



**Gisaga v Kiruja (Civil Application E098 of 2024)
[2025] KECA 554 (KLR) (14 March 2025) (Ruling)**

Neutral citation: [2025] KECA 554 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E098 OF 2024
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
MARCH 14, 2025**

BETWEEN

ABDALLA MUTEMBEI GISAGA APPLICANT

AND

PATRICIA KATHURE KIRUJA RESPONDENT

(An application for stay of execution of the Judgment of the Environment and Land Court at Chuka (Yano, J.) delivered on 25th September 2024 in E.L.C Appeal No. E008 of 2023.)

RULING

1. Before this Court is an application dated 11th October 2024 brought by Abdalla Mutembei Gisaga, the applicant inter alia under rule 5 (2)(b) of the Court of Appeal Rules seeking orders of stay of execution of the judgment of the Environment and Land Court at Chuka (Yano, J.) delivered on 25th September 2024 in ELC Appeal No. E008 of 2023 pending the hearing and determination of the intended appeal.
2. In the impugned judgment, Yano, J. dismissed the applicant's appeal against the ruling of the Business Premises Rent Tribunal delivered on 3rd March 2023 where Patricia Kathure Kiruja the respondent, a tenant of the appellant, was awarded Kshs.1,650,000/- as refund on the costs incurred in renovation; Kshs.112,000/- as unutilized rent for seven (7) months January to August 2022; and cost of the reference assessed at Kshs.175,000/-.
3. Aggrieved and dissatisfied by the judgment, the applicant preferred an appeal to this Court and subsequently filed the instant application on grounds on the face of it and advanced in his supporting affidavit sworn on even date.
4. The applicant averred (where) that he has an arguable appeal as evinced in a draft memorandum of appeal dated 11th October 2024 annexed to his application. He faults the learned Judge for upholding the judgment of the subordinate court without having regard to its duty as a first appellate court; failing



to evaluate and analyze afresh the evidence adduced before the trial court; failing to take into account the glaring inconsistencies in the respondent's case. He further averred that the respondent is the verge of executing and enforcing the judgment which he urged would be detrimental to him.

5. In opposition, the respondent filed a replying affidavit sworn on 31st October 2024 and averred that the applicant has neither demonstrated to this Court that there exists an arguable appeal with high chances of success nor has he satisfied the pre-conditions set-out under Order 42 rule 6 of the Civil Procedure Rules, 2010 to warrant the grant of orders of stay of execution. Further, she averred that the applicant has not shown the substantial loss that would be occasioned or the prejudice he stands to suffer if stay was not granted. In addition, she averred that the application was a delaying tactic, made in bad faith, misconceived, incompetent and lacked merit and should therefore be dismissed. However, she urged that should this Court grant orders of stay, then the same ought to be conditional upon the applicant depositing with the Court the entire decretal sum together with costs all amounting to Kshs.1,650,000/-.
6. At the hearing, learned counsel Ms. Anguche appeared for the respondent. The applicant who is in person, although served with a hearing notice, did not appear in Court. However, he filed his written submissions dated 25th October 2024. Ms. Anguche relied on the respondent's written submissions dated 31st October 2024 with no desire to highlight them.
7. We have carefully considered the application and the supporting affidavit, the replying affidavit, rival submissions and the applicable law. For this Court to grant an order of stay under rule 5 (2)(b) of this Court's Rules, the applicant must first satisfy this Court that he has an arguable appeal, even one bona fide issue suffices and second, that unless the order for stay is granted, the appeal or intended appeal, whichever the case may be, if successful, shall be rendered nugatory. See. Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR.
8. We have perused the court record it is evident that the impugned judgment merely dismissed the applicant's appeal hence a negative order that is incapable of being executed. This position has been taken by this Court while faced with similar application for stay of a negative order. In Kanwal Sarjit Singh Dhiman v Keshavji Shah [2008] eKLR, this Court held as follows:-

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see. Western College of Arts & Applied Science v Oranga & Others [1976] KLR 63 at page 66 paragraph C).”
9. Similarly, in Kaushik Panchamatia & 3 Others v Prime Bank Limited & Another [2020] eKLR, this Court held that a negative order is incapable of being stayed because there is nothing to stay.
10. However, this notwithstanding, we have revisited those grounds of appeal as contained in the draft memorandum of appeal in light of the principles under rule 5 (2)(b) and considering that the intended appeal should be on point of law as it would be a second appeal, we are not satisfied that the applicant has an arguable appeal. Likewise, the applicant has

not demonstrated that the respondent would be unable to adequately pay him damages as may be ordered should the intended appeal ultimately succeed. We are therefore not satisfied that the intended appeal shall be rendered nugatory if the stay order is not granted.



11. For those reasons, we find the application dated 11th October 2024 is without merit and we hereby dismiss it with costs.

DATED AND DELIVERED AT NYERI THIS 14TH DAY OF MARCH, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI - ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

