



**Githua v Muhia & another (Environment and Land Appeal  
E010 of 2023) [2024] KEELC 1403 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1403 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E010 OF 2023**

**JG KEMEI, J**

**MARCH 14, 2024**

**BETWEEN**

**JAMES KARU GITHUA ..... APPELLANT**

**AND**

**ISAAC NJOROGE MUHIA ..... 1<sup>ST</sup> RESPONDENT**

**TIMOTHY OTIENO AWUOR T/A NAIROBI CONNECTION SERVICES  
AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Appellant/Applicant filed the instant Motion dated 17/7/2023 expressed under Sections 1A,1B, 3A and 63 (e) [Civil Procedure Act](#) and Orders 40, 42 and 51 [Civil Procedure Rules](#) seeking Orders That;
  - a. Spent.
  - b. Spent.
  - c. Pending the hearing and determination of the appeal, there be and it is hereby ordered that, there be a stay of execution of the decree in MCELC Case No. E115 of 2022 [Ruiru Law Courts] -*James Karu Githua v Isaac Njoroge Muhia & Another*.
  - d. Costs of this Application be provided.
2. The Application is based on the grounds that the Applicant's suit in the trial Court was dismissed on 22/6/2023 and the Respondent may execute the decree if stay of execution is not granted. That the 2<sup>nd</sup> Respondent attached the Applicant's household items worth Kshs 600,000/- and further the Applicant expended a sum of Kshs. 800,000/- in repairs of a house for the 1<sup>st</sup> Respondent. That if the application is not granted, the Applicant stands to suffer substantial loss.



3. The Application is further supported by the Applicant's Affidavit of even date. Reiterating the above grounds, he deposed that via an oral agreement with the 1<sup>st</sup> Respondent, he rented a residential building known as Mugutha House situate within Ruiru. That the house belonged to the 1<sup>st</sup> Respondent who at the time was abroad but was handed possession by the 1<sup>st</sup> Respondent's son. The Applicant averred that he occupied the house which was in a deplorable condition to wit faulty wiring; poor water systems and collapsing perimeter water which exposed his family to danger and insecurity. That since the Applicant was in a desperate situation he moved into the house with the landlord's assurance to fix the problems immediately. Later the landlord failed to carry out the repairs prompting the Applicant to repair the house to the tune of Kshs. 527,211/= with the landlord's greenlight. That the trial Court rejected the Appellant's evidence in its Judgment delivered on 22/6/2023 and annexed as JKG1. That the Applicant has filed his Memorandum of Appeal alongside the instant application which he beseeches the Court to allow.
4. In opposing the application the 1<sup>st</sup> Respondent filed his Replying Affidavit sworn on 4/10/2023. He deposed that the application is frivolous, vexatious and an abuse of Court process and does not meet the threshold for granting the orders sought. That the Applicant's appeal is an afterthought and devoid of any triable issues whose sole intention is to deny him the fruits of his Judgment. He urged the Court to dismiss the application with costs and in the alternative, to grant conditional stay by ordering the Applicant to deposit the decretal sum in Court for the due performance of the trial Court decree.
5. The application was argued orally before Court on 11/10/2023.
6. The sole issue for determination is whether the application is merited.
7. The legal provisions for stay of execution are anchored in Order 42 rule 6 of the [Civil Procedure Rules](#) that;

“6. Stay in case of appeal [Order 42, rule 6.]

- (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 order 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 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.”

8. It is trite that for an Applicant to succeed in an Application of this nature, one must establish three conditions namely; establishment of substantial loss, timely filing of the Application and the furnishing of security.
9. The Applicant has appealed against the impugned Judgment of the trial Court. He argues that the Respondent may execute the decree if stay of execution is not granted. That the 2<sup>nd</sup> Respondent has already attached his goods worth Kshs. 600,000/- and spent over Kshs. 800,000/- in repairing the house. The 1<sup>st</sup> Defendant opposes the motion stating that it is frivolous and only aimed at denying him enjoyment of the fruits of his Jdt.
10. Discussing the scope of execution viz proof of substantial loss, Gikonyo J described it as follows in *James Wangalwa & Another v. Agnes Naliaka Cheseto* [2012] eKLR:-

“ .... the fact that the process of execution has been put in motion, by itself, does not amount to substantial loss .... 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. That is what substantial loss would entail ... ”
11. Further the ingredients of substantial loss were well captured by , Kuloba J (as he then was) in the case of *Machira T/A Machira & Company Advocates v. East African Standard (No 2)* [2002] 2 KLR as follows: -

“If the Applicant cites as a ground, substantial loss the kind of loss likely to be sustained must be specified, details or particular thereof must be given and the conscience of the Court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the Applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order before disposal of the Applicant’s business (e.g. appeal or intended appeal).”
12. The Judge went on to add that: -

“Moreover, a Court will not order a stay upon a mere vague speculation; there must be the clearest ground of necessity disclosed on evidence .... Another common factor in favour of the Applicant is whether to proceed further or to execute may destroy the subject matter of the action and deprive the Appellant or intended Appellant of the means of prosecuting the appeal or intended appeal. So, really, stay is normally not granted, save in exceptional circumstances.”
13. The Applicant annexed copy of the proclamation of good marked JKG2 which was issued by the 2<sup>nd</sup> Respondent in satisfaction of the trial Court Judgment. It is trite that in an application for stay of execution the Court must consider the overriding objective and balance the competing interests of the parties before it. That is to say the right of the Judgment holder to enjoy the fruits of his Judgment viz the right to a fair hearing which includes the right to appeal for the aggrieved party. These were the



sentiments of Odunga J (as he then was) in the case of *Michael Ntouthi Mitheu v. Abraham Kivondo Musau* [2021] eKLR in determining a similar application held;

“Where execution of a money decree is sought to be stayed, in considering whether the Applicant will suffer substantial loss, the financial position of the Applicant and that of the Respondent becomes a crucial issue. The Court cannot shut its eyes where it appears the possibility of the Respondent refunding the decretal sum in the event that the Applicant is successful in his appeal is doubtful. The Court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the appeal.”

14. In light of the forgoing having tendered evidence of his household goods, the Applicant has demonstrated a state of affairs that may be negated should he succeed on appeal.
15. Was the Application filed timeously? The Application was filed on 22/7/2023, a month after delivery of the impugned Judgment on 22/6/2023. The period of one month is not inordinate in the circumstances.
16. The last limb for the Court to consider is an offer for security for the due performance of the decree. The Applicant did not offer any. The Court is empowered to order for security as it may deem fit on a case to case basis. The Respondent proposed that if the Court is inclined to grant stay, the Appellant be ordered to deposit the decretal sum in a joint interest earning account. The issue of adequacy of security was dealt with by the Court of Appeal in *Nduhiu Gitahi v. Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 where the Court of Appeal expressed itself as follows:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into Court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the Court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The Court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the Court to disadvantage the Defendant while giving no legitimate advantage to the Plaintiffs. It is the duty of the Court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the Plaintiffs are secured in one way rather than another. It would be easier for the Defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the Court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at Court rates. Indeed in this case there is less need to protect the Defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it”



17. As to the nature of security that the Court should consider in the circumstances of this case, the Court is guided by the decision in para 69 of *Westmont Holdings SDN - BHD v Central Bank of Kenya* where the Court stated that;

“To that end, we are of the considered view that a Court may impose a condition precedent when imposing an order for security for costs in special and exceptional circumstances such as extraordinary and important cases, for instance, election petitions. The same should, however, be done in a manner that is reasonable and not to punish or subdue a genuine claim. In that regard, imposing a condition precedent is not in itself unconstitutional provided it is not unreasonable to the extent that it impedes a party’s access to justice.”

18. In the end the Court finds that this is a ripe case for granting conditional stay of execution in terms of depositing a sum of Kshs. 200,000/- in a joint interest earning account in the names of the Counsels of the parties herein.

19. In the end the application is allowed in the following terms:-

- a. The deposit of Kshs 200,000/- in a fixed interest earning account the names of both Counsel for the parties within a period of 30 days in default the orders shall lapse.
- b. Costs shall be in favour of the Respondents.

20. Orders accordingly.

**DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 14<sup>TH</sup> DAY OF MARCH, 2024.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Bw’oigara for Appellant

Ms. Kinyanjui HB Ms. Kinyua for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Court Assistants – Phyllis/Oliver

