Small Claims Court.
  - b. The judgment was delivered on 28<sup>th</sup> June 2022.
  - c. The applicant did not seek a stay of execution in the lower court.



- d. Leave to appeal at the High Court was not sought and
  - e. The application is an abuse of the court process.
4. The application was canvassed through written submissions with each party complying.

### **Applicant's Submission**

5. Counsel for the Applicant filed submissions on 22<sup>nd</sup> December 2022. He submitted that the issue for consideration by the court is whether it ought to extend the temporary stay of execution issued; and court should be guided by two factors as hereunder: -
- a. Whether there is a sufficient cause and
  - b. Whether the applicant will suffer a substantial loss if the orders sought are not granted.
6. Counsel submitted that the Respondent will not be in a position to refund the decretal sum if the same is paid to him and ground 1 and 2 of the preliminary objection fail to meet the threshold of a preliminary objection. Further that Order 42 Rule 6 (6) does not provide for failure to seek a stay in the lower court and an appeal from the decision of the trial court lies as a matter of right to the applicant and thus leave to appeal was not necessary.
7. Counsel urged the court to extend stay orders until the determination of the appeal.

### **Respondent's Submissions**

8. Counsel for the Respondent filed written submissions on 8<sup>th</sup> December 2022. He submitted that the appeal as filed ought to be dismissed as the applicant failed to seek leave of the court to appeal and cited Section 75 of the *Civil Procedure Act* and stated that the current appeal is not an appeal as a matter of right.
9. Counsel further submitted that this appeal is a waste of court's time as it does not disclose triable issues; that the Respondent is entitled to costs as awarded by the trial court. He urged the court to dismiss the application dated 27<sup>th</sup> July 2022 and release to the Respondent the security for costs deposited into court.

### **Analysis and Determination**

10. I have considered the averments by parties herein, the grounds of opposition and the submissions filed. The issue for determination is whether he has met prerequisites for grant of order for stay of execution. Order 42 rule 6(2) of the *Civil Procedure Rules* provides 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.
  - 1. An application for a stay of execution of a decree or order pending appeal should satisfy the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules- as set out above.



2. In the instant case, the applicant contends they will suffer substantial loss if stay orders are not granted; she stated that the respondent has not demonstrated that he is able to refund the sum if the appeal succeeds. She has demonstrated she is willing to pay security of Kshs. 200,000/= into court.
  3. The judgment of the trial court was issued on 28th June 2022 and the current application seeking a stay of execution was filed on 28<sup>th</sup> July 2022, thirty (30) days from the date of delivery of judgment. I am satisfied there has been no inordinate delay in bringing the instant application.
14. On whether substantial loss will be occasioned to the Applicant if stay is not granted, I note that there is no clear indication that the respondent will be in a position to refund the decretal amount in the event that the Applicant succeeds in the appeal. There is therefore likelihood of the applicant suffering substantial loss if execution is not stayed.
15. On the issue of security for costs, the Applicant has made a deposit of the decretal amount in court as security as per the orders of this court of 28<sup>th</sup> July 2022. The appellant/applicant has therefore complied with the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules and in an attempt not to render the appeal nugatory, I will not devolve into the merit of the appeal. I do allow the application date 27<sup>th</sup> July 2022. The decretal amount to remain in court until the determination of the appeal.
16. Final Orders:-
1. I hereby stay of execution of the decree in Thika SCC.Com Case no. E169 of 2022 on condition that the decretal amount deposited in court remains until hearing and determination of the Appeal herein.
  2. Costs of the Application to abide by the outcome of the appeal.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023.**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Martin – Court Assistant

Mr. Mwaura for Respondent

No appearance for Applicant

