



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Gataka v Mwangi (Civil Appeal E013 of 2024)  
[2024] KEHC 14125 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14125 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CIVIL APPEAL E013 OF 2024  
AK NDUNG’U, J  
NOVEMBER 13, 2024**

**BETWEEN**

**SALOME MUTHONI GATAKA ..... APPELLANT**

**AND**

**CHARLES KINGORI MWANGI ..... RESPONDENT**

**RULING**

1. This ruling concerns the notice of motion herein dated 26/04/2024 brought under Article 48 and 50 of *the Constitution*, Order 42 rule 6 and Order 51 rule 1 of the Civil Procedure Rules, sections 1A, 1B and 3A of the *Civil Procedure Act* for orders that the court do issue stay of execution of decree delivered by Hon. L. G. Nyaga in Civil Case No. E188 of 2022 and any consequential decree or orders pending the hearing of the appeal. Interim orders were granted by this court on 08/05/2024.
2. The application is grounded on the grounds on the face thereof and is supported by an affidavit of Salome Muthoni Gataka, the Applicant. She averred that she was granted 30 days stay which have already expired and she is apprehensive that the Respondent may attach her property in the process of execution. That if stay is not granted, she will not have any means of recovering decretal amount if the appeal succeeds. That the appeal has high chances of success since it is arguable, not frivolous and as such, ought to be given an opportunity to argue the same. That she is willing to comply with any condition that the court may impose including deposit of security. She deponed that the Respondent does not stand to suffer prejudice if the orders sought are granted and that the appeal will be rendered nugatory if the motion is not heard.
3. The Respondent filed a replying affidavit dated 12/06/2024. He averred that the application does not satisfy the conditions for granting stay of execution; that the Applicant has not produced any documentary evidence to show that she will suffer substantial loss if the decree is executed; that he is in a position to reimburse the decretal sum and releasing the same to him will not render the appeal nugatory as he is a man of means; that the Applicant has failed to demonstrate the loss she



will suffer therefore, there is no reason to deprive him the enjoyment of the fruits of a judgment; that the Applicant has not adduced evidence to show that she will be prejudiced if stay is not granted and he is the one who is bound to suffer prejudice due to prolonged delay in enjoying the fruit of his judgment and owing to the amount he spent for treatment and motor vehicle repair. He deponed that the Applicant has not offered to furnish any amount as security leading to the presumption that the application is a tactic to frustrate execution. That if stay is granted, he urged the court to order that 70% of decretal sum be released to him and 30% be deposited in a joint interest earning account.

4. In response, the Applicant filed two supplementary affidavit one sworn by her and the other one by her husband. She averred that the assets and documents listed by the Respondent in his replying affidavit are not conclusive proof that he is a man of means neither are they proof of resources and ability to pay the decretal sum if released to him in that, the log books attached do not show that the motor vehicle and the motor cycle are registered in his name and their value is not ascertained. As to the bank account attached, she averred that it shows that he does not have a consistent source of income. That he admitted in his replying affidavit that he is a man of straw by stating that he is bound to suffer prejudice due to financial drawback he faces owing to the substantial amount spent in treatment and motor vehicle repair thus, pointing to a man who does not have a source of livelihood.
5. Further to that, the pictures attached of his home are not accompanied by a title deed therefore, he has failed to proffer any evidence that he will be in a position to refund the decretal sum if the same is released to him. As to security she offered the property known as Nanyuki Municipality Block 6/142 valued at Kshs.18,000,000/- which is the matrimonial property. She offered the title to be deposited in court. In the second supplementary affidavit, Geoffrey Waweru Mbato averred that he is the Applicant's husband and consent to the title proposed by the Applicant been deposited to court as security.
6. The application was canvassed by way of written submissions. The Applicant's counsel submitted that the Applicant stands to suffer substantial loss for there will be no means of recovering the decretal amount should the appeal succeed since the financial capacity of the Respondent is not a matter that is within the Applicant's knowledge. That the burden was on the Respondent to prove that he is a man of means and the document he attached in his replying affidavit are not sufficient enough to show that he is a man of means. That he has not proved ownership of the motor vehicle, he has not proved the current market value of the motor vehicle and its value is unascertainable given the fact that it was damaged during the accident subject to this appeal and therefore, cannot fetch close to half the decretal sum. Further, the documents attached in respect of the motorcycle do not ascertain ownership as it is not registered in his name and therefore, the court cannot ascertain whether he is the owner as the log book provides another person as the owner. The current market value is not also ascertained.
7. As to the bank account, he submitted that the amount been deposited is little and inconsistent and therefore cannot support that he is a man of means and cannot be expected to pay back the decretal amount. As to the house, he maintained that the title documents and valuation report were not attached. Therefore, the Respondent has failed to show that he is not a man of straw and as such, the Applicant stands to suffer loss should the decretal sum be paid to him. As to deposit of security, the counsel submitted that the Applicant has offered her matrimonial property which is registered under her husband name who has given consent for the same to be used as security. That the property is valued at Kshs.18,000,000/- which is way above the decretal sum. He urged the court to find the security offered as sufficient.
8. The Respondent also filed written submissions. As to whether the Applicant has proved substantial loss, the Respondent counsel argued that the Applicant must show that execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant being the successful



party in the appeal. That the Applicant has asserted that she stands to suffer loss since she is not conversant with the Respondent's financial position whereas there is no material presented before the court to show that she will suffer substantial loss if stay is not granted. He submitted that the Respondent is in a position to reimburse the decretal sum and releasing part of the decretal sum will not render the appeal nugatory. Further, the Respondent has demonstrated through annexures CKM1 to CKM4 that he is a man of means and financially capable to pay back the decretal sum. That the Respondent stands to suffer prejudice due to financial setbacks caused by hefty medical and motor vehicle repair expenses. Further, the Applicant has not offered any amount as security and mere willingness to furnish the same cannot suffice. That having not furnished the security, the Respondent is not in apposition to determine whether or not the Applicant has financial capability to settle the decretal sum.

9. He filed further submissions whereby he argued that a deposit of the title deed in the name of a 3<sup>rd</sup> party cannot suffice as security to guarantee payment of decretal sum. That the title document can only be applied as security if a charge is registered in favour of the decree holder in line with section 56 of the Land registration Act and section 79 and 80 of the Land Act which the Respondent and the husband has not offered to register in favour of the Applicant. That the question that arise is how will the Respondent realize such security in the event the decretal sum becomes due.
10. I have read through the application, the replying affidavit, supplementary affidavits and I have considered rival arguments by the parties herein.
11. Order 42 rule 6 (1) grant this court power to order for stay by stating that;

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

12. The principles guiding the grant of stay of execution pending appeal are provided under Order 42 rule 6(2) of the Civil Procedure Rules which states;

“(2) No order for stay of execution shall be made under subrule (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.”



13. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution 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.”

14. See also the case of *Halal & Another v Thornton & Turpin Ltd, (1963) Ltd* [1990] eKLR where the Court of Appeal held that:

“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay. In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted...”

15. The court must also be satisfied that there is an arguable appeal before granting stay of execution as was held in the case of *Benedict Ojou Juma & 10 Others v A.J. Pereira & Sons Ltd* [2016] eKLR, thus;

“The applicant must first satisfy the court that appeal or intended Appeal is not frivolous, that is to say, that it has an arguable Appeal.”

16. Has the Applicant satisfied the above conditions? As to arguability of appeal, the Court of Appeal in *Mwalimu & 6 others v Halal & another (Civil Application E091 of 2022)* [2023] KECA 634 (KLR) held that;

“It is therefore important for the applicant to satisfy the Court that the ground or intended ground is bona fide without satisfying the Court that the said ground will necessarily succeed. As long as the point raised is bona fide and ought to be argued fully before the Court, the same meets the arguability or non-frivolity test.”



17. I have perused the memorandum of appeal attached to the Applicant's replying affidavit and I do not consider it to be frivolous.
18. As to whether there was inordinate delay in filing the application, the trial court judgment was delivered on 27/03/2024 and the Applicant was given 30 day stay. The instant application was filed on 29/04/2024 thus there was no delay in filing the instant application.
19. As to whether substantial loss will be occasioned, the Applicant was supposed to demonstrate how the same was likely to occur as was held by Musinga J in *Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001* stated that;

“It is not enough for an applicant to merely state that it is likely to suffer substantial loss, it must make effort to demonstrate how the same is likely to occur. Disruption of business and loss of reputation can only be suffered if stay of execution was refused and the applicant refused to pay or became unable to pay and auctioneers had to move in to carry out execution. “Substantial loss” is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and the applicant is therefore forced to pay the decretal sum.”
20. This being a money decree, the Applicant ought to place before court such material as would indicate, for instance, that the Applicant may have difficulties recovering the decretal sum should she succeed in his appeal.
21. Applicant claimed that he stands to suffer substantial loss since the Respondent has not proved that he is financially capable to refund the decretal amount if the same is released to him. The Respondent on the other hand argued that he is a man of means and he attached documents relating to a motor vehicle, motor cycle and pictures of his homestead and his bank account. In rebuttal, the Applicant argued that the Respondent did not prove ownership of the said listed properties and his bank account did not show that he has a consistent income and therefore, he has failed to prove that he is a man of means.
22. The court in National Industrial Credit Bank Limited -V- Aquinas Francis Wasike and Another (UR) C.A. 238/2005 stated:-

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the respondent or lack of them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”
23. The Respondent attached his bank account statement and as alleged by the Applicant, the amount credited is very little and not consistent. The motor cycle log book does not indicate that he is the owner though he attached a sale agreement. The log book for the motor vehicle is not under his name. The money transfer form is not legible so one cannot discern whether the same was meant for the vehicle though there is an acknowledgment by the seller of the motor vehicle acknowledging receipt of the purchase price. He also attached pictures of his homestead but did not attach the title deed. It is my view that the Applicant sufficiently proved that he is a man of means.
24. The other condition is furnishing of security. The Applicant has offered a title deed in the name of her husband. She claims that the property is matrimonial property. Her husband also filed a supplementary



affidavit offering the said title as security. The Respondent counsel submitted that a title cannot be used as security unless that title is charged in favour of the decree holder as that will bring difficulties in realizing the decretal amount.

25. I agree with the Respondent’s counsel that this being a money decree, a title cannot be used as security. I am guided by the decision in *Onesmus Mburu Njuguna vs Samson Kitire Kuna* [2007]eKLR where the Court stated;

“The judgment against the appellant is a money decree. In the circumstances, it would be fair and just that the security to be deposited should be in form of money and not a title deed of a parcel of land. I think it would be unjust to the respondent if this court were to accept the proposal by the appellant that he deposits a title deed instead of cash as security pending the hearing and determination of the Appeal. The purpose of security is to secure the interests of a respondent pending the hearing of the appeal. In the instant application, the respondent was awarded a money decree. The security should therefore be in form of money. I therefore hold that the security offered by the appellant is not appropriate for the circumstances of this case.”

26. See also *Ph Ogolla- Onyango v Daniel Githegi* [2020] eKLR where the court stated thus;

“With regard to the requirement that the Applicant avails the security for the due performance of the money decree. Am guided by cited authorities that suggest that deposit of title documents cannot suffice where there is a money decree.... In the instant case, the judgment is of a money decree; the title document is not sufficient security. It would be deposited in court and the Respondent has no access or knowledge of it. The same if allowed would be deposited with Deputy Registrar and the Respondent would have no access and security to it. It is not sufficient security even if the appeal is heard and determined, the title document cannot be transferred to any party, sold or disposed of.”

27. The Applicant has not offered any security for granting of the orders sought. The law is clear that the provision of security for the due performance of the decree is a mandatory requirement in the granting of an order for stay of execution. The court has discretion to order for security to be deposited.
28. On the whole and on the material before me, am satisfied the interests of justice would be met by the issuance of an order for stay of execution but subject to appropriate security.
29. With the result that a stay of execution be and is hereby issued pending the hearing and determination of the appeal herein subject to a deposit of half the decretal amount in a joint interest earning account in the names of the advocates on record for the parties within 30 days hereof. In default of such deposit, the stay lapses.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**A.K. NDUNG’U**

**JUDGE**

