



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gachoka v Mulu (Civil Appeal 248 of 2023) [2024] KEHC 590 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 590 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 248 OF 2023  
SM MOHOCHI, J  
JANUARY 25, 2024**

**BETWEEN**

**JAMES GITHAIGA GACHOKA ..... APPLICANT**

**AND**

**PRISCILLA MWIKALI MULU ..... RESPONDENT**

**RULING**

1. Before me is a filed under Certificate of Urgency, pursuant to sections 1A, and 3A of the [Civil Procedure Act](#), order 22 rule 22, order 42 rule 6 and order 51 rules 1 and 3 of the [Civil Procedure Rules](#) to the seeking the following orders: -
  - i. Spent
  - ii. Spent
  - iii. This Honourable Court be pleased to grant an order of stay of execution of the judgment on 11<sup>th</sup> August, 2023 and all consequential orders arising therefrom pending the hearing and determination of the appeal.
  - iv. This Honourable Court be pleased to issue an Order for provision of a Bank Guarantee of the entire decretal sum awarded by the trial court of Kshs. 207,190/- as security pending hearing and determination of HCCA 248 of 2023 James Githaiga Gachoka
  - v. That this Court be pleased to stay execution of the decree issued in Nakuru CMCC NO 383 of 2019 and all subsequent orders until the Appeal herein is heard and determined.
  - vi. This Honourable Court be pleased to issue any other Order as it may deem just, appropriate and expedient in the interest of justice.
  - vii. Costs of this application be provided for.



2. The Application is supported by the undated sworn affidavit of James Githaiga Gachoka undated and is based on the following grounds;
  - a. The Defence Case in Nakuru CMCC N0. 1149 OF 2018 was closed and the parties herein filed their submissions and the matter was reserved for delivery of judgment on 11/8/2023.
  - b. The judgment in the subordinate court was delivered vide a judgment dated 11/8/2023 in the following terms: liability at 50% against the Applicant; General damages-Kshs. 200,000/- :special damages of Kshs. 7,190/-: costs of the suit and interest thereon were also awarded to the Respondent herein.
  - c. The Applicant, dissatisfied with the Appeal, lodged an appeal at the high court dated 6<sup>th</sup> September, 2023 and filed on 8<sup>th</sup> September, 2023.
  - d. The Applicant is apprehensive that in the event the amount is paid to the Respondent and the high court overturns the judgment of the trial court they may never recover the amount which amount is very high.
  - e. The said Appeal raises numerous triable issues and has high chances of success.
  - f. The Applicant is apprehensive that the Respondent will commence, execution proceeding against him to his detriment.
  - g. The Applicant is ready, willing and able to furnish the court with a bank guarantee from Family Bank for the entire principle sum as security for due performance of the judgment/ decree pending the hearing and determination of the appeal, within the scope of the *Insurance (Motor Vehicles Third Party Risks) Act* as this Honorable Court may order.
  - h. Directline Assurance Company Limited, the insurer of the Applicants herein. have entered into an agreement with Family Bank for the provision of bank guarantee.
  - i. The applicant stands to suffer substantial loss and damage if the orders sought herein are not granted and further that the Appeal will be rendered nugatory.
  - j. That there will be no prejudice occasioned to the Respondent if the orders sought herein are granted.
  - k. The judgment amount, which is the subject matter herein is substantial and should the execution process commence the applicants stand to suffer irreparable loss and prejudice as the ability of the respondent herein to refund the decretal amount is unknown.
  - l. That this Honourable court has powers to grant the orders sought herein in the interest of justice and fairness.
3. The Matter came up Ex-Parte before court on the October 19, 2023 whereby the court certified the same as urgent on the following terms;

Upon reading the Notice of Motion filed under certificate of Urgency dated October 14, 2023 supported by the (undated) sworn affidavit of James Githaiga Gachoka this court hereby directs and orders as follows:

  - a. The application is hereby certified as urgent and service of the same is dispensed with in the 1st instance.



- b. That an Order of Temporary Stay of execution of Judgment/ Decree in Nakuru CMCC No 1149 of 2018 is hereby issued, pending hearing and determination of this Application.
  - c. The Applicant shall Deposit 50% of the entire Decretal amount in the default Judgment of Nakuru CMCC No 1149 of 2018 in a joint interest-bearing bank account in the names of the counsels on record for the parties within the next 21 days from the date hereof.
  - d. The applicants shall serve the application upon the respondent within 14 days from today (not later than 14th November 2023 ).
  - e. The respondent shall file his response within 14 days from today (Not later than November 29, 2023)
  - f. Inter Parte Mention for further directions on the December 1, 2023.
  - g. A default in compliance with order 3 above, shall automatically vacate the temporary order of stay.
4. The applicant never complied with any of the directions of the court, no return of service was ever filed to demonstrate service of the application upon the respondent.
  5. The applicant has demonstrated utter disregard, want of diligence and general ignorance in prosecuting the motion.
  6. The conditions to be met before stay is granted is provided by order 42 rule 6(2) as follows:-
 

“No order for stay of execution shall be made under sub rule (i)” Unless:-

    - a. The court is satisfied that substantial loss may result to the applicant unless the order is made.
    - 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.
  7. The Court of Appeal in *Butt Vs Rent Restriction Tribunal* (1982) KLR 417 gave guidance on how a court should exercise discretion and held that:
    - 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”.
  8. In the case of *Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd* [2019] eKLR, the court thus held that:-
 

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the



opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine

9. This court is unpersuaded that, the three pre-conditions for grant of stay been demonstrated, the manifest disregard of court directions failure to comply with conditions set is demonstrative of the applicant undeserving of the interlocutory reliefs sought.
10. In the upshot the court in exercise of its, discretion and in the interests of justice orders and directs as follows:
  - a. The notice of motion application dated December 8, 2022 is hereby dismissed for want of merit.
  - b. The appellant shall file and serves a record of appeal and Set it down for Admission, Directions and hearing within Sixty (60) days from today.
  - c. Costs shall be in the cause.

It is so Ordered.

**SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 26<sup>TH</sup>JANUARY, 2024**

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**Mohochi S.M**

**JUDGE**

