Muragu & 2 others v Maina & another (Civil Appeal E038 of 2025)
[2025] KEHC 16989 (KLR) (20 November 2025) (Ruling)

Neutral citation: [2025] KEHC 16989 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CIVIL APPEAL E038 OF 2025

TW OUYA, J

NOVEMBER 20, 2025

BETWEEN

JOHN MURAGU ..... 1ST APPLICANT

PATRICK WANGARURO ..... 2ND APPLICANT

ROMAN CATHO;IC ARCHDIOCESE OF NAIROBI TRUSTEE OF ST JOSEPH MUKAZA CATHOLIC CHURCH ..... 3RD APPLICANT

AND

JOSEPH NG'ANG'A MAINA ..... 1ST RESPONDENT

AMON NG'ANG'A MAINA ..... 2ND RESPONDENT

RULING

1. This ruling, is in respect to the Notice of Motion dated 9th April, 2025. Prayer I of the Motion is now spent, and what is pending this courts determination are the following prayers:

    i. That this honourable court be pleased to order for stay of execution of the judgement and/or decree rendered in Murang'a SCCC No. E183 of 2024, delivered on 23rd December 2024 by honourable D.C Soy for the sum of Kshs. 523, 550, plus costs and interest pending the hearing and determination of the appeal.

    ii. That the costs of and incidental to the application be provided for.

2. The application is premised on the grounds set out on the face of the Motion and in the depositions made in the supporting affidavit sworn on 9th April 2025 by Ms. June Kamande, learned counsel for the Applicants. In summary, Ms. Kamande deposed that on 23rd December 2024, the lower court delivered a default judgment in Murang'a SCCC No. E183 of 2024 against the Applicants, directing them to pay a sum of Kshs. 523,550 together with costs and interest.

3. She stated that the claim in Murang'a SCCC No. E183 of 2024 had previously been heard and determined in Kenol MCCC No. E376 of 2023 by a court of competent jurisdiction, and the suit had been dismissed on its merits. She added that the Applicants subsequently instructed counsel to file an application to set aside the default judgment, on the basis that the claim in Murang'a SCCC No. E183 of 2024 contravened section 7 of the *Civil Procedure Act*, and that the court therefore lacked jurisdiction to entertain the suit.

4. Ms. Kamande contended that the filing of Murang'a SCCC No. E183 of 2024 exposed the Applicants to double jeopardy, as they had previously been sued over the same subject matter in Kenol MCCC No. E376 of 2023. She further averred that the intended appeal raises arguable issues with high chances of success, and that if the Respondent proceeds to execute the judgment delivered on 23rd December 2024, the Applicants will suffer irreparable loss and prejudice, thereby rendering the intended appeal nugatory.

5. She further stated that the Applicants are willing to comply with any conditions that this Court may impose in granting the orders sought. She therefore urged the Court to allow the application in the interest of justice and fairness.

6. The application was opposed by the respondents. The 1st respondent, Joseph Ng'ang'a Maina, in his replying affidavit sworn on 28th April, 2025, alleged that there is no substantive judgement or decree in Murang'a SCCC E183 of 2023 dated 23rd December, 2024, as such, this court cannot issue a stay of execution for a judgement that is non-existent.

7. He contended that the issue of res judicata does not arise, given that the parties in Murang'a SCCC E138 of 2023 are different from the parties in Kenol MCC E376 of 2023. He further contended that he is entitled to the fruits of his judgement and that the applicants appeal lacks substantial legal merit and is a dilatory tactic.

8. He submitted that if this court interferes with his right to enjoy the fruits of his judgement, then it is only fair that the applicants be directed to deposit the decretal sum plus legal costs in a joint bank account.

9. The 2nd respondent, Amos Ng'ang'a Mbugua, in his replying affidavit dated 25th April, 2025, averred that the applicants' assertion of res judicata are factually and legally untenable, and are intended to delay the satisfaction of a valid and lawful judgement. He contended that he was not a party to the proceedings in MCCC E376 of 2023, as such, the elements necessary to establish res judicata, particularly the identity of the parties is not satisfied.

10. He alleged that the legal obligation pursued in SCCC E183 of 2024 were distinct and independently actionable against the appellants personally, as such, the principle of res judicata cannot apply in this case.

11. He contended that the lower court's judgment was delivered on 31st December 2024, and not on 23rd December 2024 as alleged, noting that the Small Claims Court was not sitting on the date stated by the Applicants and therefore could not have delivered the judgment or orders they rely on. He further argued that the orders cited by the Applicants are non-existent, and that this Court cannot issue a stay of execution against orders that do not exist, as doing so would amount to acting in futility and would render the proceedings a nullity.

12. Regarding the claim made by the applicants that the filing of Murang'a SCCC No. E183 of 2024 will expose them to double jeopardy, Mr. Mbugua contended that the allegations of double jeopardy are misplaced as the principle only applies to criminal proceedings and has no relevance in civil claims.

13. He averred that Order 42 rule 6 (2) of the Civil Procedure rules imposes strict conditions on an application for stay of execution, and that the application by the applicants does not satisfy the strict requirements under Order 42 rule 6 of the Civil Procedure rules. Mr. Mbugua contended that the applicants' application is vexatious, frivolous and malicious, and should be dismissed with costs.

14. On 30th April 2025, this Court directed that the application be canvassed by way of written submissions. In their submissions dated 7th May 2025, the Applicants argued that the incorrect reference to the judgment date as 23rd December 2024, instead of 31st December 2024, is a mere technical error that does not affect the validity or substance of the judgment delivered on 31st December 2024, nor does it prejudice their request for an order of stay of execution. They urged the Court to focus on the substantive issues in order to meet the ends of justice.

15. The Applicants submitted that their application for stay of execution was filed without undue delay and that they stand to suffer substantial loss if the orders sought are not granted, as they may be unable to recover the decretal sum from the 1st Respondent should execution proceed and their appeal ultimately succeed. As regards security, the applicants submitted that they are ready and willing to satisfy any conditions that the court may attach regarding the furnishing of security.

16. They contended that their application has met all the three conditions set out under Order 42 rule 6 (2) of the Civil Procedure rules as such their application is merited.

17. The 1st respondent on the other hand, submitted that the application for stay of execution is not merited, as the applicants have not met the threshold to be awarded a stay of execution pending an appeal as such their application for stay should be dismissed. The 1st respondent contended that the applicants have not complied with Order 42 rule 6 (2) (b) of the Civil Procedure rules, which requires an applicant requesting for stay of execution to provide security as directed by the court for the due performance of the decree

18. The 1st respondent submitted that if this court is inclined to grant the applicants an order of stay of execution, then such stay should be conditional, in that the applicants should be ordered to deposit the entire decretal amount, together with interest and costs of the suit in a joint interest earning account in the names of the parties advocates within a period of 30 days from the date of this court's ruling. This is so that his right to benefit from the judgement is protected.

19. The 2nd respondent on his part submitted that the applicants have invoked the doctrine of double jeopardy inappropriately, given that the said doctrine is only applicable in criminal proceedings. He contended that the application of the doctrine of double jeopardy in a civil claim is legally irrelevant.

20. It was the 2nd respondent's contention that the applicants' reliance on the doctrine of res judicata is misplaced, as the parties in Kenol Law Courts being MCCC E376 of 2023 are different from the parties Murang'a SCCC E183 of 2024. He submitted that the applicants ate abusing the court's time and are causing him an injustice by dragging him to court due to their own fault and negligence.

21. The 2nd respondent further submitted that the applicants have not met the threshold for stay of execution as provided under Order 42 rule 6 (2) of the Civil Procedure rules, as such their application should be dismissed. He contended that the applicants had previously invoked the review jurisdiction of the trial court, but after their application for review was dismissed, they are now trying to appeal the said judgement.

22. He further contended that the applicants are not eligible for stay orders as their appeal lacks merit and presents no real chance of success in light of the express provisions of section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure rules. The 2nd respondent submitted that the applicants have

not provided any security for due performance of the decree as required under Order 42 rule 6 (2) (b) of the Civil Procedure rules, and that failure to provide security renders the application for stay fatally defective.

23. As regards costs, the 2nd respondent submitted that he is entitled to the costs of the suit, as he has successfully defended the applicant's application.

24. I have carefully considered the application and the grounds therein, the replying affidavits in opposition, the rival submission by the parties as well as the cited authorities. Having done so, I find that the issue that arises for determination is whether the orders sought by the applicants should be granted.

25. Order 42 rule 6 (1) of the Civil Procedure rules, empowers this court to grant stay of execution orders pending an appeal.

    The conditions to be fulfilled by an applicant seeking stay of execution orders pending an appeal, have been provided for under Order 42 rule 6 (2) as follows: "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 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."

26. The Court of Appeal in Butt versus Rent Restriction Tribunal (1979) eKLR; gave guidance to the courts on how to exercise discretion while considering an application for stay of execution. The Court of appeal stated as follows:

> "If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings. It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458: "I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory."Megarry J, as he then was, followed Wilson (supra) in Erinford Properties Limited v Cheshire County Council [1974] 2 All ER 448 at p 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal's decision being rendered nugatory should that court reverse the judge's decision. The court will grant a stay where special circumstances of the case so require...."

27. It is clear from the above decision of the court of appeal, that the court while exercising its discretion to grant orders of stay of execution, should do so in such a way that will not render the appeal nugatory if successful.

28. In the present application, the applicants contend that they are likely to suffer substantial loss if a stay of execution is not granted, as the respondents may proceed with execution to realize the judgment of

the lower court, thereby rendering their appeal nugatory. They further submit that, should execution proceed, they may be unable to recover the decretal sum from the 1st respondent in the event their appeal succeeds.

29. What constitutes substantial loss was elaborated by Platt, Ag JA, in the court of appeal case of Kenya Shell Limited versus Benjamin Karuga Kibiru & another (1986) eKLR; as follows: "The application for the stay made before the High Court failed because the first of the conditions set out in order XLI rule 4 of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the 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.....I am bound to say that the respondents are right, on the basis of order XLI rule 4 of the Civil Procedure Rules. There was no evidence of substantial loss, and such loss cannot be inferred in this case. But this court must look at the matter from the point of view of rule 5(2) of Court of Appeal Rules, and here the test would be whether the appeal would be rendered nugatory, unless payment of the decretal sum were stayed. It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be nugatory. It is loud in its claim that the appeal will fail. But no reasons are given why the appeal will be rendered nugatory. The court inquired into the respondent's circumstances, but the information that was forthcoming did not confirm the applicant's misgivings. 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 corner stone of both jurisdictions for granting a 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."

30. Again, the court in James Wangalwa & another versus Agnes Naliaka Cheseto (2012) eKLR; stated as follows: "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."

31. From the evidence on record, the decretal sum demanded from the applicants is Kshs. 523,550, which amount is in my view substantial. The 1st respondent has also not placed any material before this court, to show his financial capabilities, and it is therefore not clear to this court that should the decretal sum be paid out to him, or should the applicant's assets be sold in order to satisfy the judgement and decree of the lower court, the 1st respondent will be able to refund the said sum, in the event that the applicants appeal succeed.

32. It is trite that where an applicant claims that the respondent would be unable to refund the decretal sum, the evidential burden shifts to the respondent to demonstrate that he possesses the means to refund the said amount.

33. This position was stated in the court of appeal case of Kenya Posts & Telecommunications Corporation versus Paul Gachanga Ndarua (2001) eKLR where the court stated that:

> " Of course, ordinarily the burden was on the Corporation to show that were its appeal to succeed, the success would be rendered nugatory because the respondent would be unable to restore the decretal sum if that sum was immediately paid out to respondent immediately.

> But in a case, such as this where it is alleged that the respondent has no known assets, the evidential burden must shift to him to show that he has assets from which he can refund the decretal sum. That must be so because the property a man has is a matter so peculiarly within his knowledge that an applicant such as the Corporation may not reasonably be expected to know them. He did not do so."

34. I am therefore convinced that the applicants will suffer substantial loss should the order for stay of execution not be granted, as the 1st respondent has not proved to this court that he will be in a position to refund the decretal sum should the applicants appeal succeed.

35. The applicant has also indicated that he is ready and willing to deposit security, being the entire decretal amount in a joint interest earning account in the names of the parties advocates or any other form of security that the court may deem fit to impose. In my view, the fact that the applicants are willing and ready to deposit the entire decretal sum in a joint bank account registered in the names of their respective advocates is a show of good faith on the part of the applicants; as it demonstrates that they are not making this application as a way of denying the 1st respondent the fruit of his judgement. The applicant has therefore satisfied this ground for granting an order for stay of execution.

36. The application was also in my view, brought without undue delay, given that the judgement was delivered on 31st of December, 2024, and the application was filed on 9th April, 2025, which is a period of about three months. In my view a period of three (3) months delay is not inordinate.

37. Flowing from the foregoing, I am of the considered view that the applicants have met the threshold for granting an order for stay of execution pending appeal.

38. I therefore find that the applicants should be granted the said order on the following conditions:

    i. They deposit the entire decretal sum of Kshs.523, 550, in a joint interest earning account in the names of the respective counsels on record for the parties within a period 30 days from the date of this ruling

    ii. That in default of I above, the orders for stay of execution be automatically vacated and the respondent shall be at liberty to execute

    iii. Costs of the application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 20TH DAY OF NOVEMBER 2025.

HON. T. W. OUYA

JUDGE