



REPUBLIC OF KENYA



**KENYA LAW**  
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**Chege v Gachora (Civil Appeal 265 of 2023)  
[2024] KEHC 1994 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1994 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL 265 OF 2023  
FN MUCHEMI, J  
FEBRUARY 29, 2024**

**BETWEEN**

**SIMON KABOGO CHEGE ..... APPELLANT**

**AND**

**PAUL KIMANI GACHORA ..... RESPONDENT**

**RULING**

**Brief facts**

1. The application dated 18<sup>th</sup> September 2023 seeks for orders for stay of execution of the ruling delivered on 30<sup>th</sup> August 2023 in Thika CMCC No. 718 of 2021 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 27<sup>th</sup> October 2023.

**Applicant's Case**

3. The applicant states that he filed an application dated 14<sup>th</sup> March 2023 seeking for orders to set aside the interlocutory judgment issued on 7<sup>th</sup> December 2022 and allow him to file his defence so that the suit would be heard on merit. The application was dismissed on 5<sup>th</sup> April 2023 for non-attendance and the applicant contends that his advocates filed another application on 10<sup>th</sup> May 2023 seeking to reinstate the application dated 14<sup>th</sup> March 2023. The said application was dismissed and being aggrieved with the said ruling, the application filed this appeal to challenge the said ruling.
4. The applicant contends that he will suffer irreparable loss should the respondent execute his judgment and attach his property.



## The Respondent's Case

5. The respondent states that the applicant has a habit of filing one application after another and does not prosecute the said applications resulting dismissal for non-attendance. The respondent further states that the judgment in Thika CMCC No. 718 of 2021 was delivered in his favour on 7/10/2022 and the applicant was notified of the outcome. Thus, the applicant has not given any plausible reason for taking over a year to set aside the judgment. The respondent contends that the applicant's sole intention is to delay finalization of this matter and that he has no intention in bringing the matter to finalization in the near future.
6. The respondent contends that the applicant has not shown the loss he is likely to suffer in the event the orders of stay of execution are not granted. As such, the respondent urges this court to dismiss the application as the applicant has a history of indolence and is not deserving of the principles of equity.

## The Applicant's Submissions

7. The applicant relies on the case of *Machira t/a Machira & Co. v East Africa Standard No. 2* (2002) 2 KLR 63 and submits that he shall suffer substantial loss should execution proceed as the trial court awarded the sum of Kshs. 968,792/- as damages and costs of the suit is high and the respondent may not be in a position to refund should this appeal succeed.
8. The applicant submits that he has brought the instant application at the earliest instance upon discovering the existence of the *ex parte* judgment. The applicant further submits that the appeal was lodged on 6<sup>th</sup> September 2023, five days after the court rendered its ruling. It is also argued that the delay in prosecuting the instant application was occasioned by the file being transferred to the current court from Kiambu High Court.
9. Relying on the case of *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others* (2015) eKLR, the applicant submits that he is ready and willing to deposit the security for costs as may be ordered by the court.

## The Respondent's Submissions

10. The respondent relies on Order 42 Rule 6 of the *Civil Procedure Rules* and the case of *Machira t/a Machira & Co. Advocates v East African Standard (No. 2)* and submits that the applicant has not satisfied the conditions set out for him to be granted the stay orders.
11. The respondent relies on the case of *Elyjoy Kageni v Bank of Africa (K) Limited & 3 Others* [2017] eKLR and submits that the issues raised in the applicant's memorandum of appeal are frivolous and therefore are not arguable.
12. On the issue of substantial loss, the respondent relies on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR and submits that the applicant has not shown what substantial loss he shall suffer in the event the orders of stay are not granted. The respondent further submits that he should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment and that litigation must come to an end.
13. The respondent contends that although the applicant has not indicated his readiness to furnish security for the due performance of the decree, the respondent states that he is entitled to equal treatment before the law. Without prejudice to the foregoing, the respondent urges the court to be guided by the decision in *Edward Kamau & Another v Hannah Mukui Gichuki* Misc. No. 78 of 2015 and employ a balancing act between the rights of the parties by granting stay of execution on condition that the



applicant pay half the decretal amount of Kshs. 918,352/- to the respondent and deposit the balance of Kshs. 459,176/- in a fixed joint interest amount of both advocates.

## The Law

### Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

14. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) *Civil Procedure Rules*. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-
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 orders 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 1<sup>st</sup> 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.
15. Thus under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:
1. Substantial loss may result to him/her unless the order is made;
  2. That the application has been made without unreasonable delay; and
  3. 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.
16. Substantial loss was clearly explained in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR:-
- “No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. 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...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.
17. The applicant contends that he stands to suffer irreparably if the respondent levies execution against him. The respondent argues that the applicant has not demonstrated the substantial loss he stands to suffer. On perusal of the applicant’s affidavit, I have noted that the applicant has not demonstrated



how he stands to suffer substantial loss if the orders sought are not granted. The applicant merely states that he is exposed to execution of the decree unless a stay is granted and further that the intended appeal shall be rendered nugatory if stay is not granted. Only in his submissions does the applicant state that he stands to suffer irreparable damage as the respondent will not be financially able to repay back the decretal sum.

18. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show how execution shall irreparably affect him or will alter the status quo to his detriment therefore rendering the appeal nugatory. Furthermore, the applicant cannot bring up the issue of the respondent being unable financially to pay back the decretal sum in his submissions. The applicant ought to have raised that contention in his affidavit to give the respondent a chance to respond and produce evidence of his financial abilities. It is therefore my considered view that the applicant has not demonstrated substantial loss he stands to suffer.
19. I have further perused the court record and noted that the ruling dated 30<sup>th</sup> August 2023 in Thika CMCC No.718 of 2021 before the trial court dismissed the application dated 14<sup>th</sup> March 2023 that sought to set aside the orders issued on 5<sup>th</sup> April 2023. The orders the applicant sought to set aside were for dismissal of his application for stay of execution for the reason that the applicant failed to serve the said application on the respondent despite the court ordering him to do so. In essence the impugned ruling is a negative order and is incapable of execution. This principle was enunciated by the Court of Appeal in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR where the court held as follows:-

An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.

20. Similarly in *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others* [2016] eKLR the Court of Appeal expounded on stay of execution stating:-

In *Kanwal Sarjit Singh Dhiman v Keshavji Juvraj Shah* [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows:-

The 2<sup>nd</sup> prayer in the application is for stay (of execution) of the order of the superior court made on 18<sup>th</sup> December 2006. The order of 18<sup>th</sup> December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.

The same reasoning was applied in the case of *Raymond M. Omboga v Austine Pyan Maranga (supra)* that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:-

The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order....The applicant seeks to appeal against the order dismissing his application. This is not



an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....

21. In light of the above, the order being a negative order which did not order any of the parties to do anything or restrain from doing anything is incapable of execution and thus the court cannot order stay of execution of that negative order.
22. The instant application was filed on 19<sup>th</sup> September 2023 whereas the ruling was delivered on 30<sup>th</sup> August 2023 and therefore it is my view that the application was filed timeously.

### **Security of costs.**

23. The purpose of security was explained in the case of *Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the 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 applicants 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 security for the due 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.

24. Evidently, the issue of security is discretionary and it is upon the court to determine the same. I have perused the court record and noted that the applicant has not offered any terms of security to warrant the application for stay.
25. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is *prima facie* entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

26. The court in granting stay has to carry out a balancing act between the rights of the two parties. The court ought to determine whether there is a just cause for deriving the respondent his right of enjoying the judgment. The respondent argues that the applicant has not satisfied the conditions to warrant him stay of execution. The applicant on the other hand states that his appeal has high chances of success. I have perused the memorandum of appeal and without delving to the merits of the appeal, the applicant does not raise any arguable points of law or fact. Furthermore, the applicant filed his application dated 14<sup>th</sup> March 2023 and when the application came up for directions on 29<sup>th</sup> March 2023, his counsel was present in court and stated that he just saw the matter on the cause list. The trial court scheduled the matter for a further mention on 5<sup>th</sup> April 2023 in the presence of the



applicant's counsel. On 5<sup>th</sup> April 2023, the trial court dismissed the application for non-attendance by the applicant. Therefore, the applicant is being dishonest to claim that his counsel did not see the case in the digital cause list and therefore did not attend court. The applicant and his counsel being the initiators of the application ought to have been in the lead in prosecuting the application. Judgment in Thika CMCC No 718 of 2021 was delivered on 7<sup>th</sup> October 2022 and the applicant filed this application to set aside interlocutory judgment on 14<sup>th</sup> March 2023 which was four months after judgment was entered. After filing the said application, the applicant was not keen to prosecute it thus, leading to its dismissal. Granting stay in this matter would lead to further delay and inconvenience to the respondent who requires to enjoy the fruits of his judgment. It is trite law that litigation must come to an end and thus it would be more prejudicial to the respondent if the orders of stay are granted.

### **Conclusion**

27. Consequently, it is my considered view that the applicants have failed to satisfy the conditions to warrant stay of execution pending appeal as set out in Order 42 Rule 6.
28. The application dated 18<sup>th</sup> September 2023 lacks merit and is hereby dismissed with costs to the respondent.
29. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024.**

**F. MUCHEMI**

**JUDGE**

