Ngumbi v Kanyina alias Rosemary Kakonzi Mwangangi (Miscellaneous Application E024 of 2024) [2025] KEHC 15492 (KLR) (23 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15492 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANEOUS APPLICATION E024 OF 2024

RC RUTTO, J

OCTOBER 23, 2025

BETWEEN

PETER NGILA NGUMBI ..... APPLICANT

AND

ROSEMARY KANYINA ALIAS ROSEMARY KAKONZI MWANGANGI ..... RESPONDENT

RULING

1. Before this Court for determination is a Notice of Motion dated 6th March 2025, seeking;
   a. Spent
   b. Spent
   c. This Honourable court be pleased to set aside the judgment entered by the lower court and allow the applicant to be heard on appeal.
   d. A temporary injunction be issued restraining the Respondent, their agents, employees, servants or any other person acting under their instructions from selling by public auction or private treaty the applicant's properties pending the hearing and determination of this appeal.
   e. This Honourable court be pleased to issue such further orders as it may deem just and expedient in the circumstances.
   f. Costs of this Application be provided for.
2. The grounds for the Applicant's application are that he has filed an application seeking leave to appeal out of time, which is pending hearing and determination before this Court. He is apprehensive that his goods and properties may be attached and sold by the Respondent, having already been served with a warrant of sale of property and a warrant of attachment from Wright Auctioneers. He avers that unless

this Court grants stay of execution and issues a temporary injunction against the judgment delivered on 19th April 2023, his properties may be unlawfully auctioned, thereby rendering his intended appeal nugatory. He further states that he is ready and willing to furnish security as the Court may direct.

3. The application was opposed by the Respondent through a Replying Affidavit sworn on 28th March 2025. In summary, the Respondent deposed that execution of a court's decree is a lawful and automatic process and it is incumbent upon the Applicant to demonstrate the distinct and special circumstances under which execution should be stayed, noting that the grant of stay lies solely within the discretion of the Court.

4. She averred that an application for stay of execution must be premised on three conditions: proof of substantial loss by the Applicant, prompt filing of the application, and provision of security for the due performance of the decree. The Respondent contended that the present application is yet another tactic by the Applicant to frustrate her and delay the satisfaction of the judgment. She further noted that the Applicant had previously filed an appeal in the Environment and Land Court, being ELC No. 24 of 2023, against the same judgment delivered on 19th April 2023, where he also enjoyed an order of stay of execution until the appeal was determined on 18th September 2024. It was only after being served with warrants of attachment that the Applicant once again sought stay of execution through the present application dated 6th March 2025, 688 days after the trial court's judgment and 170 days after the judgment of the ELC.

5. The Respondent asserts that the Applicant's application dated 15th October 2024, seeking leave to file an appeal out of time has never been served upon her. She argues that this omission demonstrates that the Applicant did not seek any stay of execution despite being aware that his initial appeal had been dismissed. She therefore contends that the present application is an afterthought, unjustifiably aimed at defeating her right to enjoy the fruits of her judgment.

6. She further maintains that the four grounds raised in the supporting affidavit, do not mention or substantiate any loss or prejudice he would suffer if execution proceeds. Instead, the Applicant merely alleges that the intended appeal will be rendered nugatory, yet no memorandum of appeal has been annexed to either the current application or to the application for leave to appeal out of time. Moreover, no reference has been made to the intended grounds of appeal to demonstrate a prima facie case.

7. The Respondent emphasizes that the judgment entered against the Applicant was solely to reinstate her for the loss incurred, and not to vex the Applicant. She accuses the Applicant of continuously employing delay tactics intended to frustrate her and to circumvent the ends of justice, including engaging in forum shopping through multiple appeals and applications. She adds that, should the Court be inclined to allow the application, the Applicant ought to be directed to deposit the decretal sum, together with the costs awarded both at the trial court and in the dismissed appeal, in a joint interest earning account as security.

8. Pursuant to the directions issued by this Court, stay of execution was granted pending the hearing and determination of the application and parties were directed to file written submissions. The Applicant filed submissions which are undated while the Respondent's submissions are dated 17th June 2025.

Applicant's Submissions

9. The Applicant, in his submissions, began with a brief introduction, stating that he is primarily seeks to set aside the judgment delivered on 19th April 2023 in ELC Chamber 11 of 2019. He also seeks conservatory orders to restrain the Respondent from executing or proceeding with any intended auction or disposal of his property pending the determination of the intended appeal. While

acknowledging the existence of a pending application dated 15th October 2024 for leave to appeal out of time, the Applicant emphasized that the core focus of the present application is the setting aside of the lower court's judgment, which, if not urgently addressed, will render his rights illusory.

10. The Applicant placed reliance on Order 12 Rule 7 of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act*. He submitted that the failure to challenge the judgment within the prescribed timelines was due to a procedural error by his counsel, who erroneously filed the appeal before an incompetent forum. Citing the case of Philip Chemwolo & Another v. Augustine Kubende [1982–88] KAR 103, the Applicant urged that he should not be penalised for the mistakes of counsel. He noted that once the error was discovered, his advocate acted swiftly to regularise the position by filing the present application alongside the application for leave to appeal out of time.

11. The Applicant contended that failure to set aside the judgment will permit enforcement, resulting to the auction or alienation of his properties, and causing substantial and irreversible loss. He relied on Article 159(2)(d) of *the Constitution* and the case of Tana & Athi Rivers Development Authority v. Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR, to argue that the Respondent's claim that the present application should to be dismissed for being filed as a "miscellaneous" application does not invalidate the application. He submitted that the reference to a "miscellaneous application" was merely a typographical error, which should not be allowed to defeat the substance of the matter.

12. The Applicant further submitted that setting aside the judgment is a crucial step toward enabling him to prosecute an appeal, subject to leave being granted. He noted that an application for such leave has already been filed and remains pending before this Court. He argued that unless the application is allowed, the Respondent may proceed with the sale of his property, thereby rendering the intended appeal nugatory and defeating the ends of justice.

13. The Applicant concluded his submissions by urging the Court to allow the application.

Respondent's submissions

14. The Respondent commenced her submissions by providing a brief background to the present application. She observed that, as at the time of preparing her submissions, the Applicant had neither served his further affidavit nor his submissions as directed by the Court on 1st April 2025. The Respondent addressed the merits of the Application arguing that it is misconceived and bad in law on the basis that it seeks to set aside the judgment of the trial court through a miscellaneous application, yet the same judgment is the subject of the intended appeal. In her view, the Court is being improperly invited to determine a perceived appeal on its merits at a preliminary stage.

15. In support of her position, the Respondent relied on the case of Otieno & 9 Others v. Wagude & Another [2023] KEELC 16339 (KLR), submitting that the delay in seeking orders for stay of execution has been inordinate and remains unexplained. She noted that the Applicant had previously filed an appeal before the Environment and Land Court, being ELC No. 24 of 2023, arising from the same judgment delivered on 19th April 2023. In that appeal, the Applicant enjoyed stay of execution until the appeal was determined on 18th September 2024. She pointed out that it was only after being served with warrants of attachment that the Applicant moved the Court for stay of execution on 6th March 2025, 668 days after the judgment of the trial court and 170 days after the determination of the appeal before the ELC.

16. The Respondent further submitted that the Applicant has failed to demonstrated that the intended appeal would be rendered nugatory. She emphasized that the Applicant has neither annexed a Memorandum of Appeal to the application nor specified the grounds of appeal. In her view, the Applicant has not shown how the appeal would be rendered nugatory should execution proceed.

Citing the case of James Wangalwa & Another v. Agnes Naliaka Cheseto [2012] eKLR, the Respondent argued that a mere assertion that execution will issue does not in itself constitute sufficient grounds for the grant of stay of execution.

17. The Respondent further submitted that the Applicant has not demonstrated the existence of a prima facie case to warrant the grant of a temporary injunction. She reiterated that no memorandum of appeal has been annexed, nor have any grounds of appeal been disclosed, to demonstrate that there exists a case with a probability of success.

18. In conclusion, the Respondent contended that the Applicant has approached the Court with unclean hands, seeking refuge from the very shrine of equity. She noted that although judgment was delivered on 19th April 2023, the Applicant has continued to enjoy stay of execution by employing delaying tactics and filing frivolous applications in various courts. On this basis, she urged the Court to dismiss the application with costs.

Analysis and Determination

19. I have considered the affidavits by parties and submissions made in respect of the motion and it is my view that there the issues for determination are;

    a. Whether the Applicant has satisfied the conditions for grant of stay of execution pending the intended appeal.

    b. Whether the Applicant has met the principles for grant of a temporary injunction restraining execution pending filing of the appeal.

Whether the Applicant has satisfied the conditions for grant of stay of execution pending the intended appeal.

20. The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 Rule 6 of the Civil Procedure Rules stipulates: -

> "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.

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.

21. Therefore, under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant should satisfy the court that:

    a. Substantial loss may result to him unless the order is made;

b. That the application has been made without unreasonable delay; and

c. 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.

22. These principles were enunciated in Butt vs Rent Restriction Tribunal [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -

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

b. Secondly, 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 the appeal court reverse the judge's discretion.

c. Thirdly, 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.

d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse.

23. The first condition, requires the Applicant to clearly demonstrate the loss they stand to suffer, if any, as articulated in the case of Shell Ltd vs Kibiru and Another [1986] KLR 410 Platt JA which outlines two circumstances under which substantial loss may arise as follows: -

> "The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages....It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts...."

24. The learned judge continued to observe that: -

> "It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting 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."

25. In Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR, Mativo J relied on the case of Equity Bank Ltd v Taiga Adams Company Ltd, [2006] eKLR to explain the onus of the Applicant where the court stated a follows: -

> " ...The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out-in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant."

26. Similarly, National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR Court of Appeal held thus:

> " Once an applicant expresses a reasonable fear 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..."

27. The Applicant contends that the Respondent has initiated the process of execution and will proceed with the same unless the Court grants a stay of execution. They argue that substantial loss will occur and the appeal will be rendered nugatory if the stay is not granted. The Applicant refers to an application dated 15th October 2024 for leave to appeal out of time that is pending before this Court and emphasizes the risk of substantial loss should sale proceed.

28. The court in the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] KEHC 1094 (KLR) held that;

> "
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> " 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."

29. I am persuaded by the above court's averment on substantial loss. Relating to the circumstances in this matter, the Applicant asserts a risk of sale of property and loss. This assertion alone is insufficient, it is relevant but, standing alone is not determinative. The Applicant must persuade this court by evidence that the loss would be irretrievable or that the Respondent would be unable to restore the position should the appeal succeed. The Applicant's affidavit fails to quantify the properties, provide valuations, demonstrate uniqueness, or show the Respondent's inability to refund. In the absence of such evidence, this Court finds that the Applicant has not demonstrated the substantial and/or irreparable damage and loss. The ground thus fails.

30. The second condition concerns whether the application was made without reasonable delay. The Applicant alleges counsel's procedural mistake when an application for leave to appeal was filed, they omitted to seek for stay of execution. They provides no detailed timeline showing when the mistake

was discovered, and what steps were immediately taken. The burden lies heavily on the Applicant to explain delay. An unexplained or inordinate delay typically denies equitable relief.

31. While there is no precise yardstick for determining what constitutes inordinate delay, the assessment will vary from case to case depending on the circumstances, the subject matter, the nature of the proceedings, and the explanation offered for the delay, among other factors. Even so, inordinate delay is usually self evident once it occurs, the test being whether the period of delay is such that the court is inevitably drawn to the conclusion that it is excessive and, consequently, inexcusable.

32. This court notes it is not in contentious that the trial judgment was delivered on 19th April 2023 after which the appellant appealed to the Environment Land Court being Appeal No 24 of 2023. This appeal was heard and judgment delivered on 18th September 2024. According to the respondent the Applicant moved the Court 170 days after judgment of the ELC and after execution proceedings had commenced and 668 days after the trial court judgment was delivered. What is clear is that the applicant never sought stay of execution when he filed the application for leave to appeal out of time and the explanation provided does not justify the delay.

33. The Court must consider the length of the delay, reasons offered and any prejudice to the respondent. The rationale behind this condition is to prevent stay that delays the trial process or enforcement of a decree. The right to be heard on appeal should not be seen to defeat the ends of justice. This was affirmed in the case of Global Tours & Travel Limited Nairobi. He Winding up Cause No. 43 of 2000 where the court held:

> " As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from it a matter of judicial discretion to be exercised in the interest of justice. The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order stay the court should essentially weigh the pros and cons of granting of not granting the order."

34. Based on the foregoing, this application is found to be guilty of laches.

35. On the third condition on security for costs, the Applicant is required to satisfy the requirement of providing security.The Court in Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR, stated that:-

> " Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay."

36. From the foregoing decisions, it is evident that the issue of security is discretionary and subject to the court determination. In this application, the applicant has expressed willingness to offer security however, an offer of security alone cannot cure the deficiencies in this Application.

37. Having applied the legal test to the facts and submissions, the Court finds that the Applicant has not demonstrated sufficient cause for a stay of execution. The claim of substantial and irretrievable loss is speculative and unsupported by particulars; the delay in seeking the present relief is inordinate and inadequately explained; and the offer to furnish security is not particularized or shown to be adequate

to protect the Respondent's interests. Accordingly, the application for stay of execution under Order 42 Rule 6 is dismissed.

Whether the Applicant has met the principles for grant of a temporary injunction restraining execution pending appeal.

38. The principles that govern the grant of orders of injunction remain as clearly articulated by the court in Giella V Cassman Brown & Co. Ltd (1973) EA. 358 as follows;

> " The necessary conditions for the grant of an interlocutory injunction were spelt out by Giella V Cassman Brown & Co. Ltd (1973) EA 358. They are that, first an applicant must show a prima facie case with a probability of success; secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages; and thirdly, if the court is in doubt, it will decide an application on a balance of convenience."

39. The above principles were restated by the Court of Appeal in the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR where the court stated as follows:

> "...In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> (a) establish his case only at a prima facie level,
>
> (b) demonstrate irreparable injury if a temporary injunction is not granted, and
>
> (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially....."

40. On the issue of prima facie case, the Court of Appeal in Mrao Ltd V First American Bank of Kenya Ltd & 2 others (2003) KLR 125 are instructive as follows:

> " In civil cases, a prima facie is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than arguable case."

41. This court is guided by the above sentiments.Where no prima facie case is made out, the remaining limbs need not be considered.

42. The Applicant has not attached a memorandum of appeal nor particularized the grounds of appeal in the supporting affidavit. This is a material omission especially where the central claim is that the appeal will be rendered nugatory. Without itemizing the grounds asserted to be arguable, the Court cannot make a finding that there is a serious triable issue. Granting an injunction based on bare assertions would prejudice the Respondent.

43. The Applicant has failed to establish a prima facie case or disclose a serious triable issue, which is the first essential consideration in granting an order of injunction. Having failed to satisfy this initial requirement, there is no need to analyse the second and third principles.

44. Consequently, the application for a temporary injunction restraining the Respondent from selling or otherwise disposing of the Applicant's properties is hereby dismissed.

45. Based on the above, this court makes the following orders;

    a. The Application dated 6th March 2025 is dismissed with costs.

    b. The interim stay of execution granted by this court is vacated.

    Orders accordingly.

Dated, signed and delivered at Machakos this 23rd day of October 2025.

RHODA RUTTO

JUDGE

In the presence;

.....for Applicant

.....for Respondent

Selina Court Assistant