



Gacheri & another (Suing as the legal representative of the Estate of Sammy Mburugu Gitobu - Deceased) v Gichuhi & another (Civil Case 11 of 2020) [2025] KEHC 2870 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2870 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL CASE 11 OF 2020
HM NYAGA, J
FEBRUARY 27, 2025**

**SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF SAMMY MBURUGU GITOBU (DECEASED)**

BETWEEN

JANE GACHERI 1ST PLAINTIFF

PURITY KARAMBU 2ND PLAINTIFF

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SAMMY
MBURUGU GITOBU - DECEASED**

AND

JOSEPH GICHUHI 1ST DEFENDANT

GLADYS GACERI GICHOGA 2ND DEFENDANT

RULING

1. The case proceeded to full hearing and judgement was delivered on 7th March 2024 as follows:-
 - a. Judgement is entered for the plaintiffs against the defendant jointly and severally on liability of 100%.
 - b. Judgement is entered for the plaintiffs against the defendants jointly and severally and quantum as follows;
 - i. Pain and suffering – Ksh 50,000/-
 - ii. Loss of expectations of life – Ksh 100,000/-
 - iii. Loss of Dependency Ksh 15,000,000/-



iv. Special Damages Ksh 600,000/-

Total Ksh 15, 750,000/-

- c. Plaintiffs are equally awarded costs of the suit and interest.
2. Aggrieved by the said Judgment the Defendant filed a Notice of Appeal dated 21st March 2024, against the whole of the said decision.
3. The applicants then moved the court vide the notice of motion dated 14th June 2024 in which they seek the following orders:-
- a. That the application be certified as urgent, service of the same be dispensed with and be heard ex-parte in the first instance.
 - b. That pending the hearing and determination of this application inter-partes, a stay of execution of the judgment and/or Decree entered on 7th March 2024 and all consequential orders and proceedings thereto be and is hereby issued and/or granted.
 - c. That pending the hearing and determination of the intended appeal, a stay of execution of the Judgement/Decree entered herein on 7th March 2024 and all consequential orders and proceedings thereto be and is hereby issued and/or granted.
 - d. That this Honourable court be pleased to make any other such orders as it may deem just.
 - e. The costs of this application be provided for.
4. The application is propped by the grounds set out on its face and is supported by the affidavit of the 2nd defendant/applicant sworn on even date.
5. In a nutshell, the Applicants state that they have preferred an appeal against the Judgment herein, by filing a notice of appeal within time. That they intend to seek to apply for extension of this file the Memorandum and record of Appeal in the court of Appeal. That they have an arguable appeal with high chances of success.
6. The Applicants state that they were served with a proclamation Notice by Bealine Auctioneers which is irregular and premature.
- That the decretal sum is quite substantial and if execution is allowed to proceed, they will suffer substantial loss. That the Plaintiffs source of income is unknown and it would be impossible to recover the decretal sum should the defendants succeed on appeal. That the Plaintiffs will not suffer any prejudice and/or damage from which relief is irrecoverable if the stay as granted.
7. Lastly, it is averred that the application has been made without unreasonable delay.
8. In response the 1st plaintiff/respondent swore a replying affidavit sworn on 10th July 2024. It is averred that there is no appeal pending at the Court of Appeal to warrant a stay of execution as sought.
9. It is further averred that the defendants/applicants are transferring their property to different companies registered in the 1st Applicant's sister's name in order to avoid execution. Thus if stay is granted, Justice will be defeated.
10. The Respondent further states that she is a successful litigant and that she should be allowed to enjoy the fruits of the judgment.



11. It is further averred that should the court be inclined to grant a stay, then the applicants should be ordered to pay half the decretal sum to her and the balance be deposited in a joint interest earning account in the names of the advocates.
12. The Applicants filed a supplementary affidavit to address the issues raised in the replying affidavit. It is deponed that the application for leave to file appeal out of time has already been determined in their favour by the Court of Appeal and they have already filed the record of appeal. The applicant annexed copies of the ruling of the Court of Appeal and the record of appeal.
13. The Respondent denied that they have transferred their assets and state that it is not shown that the two named companies belong to her sister.
14. It is further averred that her insurer is willing to offer a security deposit of Ksh 3,000,000/-, the maximum compensation under statute, which is reasonable in the circumstances.

Applicants submissions

15. The applicants framed the following issues for determination:-
 - a. Whether the Applicants have met the conditions necessary for the grant of the orders of stay pending appeal.
 - b. Who should bear the costs of this application?
16. The Applicants referred to order 42 Rule 6 of the Civil Procedure Rules which guide the court in determining an application for stay of execution pending appeal.
17. The applicants referred the court to the decision in Rhoda Mukuma vs John Abuoga [1988] eKLR on the grant of stay to ensure that the appeal is not rendered nugatory.
18. It is submitted that the sum awarded coupled with the auctioneer's costs are substantial and if execution is carried out they will suffer substantial loss.
19. It is submitted that the respondents have not provided evidence to show their financial capabilities nor did they swear any affidavit of means and as such their ability to refund the sums paid to them is unknown. Cited to buttress this point was National Industrial Credit Bank Ltd vs Aquinas Francis Wasike and another [2006] eKLR and Edward Kamau and another vs Hanah Mukui Gichuki and Another [2015] eKLR.
20. It is further submitted that there is no dispute that execution has commenced and unless the same is stayed, the appeal will be rendered nugatory.
21. Further, it is submitted that although they had not filed an appeal at the time of filing the application, as of now the appeal has been lodged and the same is meritorious. That substantial loss has been established.
22. On the question of delay, it is submitted that the notice of appeal was filed on time. That the advocates on record were allowed to come on record on 20th May 2024 and the application was filed on 14th June 2024. It is submitted that the 3 months period is not unreasonable.
23. On security the applicants submit that the rights of the respondent have to be weighed against the right of appeal and was held in Gianfranco Manenthi and Another vs Africa Merchant Assurance Co. Ltd [2019] eKLR.



24. The applicants also submit that the offer to deposit security for a sum of Kshs 3,000,000/- is reasonable and citing *Arun C. Sharma vs Ashana Raikundalia T/A Raikundalia & Co. Advocates and 2 others* [2014] eKLR, the applicants urged the court to find the offer to be adequate.
25. On costs the applicants conceded that the same are the discretion of the court as set out in section 27 of the *Civil Procedure Act* and reiterated in *Cecilia Karuri Nganyu vs Barclays Bank of Kenya and another* [2016] eKLR. They urged the court to award them costs.

Respondents' submissions.

26. The Respondents reiterated the conditions out under order 42 Rule 6 of the Civil Procedure Rules.
27. It is submitted that the applicants have not stated what substantial loss they stand to suffer if stay is not granted. That they do not state that they are willing to provide such security as the court orders for the due performance of the decree. Cited was the case of *Njoki & 3 others vs Kamau* [2022] KE ELC 15542 (KLR).
28. Relying On *Tabro Transporters Ltd vs Absolom Dova Lumbasi* [2012] eKLR, the Respondents reiterate the need for the court to strike a balance between the applicants' right of appeal and the Respondents' right to enjoy the fruit of their judgment.
29. It is further submitted that the applicants have been shown to be transferring assets including the accident vehicle to other entities and are just seeking time to evade justice.
30. It is also submitted that the delay of 3 months before filing this application is inordinate and has not been sufficiently explained. Cited was the case of *Edgar Namusende Likono vs Isaac Khalisia Bubiru* [2021] eKLR.
31. The Respondents urge the court to dismiss the application with costs.

Analysis and determination

32. Being an applicant for stay of execution, the parameters are well known. Order 42 Rule 6 of the CPR provides as follows:-
 - “ 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 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 of stay 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 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”

33. Thus to succeed an applicant should satisfy the court that:

- a. Substantial loss may result to him/her 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.

34. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] eKLR where 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: -

- i. 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.
- ii. 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.
- iii. 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.
- iv. 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.

35. Thus, the question is whether the applicants have met the threshold for the grant of the orders sought.

36. On substantial loss, there is really the doubt that the execution has commenced on the issue of execution. It is at this point that I have to address an issue that I have noted.

37. From the court record it is apparent that the execution was commenced before the party and party costs were taxed.

38. Section 94 of the *civil Procedure act* provides as follows:-

“Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation”.

39. From a plain reading of the said section, it is clear that any execution before costs are ascertained in decree from the High court must be pursuant to a court order.



40. I have perused the entire court record and I have not seen any application praying for such execution. The warrants issued were exclusive of costs so it is safe to conclude that the taxation of the said costs is yet to take place.
41. In *Kartar Singh Dhupar and Co. Ltd vs Lianard Holdings Ltd* [2017] eKLR, the Court of Appeal explained the purpose of section 94 of the *Civil Procedure Act* as follows:-
- “The mischief sought to be addressed by section 94 of the *Civil Procedure Act*, is to protect a judgment debtor from suffering multiple executions, one in respect of the principal sum and the other for the costs after ascertainment in respect of the same suit.”
42. Similar views were expressed by the same court in *Bamburi Portland Cement Co Ltd vs Hussein* [1995] LLR 1870 where it was held:-
- “Section 94 of the *Civil Procedure Act* requires that for execution of a decree before taxation leave must be obtained from the High Court, such leave may be sought informally at the time judgment is delivered but if that is not done then it must be made by way of a notice of motion. The motion must be served on the other party and heard inter parties. Order 21 Rule 7(4) of the Civil Procedure Rules purports to confer on the registrar and deputy registrar the power specifically given to High Court under section 94 of the Act. Rule 7(4) is clearly ultra vires section 94 of the Act because the section reserves that power exclusively to the High Court.”
43. Further in *Lakeland Motors Ltd vs Sembi* [1998] KLR 682 it was held that:-
- “The exercise of judicial discretion by the superior court under section 94 of the Act necessarily requires that parties to a decree passed by that court in the exercise of its original civil jurisdiction should be availed an opportunity to be heard before making an order for execution of that decree before taxation. This, we think, is the spirit of the observation of Shah, J.A., with which we agree, in *Bamburi Portland Cement Co Ltd v Abdulhussein* (1995) LLR 2519 (CAK) in regard to the application of section 94 of the Act.”
44. As can be seen, the importance of the said provision cannot be downplayed.
45. Having commenced execution without seeking leave as required, then the whole process was flawed.
46. Consequently, the decree the warrants of attachment and warrant of sale issued herein are set aside and revoked. The Auctioneer is to return them to the court forthwith.
47. The above notwithstanding, I will also consider the application on the premise that the execution process was proper.
48. As to substantial loss, it is not in dispute that the amount involved is quite considerable by any measure. As has been averred by the Applicants, the Respondents have not shown that they possess the ability to refund the decretal sum in the event the appeal is successful. In the case of *National Industrial Credit Bank Ltd. v Aquinas Francis Wasike & Another* [supra] the Court of Appeal held as follows:
- “This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses 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. In my view, the respondent was unable to discharge his burden”.

49. Thus, the appeal, which has already been filed may be rendered nugatory. In the case of Rhoda Mukuma v John Abuoga (supra) it was stated that –

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

50. On the question of delay, I think that the same has been sufficiently explained. The notice of appeal was filed on time. In between it and the present application, the advocates now on record for the applicants had moved the court seeking to be allowed to act herein. In my view given those circumstances, the delay of 3 months is not unreasonable or inordinate and has been explained.

51. As to whether the appeal raises triable issues, I find that this is not a matter for consideration by this court. It cannot be called upon to assess the chances of an appeal from its own decision. It suffices to state that the Court of Appeal duly extended time to file the appeal. The said court must have deemed the said appeal to be arguable.

52. On the question of security, I have noted the rival proposals. Order 42 Rule 6 (2) (b) of the Civil Procedure Rules is couched in mandatory terms to the effect that the Applicant must furnish security for the due performance of the order or decree. In the case of Arun C Sharma Vs Ashana Raikundalia T/A Raikundalia & Co. Advocates and 2 others (supra) , the court held that:-

“The purpose of the security under Order 42 is to guarantee due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor....civil process is quite different because in civil process the judgment is like a debt hence the applicant become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the civil procedure rules acts as a security for the performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

53. The applicants have made an offer of security and for the purposes of the said rule they have duly complied with it.

54. As has been correctly submitted by both sides the court has to balance between the rights of the successful party and the other party who wishes to exercise its right of appeal.

55. Having considered the matter, I find that the following orders ought to issue:-

- a. The applicants are to pay the conceded amount of security of Ksh 3,000,000/- to the respondents within the next 30 days.
- b. The applicant shall provide appropriate security for a sum of Ksh 4.5 Million in the form of a bankers guarantee or other acceptable security. The same is to be filed in court within 60 days.
- c. The balance of the award of the court shall await the determination of the appeal.
- d. In default of (a) and (b) above, the Respondents shall be at liberty to execute, but mindful of the provisions of the said section 94 of the *Civil Procedure Act*.
- e. Costs shall abide by the outcome of the appeal in the Court of Appeal.



56. Orders accordingly.

SIGNED, DATED AND DELIVERED AT MERU THIS 27TH DAY OF FEBRUARY 2025

H.M. NYAGA

JUDGE

