



REPUBLIC OF KENYA



KENYA LAW
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**Omboga v Mbaru (Civil Appeal 174 of 2023)
[2023] KEHC 27452 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 27452 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 174 OF 2023
DO CHEPKWONY, J
SEPTEMBER 21, 2023**

BETWEEN

JOSPAT MOMANYI OMBOGA APPELLANT

AND

GRACE WANJUGU MBARU RESPONDENT

RULING

1. What is before this court for determination is a Notice of Motion application dated 7th June, 2023 seeking the following orders:-
 - a. Spent.
 - b. That the Firm of G.M. Orina & Co Advocates be granted leave to come on record after entry of judgment.
 - c. Spent.
 - d. That pending the hearing and determination of the intended appeal, there be a stay of execution of the Warrants of Attachment dated 31st May, 2023.
2. The Application is based on the grounds set out on its face and the Supporting Affidavit sworn by Josphat Momanyi Omboga on 7th June, 2023, wherein the Applicant avers that the subordinate court in Ruiru SPMCC No. E029 of 2022 delivered a Judgment in favour of the Respondent for the sum of Kshs. 400,000/= together with costs and interest of the suit. The Applicant filed an application seeking orders for stay of execution and for payment in monthly instalments but the subordinate court vide a Ruling delivered 25th May, 2023 dismissed the said application for stay.
3. The Applicant has now lodged the present appeal against the said Ruling alongside an application seeking stay of execution. The Applicant holds that there is a threat of execution if the warrants of attachment are not stayed and that the appeal has a high chance of success.



4. The Respondent filed Replying Affidavit sworn on 27th June, 2023 opposing the application on the grounds that it is meant to keep her from enjoying the fruits of her Judgment. She states that the trial court rightly exercised its discretion in delivering the Judgment and therefore there is no genuine reason for setting aside or varying the Judgment. The Respondent therefore urges the court to dismiss the application.
5. The court has considered the applicant's submissions dated 10th July, 2023 and the authorities cited therein.

Analysis and Determination

6. In considering the application, I have read through the affidavits in support and in opposition thereof, alongside the written submissions filed by either party and find the issue for determination is whether the application has merit?
7. The law on stay of execution is enshrined under Order 42 Rule 6 of the [Civil Procedure Rules](#) which provides as follows:-

Order 42 Rule 6(2) of the [Civil Procedure Rules](#) which provides:-

“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”
8. On the purpose of an application for stay of execution pending appeal the court in [RWW -vs- EKW](#) [2019] eKLR, held:-

“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.

9. It is trite law that for the court to grant stay of execution three conditions must be met:-
 - a. The application has been made without unreasonable delay.
 - b. The Applicant will suffer Substantial loss
 - c. The Applicant has offered security for due performance of the decree.
10. On the first condition, the Ruling herein was delivered on 25th May 2023 and the present application was filed on 7th June 2023 which was timely and without unreasonable delay hence this condition has been fulfilled.
11. On the second condition of substantial loss, the applicant stated there is real and imminent threat of execution since the Respondent instructed Icon Auctioneers who issued Warrants of Attachment and



Proclamation Notice. The court in the case of *Kenya Shell Limited –vs- Benjamin Karuga Kibiru & Another* [1986] eKLR held:-

“Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”

12. The court finds that there although there is proof of warrants of execution it is not sufficient to show that he will suffer substantial loss.

13. Lastly is the issue of security for the due performance, the Applicant has not offered any security in the Affidavit in order to fulfil this condition. The issue of security was discussed in the case of *Gianfranco Manenthi & Another –vs- Africa Merchant Assurance Company Ltd* [2019] eKLR, held:-

“... 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 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 degree in order to enjoy the fruits of his judgment in case the appeal fails...”

14. The Applicant in this case has only fulfilled one out of the three conditions for the stay of execution orders to issue. Although the court is not required to consider the merits of the appeal at this juncture to determine whether it will succeed or not, it ought to establish whether the appeal is arguable or not. The Court of Appeal in *Joseph Gitabi Gachau & Another –vs- Pioneer Holdings (A) Limited & 2 Others* [2009]eKLR on arguable appeals held;-

“...On our part, after considering the rival submissions by the parties, the ruling of the learned Judge below together with pleadings we are satisfied that the appeal is indeed arguable. This, in essence, does not mean an appeal which must necessarily succeed, but of course, one which ought to be argued fully before the Court.”

15. In this case looking at the grounds of appeal and the circumstances the court finds that the appeal though it may appear to be arguable it will not render the appeal nugatory if the stay orders are not granted.

16. Further the court must strike a balance between the rights of the Applicant to seek stay of execution and the rights of the successful litigant who should not be kept from enjoying the fruits of her Judgment.

17. In this case, the court finds that the Notice of Motion application dated 7th June, 2023 lacks merits and is hereby dismissed with costs to the Respondent. The interim stay orders in force have now been vacated.

It is so ordered.

RULING DATED AND SIGNED AT KIAMBU THIS 21ST DAY OF SEPTEMBER, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:



No appearance for and by Applicant

Mr. Kimani counsel for Respondent

Court Assistant - Martin

