



**Muturi v Gathara & another (Commercial Case E197 of 2023)  
[2025] KEHC 491 (KLR) (Commercial and Tax) (24 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 491 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E197 OF 2023  
JWW MONG'ARE, J  
JANUARY 24, 2025**

**BETWEEN**

**GLADYS NJERI MUTURI ..... APPELLANT**

**AND**

**SAMUEL GITAHU GATHARA ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH KAHUHO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Respondents have by an application dated 6<sup>th</sup> September 2024 moved this Honourable Court under Certificate of Urgency. The application is brought under Orders 9, 42 and 51 of the Civil Procedure Rules and it seeks the following orders:-
  1. Spent
  2. Spent
  3. Spent
  4. Spent
  5. That pending the hearing and determination of the main appeal this Honourable Court be pleased to order for a stay of execution of the judgment and /or decree in HCCOMM Appeal No. E197 of 2023 in respect of the judgment delivered on 25/07/2024.
  6. That upon grant off prayer 5 above, this Honourable Court be pleased to order that the Respondents do provide sufficient security in the form in which this Honourable Court will direct.



7. THAT the costs of this Application be provided for.
2. The application is supported by the grounds set out on its face and the supporting affidavit sworn by the Applicants, Joseph Kahuho and Samuel Gitahi Gathara. The Application is vehemently opposed and the Respondents have filed a replying affidavit sworn by Gladys Njeri Muturi, the Appellant in the Appeal.
3. Upon being directed by the court, both parties have filed written submissions which I have considered.

**Analysis and Determination:-**

4. It is imperative to note that this court on 25<sup>th</sup> July 2024 rendered a judgment on the Appeal filed herein by the Appellant, which appeal emanated from a decision of the subordinate court in respect of a judgment by Hon. G. M Gitonga SPM on 4<sup>th</sup> August 2023 in Milimani CMCC Case No. 2289 of 2020, reversing the said decision in favour of the Appellant. It is against this judgment that the Applicants have filed the present application seeking to stay the execution and the subsequent decree thereto.
5. The Applicants argue that they intend to Appeal the Judgment of this court and to this end they have filed a Notice of their intention to do. They further argue that although the said notice was filed 43 days after the impugned judgment, the same was filed timeously and without inordinate delay. They argue that they in possession of the suit property and that execution of the judgment therein shall deprive them of the same and that since the judgment requires payment of a decretal amount to the tune of Kshs.2,470,000/=, if the same is paid to the Appellant they stand to suffer substantial loss as the Appellant has no known source of income from which the said funds can be refunded to once paid to her. They urge the court to order the Appellant to provide security for costs in the event they succeed with their intended appeal.
6. In opposing the said application, the Appellant argues that the Application presently as filed is without merit. The Appellant argues that the same was filed with inordinate delay as it was filed 43 days after the judgment of the court with the sole aim of denying the Appellants the fruits of her judgment. The Appellant argues that the Applicants have been in illegal occupation of her property for 10 years and any further delay in taking possession shall greatly prejudice her. She urges that since the Applicants have not filed a substantive appeal to the judgment, there is no basis from which the court can determine whether or not the Applicants have an arguable appeal with a likelihood of success. She further argues that the prayer for security for costs cannot be granted by this court in the absence of an appeal having been filed against the judgment of this court.
7. I have considered in totality the arguments put forward by the parties and note that the said application is brought substantively under Order 42 Rule 6 Of the Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules provides as follows:-

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 subrule (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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

8. It is the courts’ view that an application under Order 42 Rule 6 of the Civil Procedure Rules stands or falls on the key considerations of substantial loss and security. This position was reinforced by the Court of Appeal in the case of Shell ltd –vs- Kibiru & Another, Civil Appeal No.97 of 1996 where court held:-

“that substantial loss to include prove of loss of money if the payment was made since the Respondent would not be able to repay the money. That is a potential loss that the Applicant has demonstrated and the Respondent has demonstrated that he is capable of refunding the money held in security if the appeal succeeds. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein.”

9. In the present case I reiterate that no appeal has been preferred against the Judgment of the court. What the Applicants have filed is a notice of their intention to file an Appeal. There is no explanation offered as to why the intended appeal or a draft Memorandum of Appeal has not been annexed to the pleadings herein to demonstrate the grounds upon which the intended appeal shall be premised. It is therefore the finding of this court that there is no demonstration or proof of substantial loss put forward to demonstrate what loss if any, will the Appellants lose if the present application is denied. The judgment of this court is therefore unchallenged and the same is available to the Appellant for execution.
10. The court having rendered itself on this matter is otherwise functus officio and cannot be seen to be curtailing the execution of its own judgment in the absence of an order from a superior court. I am therefore disinclined to allow the present application as the same will only act to obstruct the rights of the Decree Holder in a judgment that has not been challenged. I find and hold therefore that the present application for stay of execution of the Judgment and decree in HCCOMMA No. E197 of 2023, pending appeal has no merit. The same is dismissed with costs to the Respondent. It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF JANUARY  
2025**

**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

Mr. Njuguna for the Appellant/Respondent.

No appearance for the Respondents /Applicants.

Amos - Court Assistant

