



REPUBLIC OF KENYA



KENYA LAW
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**Gathii v Mwatha (Civil Appeal 125 of 2022)
[2023] KEHC 22473 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22473 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 125 OF 2022
SM MOHOCHI, J
SEPTEMBER 19, 2023**

BETWEEN

PHILIP MAINA GATHII APPELLANT

AND

STEPHEN MWAURA MWATHA RESPONDENT

RULING

1. Before me is a Notice of Motion Application dated December 8, 2022, filed pursuant Order 42 Rule 6 (1) of the [Civil Procedure Rules](#) to the seeking the following orders Respondent: -
 - i. Spent
 - ii. That this court be pleased to stay execution of the decree issued on April 1, 2022 or any other date and all subsequent orders emanating thereof until this application is heard Inter-Partes.
 - iii. That this court be pleased to stay execution of the decree issued in NAKURU CMCC NO 383 of 2019 and all subsequent orders until the Appeal herein is heard and determined.
2. The Application is supported by thesworn affidavit of Philip Maina Gathii dated December 8, 2022, and is based on the following grounds;
 - a. The applicant's health status;
 - b. That there is a Moratorium Declared on all Claims involving Resolution Insurance Company Limited in which category the respondent's claim falls.
 - c. That the applicant is likely to suffer irreparable damage if execution against his Properties is allowed to proceed.



- d. That the Appeal preferred has merit.
 - e. That the subordinate court has exhausted the Stay Procedures and declined to Stay the execution.
3. The Matter came up before court on the February 28, 2023 whereby parties by consent elected to obtain a ruling on the application based on the filed pleadings.
 4. The respondent swore a replying affidavit on December 13, 2022 in opposition to the aforesaid application and filed written submissions on the January 11, 2023.
 5. The Applicant never filed written submissions.

Submissions by the Respondent

6. The respondent submits that, a lawful judgement was delivered on February 15, 2022, by Hon Orange in his favor and the appellant neither appealed nor sought a review of the said judgement of the or at all.
7. That in the absence of a Memorandum of Appeal, he went ahead and commenced execution proceedings against the appellant who woke up from slumber and filed the present application.
8. That the respondent was well within the law at the time of the commencement of execution proceedings against the appellant, hence the said exercise was valid, legal and lawful.
9. The respondent submit that, following lawful commencement of execution proceedings, then it's only fair that the appellant pays the auctioneers' fees too.
10. That, it is the respondent's submission that the appellant should offset the entire decretal sum considering the moratorium does not specifically shield the appellant herein against execution and that moratorium came into force too late in the day when the court had delivered a judgement in his favour and is only applicable to matters that had not been filed against the insured of Resolution insurance company.
11. It is submitted that, at the time of enforcement of the moratorium herein, judgement in the aforesaid matter had already been delivered and that the moratorium against the insured of Resolution insurance is not applicable to the appellant in this case.
12. It is the respondent's case that the aforesaid application is a ploy by the applicant to deny him from enjoying the fruits of a lawful judgement. It is his case that no memorandum of Appeal was filed by the appellant ever at all. It is his case that the court should balance the respondent's right to a lawful judgement. It is also the Respondents' case that, the applicant has not demonstrated in what way he stands to suffer irreparable loss should the court decline to grant applicant's stay orders.
13. Finally, the respondent is of view that the court should order the applicant to deposit the entire decretal sum with the respondent in the wider interests of justice.
14. It is submitted that, the Application invokes, the discretionary powers of court, that such powers must be exercised judiciously. That the conditions to be met before stay is granted is provided by Order 42 Rule 6(2) as follows:-

“No order for stay of execution shall be made under sub rule (i)” Unless:-

- a. The court is satisfied that substantial loss may result to the applicant unless the order is made.



- 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. The Court of Appeal in *Butt v Rent Restriction Tribunal* (1982) KLR 417 gave guidance on how a court should exercise discretion and held that:
- a. The power of the court to grant or release an application for stay of execution is a discretionary power.
 - b. 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.
 - c. The court in exercising its powers under order XLI Rule 4(2)(b) of *Civil Procedure Rules* can order security upon application by either party or on its own motion. Failure to put security for costs as awarded will cause the order for stay of execution to lapse”.
16. The court shall preoccupy itself to the preconditions for granting stay of execution where there exists a judgment legally entered in favour of one party against the other.
17. In the case of *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR, the court thus held that:-
- “...the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.
- Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine
18. The court equally notes that the applicants' challenge on Appeal is on a ruling post facto of the judgment dated February 15, 2022, and that the Judgment remains unchallenged to date.
19. All the three pre-conditions for grant of stay have not been demonstrated, the court finds that a substantial loss may be occasioned with the execution against the applicant who has not offered any security while craving for the relief.



20. In the upshot the court in exercise of its discretion and in the interests of justice orders and directs as follows;
- a. A conditional Order of Stay execution of the Judgment and decree issued in NAKURU CMCC NO 383 of 2019 is hereby issued pending Determination and Hearing of the Appeal.
 - b. The appellant shall deposit with the respondents Advocate 50% of the decretal sum within Sixty (60) days from today.
 - c. The appellant to file and serves a record of appeal within Sixty (60) days of this ruling.
 - d. Costs shall be in the cause

It is so Ordered.

SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 19TH SEPTEMBER, 2023.

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MOHOCHI S.M

JUDGE OF THE HIGH COURT

