



**Kaburu v Muchiri & another (Miscellaneous Civil Application
E098 of 2024) [2024] KEHC 15694 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15694 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL APPLICATION E098 OF 2024
FN MUCHEMI, J
DECEMBER 5, 2024**

BETWEEN

CHARLES WATATUA KABURU APPELLANT

AND

JOYCE WANGUI MUCHIRI 1ST RESPONDENT

LYDIA WAMBUI KIBEBE 2ND RESPONDENT

RULING

Brief facts

1. The applications for determination are dated 1st July 2024 and 22nd August 2024. The application dated 1st July 2024 seeks for orders of stay of execution in respect of the judgment in Ruiru SPMCC No. E312 of 2022 delivered on 17th August 2023 pending the hearing and determination of the appeal.
2. The application dated 22nd August 2024 seeks for orders of stay of execution of the warrants issued by Hon. Joseph Were (CM) on 22nd August 2024.
3. In opposition to the applications, the respondents filed a Replying Affidavit dated 18th July 2024 and Grounds of Opposition dated 12th September 2024.

Appellant's/Applicant's Case on the application dated 1st July 2024.

4. The applicant states that the respondents instituted a suit against him vide a plaint dated 26th May 2022 prompting him to instruct the firm of Norman Otieno & Company Advocates to take up the matter and defend him. The applicant further states that it was on 14th September 2023 that he learnt that the said advocates only entered appearance and filed a defence devoid of a list of documents, witnesses and witness statements and therefore the suit proceeded ex parte culminating into a judgment being delivered against him on 17th August 2023 for a sum of Kshs. 1,638,954/-.



5. The applicant states that the said firm of advocates has not tendered any explanation as to why they failed to defend the suit on his behalf when it was scheduled for hearing. The applicant further states that he has reported the professionalism conduct of the said advocates to the Advocates Complaints Commission.
6. The applicant argues that upon delivery of the said judgment on 17th August 2023, the respondents did not effect service of the 10 days' notice of entry of judgment upon him as required by the law and thus he was not aware of the ex parte proceedings and the judgment entered against him. Furthermore, the applicant avers that the respondents commenced the process of execution against him by taking up a proclamation of attachment of his moveable assets dated 14th September 2023.
7. The applicant states that he only became aware of the ex parte proceedings and the subsequent judgment when he was served with the proclamation of attachment of his moveable assets dated 14th September 2023.
8. The applicant states that he then instructed the firm of Meritad Law Africa LLP to come on record who proceeded to file an application dated 19th September 2023 seeking to set aside the judgment and decree dated 17th August 2023 and leave to defend the suit. The trial court delivered its ruling on 11th April 2024 whereby it dismissed the application seeking to set aside the judgment dated 17th August 2023. Being aggrieved by the entire ruling dated 11th April 2024, the applicant states that he lodged an appeal vide a Memorandum of Appeal dated 2nd May 2024.
9. The applicant states that he is desirous of defending his suit considering the matter proceeded ex parte because of a mistake of his previous advocates which should not be visited upon him.
10. The applicant argues that the appeal raises serious questions of both law and fact which the lower court fell into error and thus any execution by the respondents will render the said appeal nugatory.
11. The applicant avers that he then filed an application dated 17th May 2024 seeking a temporary stay of execution pending appeal of the ruling delivered on 11th April 2024 in Ruiru SPMCC No. E312 of 2022.
12. The applicant states that he received a court order issued by the Honourable Lady Justice Mshila dated 24th May 2024 transferring the matter from the Kiambu High Court to Thika High Court pursuant to the gazette notice on jurisdiction. The said court order issued ordered that the matter be placed before the Deputy Registrar Thika High Court for mention on 29th May 2024 for directions. On 29th May 2024, the applicant states that he attended court before the Deputy Registrar of Thika High Court for directions but the Deputy Registrar noted that he was only handing criminal matters on the said date.
13. The applicant argues that he has continuously followed up with the Kiambu registry on the transfer of the file, but to date, the file has not yet been transferred.
14. The applicant argues that he has demonstrated that he has an arguable appeal and thus he should be afforded an opportunity to canvass the same in accordance with the dictates of the Constitution and the principles of natural justice.
15. The applicant states that if the orders sought are not granted and the respondents proceed with execution, he stands to suffer irreparable harm as he shall be unseated from his right of appeal. Further, the applicant states that he is willing to abide by such conditions as may be set by the court in granting of such orders.



16. The applicant argues that the respondents will not be prejudiced in any way should the orders be granted. On the contrary, the applicant states that he stands to have his property attached in execution of the decree in SPMCC No. E312 of 2022 and sold to third parties, which execution shall cripple him financially.

The 1st Respondent's Case

17. The 1st respondent states the application as drawn is defective as it seeks to stay execution of a judgment and decree pending appeal against a ruling of the lower court delivered on 11th April 2024. The 1st respondent argues that the applicant is discreetly seeking stay of execution of the judgment of the trial court by hiding behind an appeal against a ruling of the said court.
18. The 1st respondent further argues that the impugned ruling of the lower court merely dismissed the applicant's application for stay of execution without making any positive order capable of being stayed by this court. Furthermore, a dismissal order is a negative order incapable of being stayed.
19. The 1st respondent states that after service of summons in the trial court, the applicant entered appearance and filed a defence on 22nd July 2022 accompanied by the defendant's list of documents and witnesses.
20. The 1st respondent states that since the applicant filed his statement of defence, the proviso to Order 22 Rule 6 of the *Civil Procedure Rules* requiring respondents to issue a 10 days' notice of entry of judgment does not apply. Issuance of the said notice should only be applicable where no appearance or defence was filed by the defendant.
21. The 1st respondent argues that she obtained judgment in a procedural and regular way and thus it should not be set aside because of the strained relationship between the applicant and his former advocates. Furthermore, the 1st respondent states that it would be unjust to drag the advocates disciplinary proceedings into the instant matter as she and the 2nd respondent are not privy to the contract for provision of legal services between the applicant and his former advocates.
22. The 1st respondent avers that it is the duty of a litigant to follow up the progress of their case with his advocates and the applicant has not demonstrated any efforts that he took to follow up the progress of his case with his former advocates. Further, the courts of law cannot force litigants and their advocates to file documents or call witnesses in support of their case. It is the duty of the litigants to furnish the courts with evidence to prove their respective positions and where a party fails to discharge that duty, the trial court cannot be faulted for delivering judgment against such party.
23. The 1st respondent avers that the applicant was granted an opportunity to defend his suit but squandered the opportunity and thus he is undeserving of the court's discretion in his favour.

The Appellant's/Applicant's Case on the application dated 22nd August 2024.

24. The applicant reiterates what he deponed in his affidavit in his previous application dated 1st July 2024 and further states despite the service of the said application, the respondents commenced the process of execution and served him with a Notice to Show Cause dated 9th August 2024. Furthermore, the lower court in Ruiru Civil Suit No. E312 of 2022 has since issued warrants of arrest against him which the respondents have commenced the process of enforcement and committal to civil jail for 6 months.
25. The applicant argues that the execution of the judgment dated 17th August 2023, arrest and committal to civil jail will render the appeal nugatory and cause him irreparable harm and damage.



The Respondents' Case

26. The respondents state that the applicant has filed another application dated 1st July 2024 seeking stay of execution that is currently pending before the court. Further, the respondents state that all the prayers sought by the applicant in the current application are directly related to the process of execution of the decree.
27. The respondents state that the applicant has not complied with the earlier directions of the court requiring him to file submissions within 14 days from 25th July 2024. The respondents argue that the current application is an abuse of the court process as the applicant has previously filed 4 other applications for stay of execution.
28. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

29. The applicant relies on Order 42 Rule 6 of the *Civil Procedure Rules* and the cases of *National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Another* (2006) eKLR and *Chris Munga N. Bichage vs Richard Nyagaka Tongi & 2 Others* [2013] eKLR and submits that he stands to suffer substantial loss as the decretal sum is substantial being a sum of Kshs. 1,637,954.50/- whereas the respondents are of unknown means, therefore there is no telling if they are able to refund the said sum if the appeal succeeds. The applicant further submits that the respondents bear the legal burden to demonstrate that they are able to refund the decretal sum in the event the appeal succeeds.
30. The applicant submits that that he has a meritorious appeal with high chances of success and thus if stay is not granted, the appeal will be rendered nugatory which would defeat the purpose of the appeal process.
31. The applicant further submits that the judgment and decree being appealed against were delivered on 17th August 2023 and he then filed an application dated 19th September 2023 seeking to set aside the same which ruling was delivered on 11th April 2024 dismissing the application. The applicant submits that he then filed his Memorandum of Appeal dated 2nd May 2024 and actively pursued copies of the proceedings in Ruiru SPMCC No. E312 of 2022. The applicant argues that he has moved the court promptly, demonstrating that there has been no unreasonable delay in filing the instant application. The applicant submits that his timely filing of the application is indicative of his diligence and in line with the principles established in *Julius Kibet Koskei vs Daniel Kiplangat Kibet* [2018] eKLR.
32. The applicant relies on the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others* [2014] eKLR and submits that he is prepared to comply with the conditions the court may impose regarding security for the due performance of the decree.
33. The applicant further relies on the case of *Equity Bank Limited vs Taiga Adams Company Ltd* [2006] eKLR and submits that stay should not be granted as a matter of course but should balance the interests of both parties.

The Respondents' Submissions

34. The respondents rely on the cases of *Jennifer Akinyi Osodo vs Boniface Okumu Osodo & 3 Others* [2021] eKLR; *Chege vs Gachora* (Civil Appeal 265 of 2023) [2024] KEHC 1994 (KLR) and *Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya)* [2015] eKLR and submit that the applicant seeks to stay execution of the orders of the lower court that dismissed his application in



which he sought to set aside the judgment of the lower court. The respondents further submit that the dismissal order was thus a negative order capable of being stayed.

35. The respondents submit that the applicant has not demonstrated how execution of a lawful decree will occasion substantial loss. The respondent further submit that the applicant has introduced in his submissions the notion that they are unable to repay the applicant if the appeal succeeds. The respondents argue that the said allegation was not raised in the affidavit in support of the motion and had the applicant raised it early enough, they would have amply demonstrated that they have financial ability to refund the decretal sum if the appeal succeeds. The respondents rely on the case of *Chege vs Gachora* (Civil Appeal 265 of 2023) [2024] KEHC 1994 (KLR) and submit that introducing a new allegation in the submissions should be frowned upon by the court.
36. Relying on the case of *Mwaura Karuga t/a Limit Enterprises vs Kenya Services Ltd & 4 Others* [2015] eKLR, the respondents submit that the decree of the lower court was a monetary decree and as such, any security to be offered for the due performance of the decree must be equivalent to the sum of Kshs. 1,637,954.50/- plus costs of the suit. The respondents further submit that in the event the court grants the orders sought, it ought to direct the applicant to deposit the sum of Kshs. 1,637,954.50/- plus costs in a joint account in the advocates names.
37. The respondents rely on the case of *Machira t/a Machira & Co. Advocates vs East African Standard (No.2)* [2002] KLR 63 and submit that the judgment sought to be set aside was delivered on 17th August 2023 and they have spent the past year trying to execute it whilst the applicant has continuously frustrated any attempts to execute. The respondents further submit that the numerous applications filed before the trial court, the High Court in Kiambu and before the current court is a clear indication of the lengths the applicant is willing to frustrate them. The respondents argue that the court should balance the right of the applicant to pursue his appeal and the right of the respondents to enjoy the fruits of their judgment.
38. The respondents submit that Order 22 Rule 6 of the *Civil Procedure Rules* requiring respondents to issue a 10 days' Notice of Entry of Judgment does not apply where the applicant had entered appearance and filed a defence as the applicant herein who filed his defence. Thus, the respondents argue that they were not legally bound to serve any notice for entry of judgment.
39. The respondents submit that the conduct of the applicant throughout the proceedings before the lower court are well summarized in the impugned ruling. The applicant had no intentions of having the matter finalized on time and the adjournments sought by the applicant and the persistent failure to comply with simple court directions like filing documents are all indicators that the applicant was happy with the status quo prevailing at the time. The respondents argue that it is only after judgment that the applicant appears to have changed. Stay of execution is an equitable and discretionally remedy and it should not be granted where the applicant's conduct is wanting.
40. The main issue for determination is whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the *Civil Procedure Rules* for stay of execution pending appeal.

The Law

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

41. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) *Civil Procedure Rules*. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-



1. “No appeal or second appeal shall operate as a stay of execution or proceedings 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 orders set aside.
2. 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 1st 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.
42. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
 1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
43. Substantial loss was clearly explained in the case of [James Wangalwa & Another vs Agnes Naliaka Cheseto](#) [2012] eKLR:-

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
44. The applicant in his affidavit states that he stands to suffer irreparably if the respondents levy execution against him as his business will be financially crippled. It is only in his submissions that the applicant argues that he shall suffer substantial loss in the event execution proceeds as he does not know the financial capabilities of the respondents.
45. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show how execution shall irreparably affect him or will alter the status quo to their detriment therefore rendering the appeal nugatory. Furthermore, the applicant by raising the issue of the respondents’ financial capabilities in his submissions, did not give the respondents a chance to demonstrate their financial capabilities. The applicant ought to have raised that point in his affidavit to give the respondents a chance to respond to the same and produce evidence of their financial capabilities. It is therefore my considered view that the applicant has not demonstrated substantial loss he stands to suffer.



Has the application has been made without unreasonable delay.

46. Judgment was delivered on 17th August 2023 and the applicant filed the instant application on 2nd July 2024. It has taken the applicant about 1 year between the date of judgment delivered in the trial court and the time when he filed the instant application. The applicant has not given any reasons why it took him almost a year to file the present application. It is therefore my considered view that a delay of about 1 year is inordinate and inexcusable.

Security of costs.

47. The purpose of security was explained in the case of *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the *Civil Procedure Rules* acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

48. It is trite law that the issue of security is discretionary and it is upon the court to determine the same. The applicant has stated that he is ready and willing to furnish security pursuant to the court’s directions.

49. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

50. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the respondents their right of enjoying their judgment. I have perused the grounds of appeal and without going into the merits of the appeal noted that they do not raise arguable points of law.

51. Having considered all the material before me, it is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal. Accordingly, it is my considered view that the applications dated 1st July 2024 and 22nd August 2024 as consolidated, lack merit and are hereby dismissed with costs to the respondent.

52. The said orders apply in file Civil Appeal No. E181 of 2024.

53. It is hereby so ordered.



**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 5TH DAY OF
DECEMBER 2024.**

F. MUCHEMI

JUDGE

