



**Githuku & another v Kamaiti (Suing as the Legal Representative of the Estate of David Kimani Karanja - Deceased) (Civil Appeal E029 of 2024) [2025] KEHC 9238 (KLR) (24 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9238 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CIVIL APPEAL E029 OF 2024  
LN MUTENDE, J  
JUNE 24, 2025**

**BETWEEN**

**GEOFFREY GITHUKU ..... 1<sup>ST</sup> APPLICANT**

**THE TRUSTEES OF CATHOLIC DIOCESE OF NAKURU ..... 2<sup>ND</sup> APPLICANT**

**AND**

**ROSE NYOKABI KAMAITI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DAVID KIMANI KARANJA - DECEASED) ..... RESPONDENT**

**RULING**

1. The Applicants approached this court through a Notice of Motion dated 28<sup>th</sup> September, 2024, seeking stay of execution of the judgment and/or the decree delivered herein on 22<sup>nd</sup> August, 2024, and all consequential orders arising therefrom pending hearing and determination of the appeal.
2. The application is premised on grounds that the lower court suit Nyahururu CMCC No. 307 of 2022 proceeded ex-parte on 14<sup>th</sup> December, 2023, without the Defendants' participation and the case was closed; the Applicants filed an application seeking to arrest the judgment that was to be delivered on notice set aside on 14<sup>th</sup> December, 2023, so that the case could be re-opened to be heard on merit; the application dated 19<sup>th</sup> June, 2024, was scheduled for inter-parties hearing on the 8<sup>th</sup> August, 2024, however the same was not heard as the trial Magistrate was indisposed.
3. That the matter was listed on 14<sup>th</sup> August, 2024, and, scheduled for delivery of judgment on 22<sup>nd</sup> August, 2024, without due regard to the pending application. A letter written by the Applicants on 16<sup>th</sup> August, 2024, requesting for the application to be heard inter-parte was not acted upon but the judgment in the primary suit was delivered on 22<sup>nd</sup> August, 2024 in favour of the Respondent as against the Applicants in the following terms; liability at 100% in favour of the Respondent against the Applicants. Damages for pain and suffering – Kshs.50,000/-, loss of expectation of life –



Kshs.100,000/-, loss of dependency – Kshs.1,435,200/-, special damages – Kshs.230,855/-, plus costs and interest.

4. That the appeal raises cogent issues and has high chances of success; the Applicants were granted 30 days stay of execution from the date of judgment that have lapsed; the Respondent will commence execution proceedings to the detriment of Applicants who will suffer irreparable damages and the appeal shall be rendered nugatory; no irreparable damage will be occasioned to the Respondent if orders sought are granted.
5. That the Applicants are willing and ready to furnish security for due performance of the decree as a condition for allowing the application.
6. In a response thereto, the Respondent filed a replying affidavit where she deposes that the Applicants have not demonstrated in any way that they stand to suffer irreparable damages if orders sought are not granted.
7. That the court should balance the Respondent's right to a lawful judgment vis-à-vis the Applicants' right to appeal. That the Applicants have not demonstrated in what way they will suffer substantial loss if orders sought are not granted. That the Applicants should deposit half the decretal sum in court while the other half should be paid to the Respondent if they are serious about pursuing the appeal.
8. The application was disposed through written submissions. I have considered the application, affidavits in support and opposition and rival submissions. Principles of stay of execution are derived from the Civil Procedure Act. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provide thus;

(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.
9. The power seized by the court in that regard is discretionary but must be exercised judiciously. In *Butt v Rent Restriction Tribunal* [1982] KLR 417 the court having considered arguments brought forth delivered itself thus;
    - a. The power of the court to grant or release an application for stay of execution is a discretionary power.
    - b. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements.



- c. The court in exercising its powers under order XLI Rule 4(2)(b) of Civil Procedure Rules can order security upon application by either party or on its own motion. Failure to put security for costs as awarded will cause the order for stay of execution to lapse.”
10. Issues to be determined are hence whether:
- i. The application has been made promptly without undue delay.
  - ii. The Applicants will suffer substantial loss if orders sought are not granted.
  - iii. Security should be provided for due performance of the decree.
11. This court did not have the opportunity of reading the judgment of the lower court alluded to but from the pleadings it can be discerned that the judgment was delivered on 22<sup>nd</sup> August, 2024, and the application was filed on 28<sup>th</sup> September, 2024, a month later. This cannot be dismissed as inordinate delay.
12. On the issue whether the Applicants will suffer substantial loss. It behoved the Applicants to demonstrate what they will suffer if orders sought will not be granted. The harm to be suffered must be one that cannot be adequately compensated in damages. In *Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga* [1982 – 1988] I KAR 1986 the Court of Appeal stated that;
- “It is usually a good rule to see if Order 41 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 cornerstone of both jurisdiction for granting stay.”
13. In demonstrating that the Applicants will suffer loss they alluded to the fact of having not been heard and the fact of having attempted to arrest the judgment at trial, an application that was disregarded. It is further argued that the Respondent has not demonstrated that she will be able to refund the decretal amount if the appeal is successful. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another Civil Appeal No. Nairobi 238 of 2005* (UR. 144/2025) it was held that;
- “This court has said before and it would bear repeating that while legal duty is on the 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 the Respondent or the lack of them. Once an Applicant expresses a reasonable fear that 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.”
14. The Respondent argues that the Applicants have not proved that the Respondent is a man of straw who cannot pay back the decretal amount. However, the burden of proof that the decretal sum can be refunded if the appeal succeeds is on the Respondent to prove that she is not impecunious by providing credible evidence. This was not the case herein.
15. On the question of security for due performance of the decree, the Applicants have offered to furnish security pending appeal as the court may direct. The Respondent on the other hand seeks to have part of the money released to her. The trial court is faulted for awarding exorbitant and oppressive sum following an erroneous estimate of the damage suffered. What has been demonstrated is the fact of



the Applicants having endeavored to be heard at trial before the judgment was entered. Circumstances that prevailed call upon the court to consider a broader aspect of interest of justice.

16. The upshot of the above is that the application has merit. In the result, I grant orders thus.
17. There be stay of execution of the judgment and/or decree delivered in the matter and all consequential orders arising thereto pending hearing and determination of the appeal on condition that;
  - i. The Applicant deposits half the decretal sum in court within 14 days of today, 24<sup>th</sup> June, 2025.
  - ii. The Applicant to file and serve the Record of Appeal within 30 days hereof.
  - iii. Failure to comply with the conditions set, the stay orders will stand vacated.
  - iv. Mention for further orders on 29/09/2024.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24<sup>TH</sup> DAY OF JUNE, 2025.**

.....

**L.N. MUTENDE**

**JUDGE**

