



**Gichaba v Waweru & another (Civil Appeal E155 of 2023)
[2023] KEHC 23279 (KLR) (9 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23279 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E155 OF 2023
SM MOHOCHI, J
OCTOBER 9, 2023**

BETWEEN

WILFRED MOKEMA GICHABA APPLICANT

AND

RUTH MUTHONI WAWERU 1ST RESPONDENT

CLEOPAS MATENGA 2ND RESPONDENT

RULING

1. No Application has been placed before this Court for determination.
2. The Court however notes the filed written submissions in the absence of any directions ever being made by this Court.
3. It would seem that the Respondents herein are without notice and have thus filed no pleadings.

Analysis & Determination

4. The principles upon which this Court may grant stay of execution pending appeal are well-settled as enshrined in Order 42 Rule 6 of the [Civil Procedure Rules](#), which requires an applicant seeking a stay of execution pending appeal to demonstrate that: -
 - a. Substantial loss may result to the applicant unless the order was made;
 - b. The application was made without unreasonable delay; and
 - c. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the applicant.



5. A stay of execution of judgment/decreed should only be granted where sufficient cause is shown. In *Antoine Ndiaye v African Virtual University* (2015) eKLR Gikonyo J opined that -

“....stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the Court should be guided by the three prerequisites provided under order 42 rule 6 of the *Civil Procedure Rules...*”

6. An Order of stay of execution pending appeal is a discretion of the Court. In *Butt v Rent Restriction Tribunal* (1982) KLR the Court gave guidance on how such discretion should be exercised and held that –

“1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. 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. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The Court in exercising its powers under Order XLI rule 4(2)(b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

7. The primary purpose of stay of execution is to preserve the status quo pending the hearing of the appeal. In *RWW vs. EKW* [2019] eKLR, it was observed that:

“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.”

8. Even in the absence of an Application for stay, bearing in mind the need to expedite the hearing and determination of the Appeal, this Court notes that, the Judgment in Nakuru CMCC No E287 of 2021 is the lead file subsuming CMCC No E263 of 2021, CMCC No. E261 of 2021, CMCC No 054 of 2021, CMCC No E262 of 2021 all as consolidated on the 8th April 2022. It thus follows that, should this Court not issue Stay Orders, execution may ensue while Stay Orders have been granted in the four



(4) related cases, which cumulatively exposes the Appellant to substantial loss. That is would be in the interest of justice the Court to mitigate the same, pending hearing and determination of the Appeal.

9. In the upshot of the above this Court in exercise of its discretion and in the interests of justice, grant the Applicant a conditional Order for stay of execution of judgment/Decree in Nakuru CMCC No 287 of 2021 on the following condition;
- a. That the Applicant shall Pay to the 1st Respondent, 50% Half the Decretal Amount in judgment/Decree in Nakuru CMCC No 287 of 2021, within the next thirty (30) days from the date hereof.
 - b. That the Applicant shall deposit, half the decretal amount in a joint interest-earning bank account to be held in the Names of the Counsel for the Applicant and Counsel for the Respondent within the next thirty (30) days from the date hereof.
 - c. The Applicant shall set-down the Appeal for hearing within the next 45 days from the date hereof.
 - d. The Costs of this Application is awarded to the Respondents.
 - e. A default of Order (a) or (b) above by the Applicant, shall automatically lapse the Order of Stay of Execution of Judgment/Decree granted.

It is so ordered.

SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 9TH DAY OF OCTOBER 2023

MOHOCHI S.M

JUDGE

