Gari & another v Pandya Memorial Hospital (Civil Appeal E276 of 2025) [2025] KEHC 14359 (KLR) (13 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14359 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E276 OF 2025

G MUTAI, J

OCTOBER 13, 2025

BETWEEN

KUKAA MWANGOVYA GARI ..... 1ST APPLICANT

SARAH DZOMBO ..... 2ND APPLICANT

AND

PANDYA MEMORIAL HOSPITAL ..... RESPONDENT

RULING

1. The lower court delivered its judgment on 30th July 2025, vide which it found for the respondent. The defendants (now appellants) were ordered to pay Kes.12,517,713/-, together with interest thereon from the date of filing until payment in full. The plaintiff (now the respondent) was also awarded costs of the suit.

2. Being aggrieved, the appellants have appealed to this court seeking to overturn the said decision and to be awarded costs in respect of the appeal and in the court below. As the appeal will take time to be heard, they filed a notice of motion application dated 28th August 2025 seeking to stay execution of the judgment pending the hearing and determination of the appeal.

3. When the said application was filed, this court granted a stay of execution. The said interim orders are still subsisting as at the date of this ruling.

4. The application was opposed. The respondent filed a replying affidavit sworn by Rastus Ouma Okochi on 3rd September 2025. Mr Okochi deposed that the application was a sham, lacked merit, and could not possibly succeed as the applicants did not deny owing the amount claimed before the trial court. The deponent stated that the application did not meet the test under Order 42 Rule 6 of the Civil Procedure Rules, as the appeal lacked merit, and also because the security which had been offered was insufficient.

5. The respondent urged that in the event the court was minded to allow the application, it should do so on condition that the entire decretal sum is deposited in court to safeguard the respondent's right to enjoy the fruits of a just judgment entered in its favour.

6. The applicants filed a supplementary affidavit sworn on 29th September 2025 in which they averred that the securities held by the respondents were not worthless. It was also deposed that the application and the appeal had merit.

7. The application was canvassed by way of written submissions. I shall summarize each party's submissions below.

8. In the submissions dated 30th September 2025, the appellant's counsel urged that unless a stay were granted, the appeal would be rendered nugatory. It was submitted that the respondent is seeking Kes. 21,881,891/- against the appellants/applicants. Counsel submitted that the appeal raised triable issues which would be rendered academic unless a stay was granted. Ms Katama urged that the application was filed without undue delay. Regarding security for the due performance of the decree, it was submitted that certificates of title in respect of CR 44966 and Title No Mombasa/Mwembelegeza/528, which had been held by the respondent since 2015, were sufficient security.

9. The submissions of the respondent are dated 29th September 2025. Counsel for the respondent urged that there was no triable appeal before the court. For that reason, the appellants couldn't suffer substantial loss.

10. On the test under Order 42 Rule 6, it was urged that the titles offered by the applicants could not amount to security envisaged under Order 42 Rule 6 of the Civil Procedure Rules. The respondent, however, offered to concede to the application if the decretal sum, or at least half thereof, was deposited in a joint interest-earning account in the names of both parties' counsels.

11. I have considered the application, the responses thereto, and the parties' written submissions. Have the applicants met the test under Order 42 Rule 6 of the Civil Procedure Rules?

12. Order 42 Rule 6 (2) of the Civil Procedure Rules states that: -

> " No order for stay of execution shall be made under subrule (1) unless: -
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> (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. What amounts to a substantial loss has been defined in a number of cases. In James Wangalwa & Another v Agnes Naliaka Cheseto [2012] KEHC 1094 (KLR), Gikonyo, J stated as follows:-

> " 11. 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. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein v Chesoni [2002] 1KLR 867, and also in the case of Mukuma v Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:
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> "...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."

14. It would appear to me that the amount claimed by the respondent is colossal. The applicants have an appeal. Compelling them to pay the same now would expose them to a substantial loss.

15. I am satisfied that the application was filed without undue delay. Regarding security, I am not convinced that two titles, in respect of properties of indeterminate values, would be sufficient. I am of the opinion that the securities should be of such a type that the successful party will be able to access them after the appeal is determined. In my view, that calls for a deposit of money in a joint interest-earning account.

16. In the circumstances, I allow the application dated 28th August 2025, on the condition that half the decretal sum is deposited in a joint interest-earning account in the names of both parties' counsels within 30 days of the date hereof. If the appellants/applicants default, the respondent will be at liberty to execute the judgment of the court below.

17. On costs, I order that costs shall be costs in the appeal.

18. It is so ordered.

DATED AND SIGNED AT MOMBASA, THE 13TH DAY OF OCTOBER 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Ms Vanani, for the Respondent;

Ms Katama, for the Appellants/Applicants; and

Arthur – Court Assistant.