



**Gathuru v Kamencu (Civil Appeal 160 of 2021)
[2022] KEHC 15940 (KLR) (28 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15940 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 160 OF 2021
EM MURIITHI, J
NOVEMBER 28, 2022**

BETWEEN

SOLOMON GATHURU APPELLANT

AND

WILSON MURIUKI KAMENCU RESPONDENT

RULING

1. By notice of motion under certificate of urgency dated May 18, 2022 pursuant to sections 1A, 1B and 3A of the *Civil Procedure Act*, order 22 rule 22, order 42 rule 6, order 45 rule 1 and order 51(1) of the *Civil Procedure Rules*, the appellant seeks:
 1. Spent
 2. Spent
 3. The orders issued by this honourable court on March 31, 2022 which dismissed the appellant's application dated November 30, 2021 be reviewed, varied and/or set aside.
 4. An order do issue to Bealine Kenya Auctioneers restraining them from taking any further step in sale of attached items as per the proclamation of attachment pending hearing and determination of this application.
 5. There be stay of execution pending the hearing and determination of the appeal herein.
 6. Costs of this application be in the cause.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Solomon Gathuru, the appellant herein, sworn on even date. He avers that after the judgment in Tigania PMCC No 46/2020 was delivered, he notified his insurance company, which was legally obligated to settle the decretal sum. His advocate on record contemporaneously lodged an



appeal against the said decision together with an application for stay of execution. The court granted stay on condition that he deposits Ksh 1,000,000 within 14 days, but on March 31, 2022, the court dismissed his application dated November 30, 2021 for non-compliance with its orders.

3. The delay in depositing the said amount is attributed to a technical issue with the insurance company, but he assures the court that the insurance company is now ready and willing to comply with the court orders. After the application of November 30, 2021 was dismissed, he was served with a proclamation of attachment, and he is in danger of being attached and his appeal, which has high probability of success, rendered nugatory, unless the orders sought herein are granted. He beseeches the court not to punish him for the mistake of the insurance company, by allowing his assets to be attached and sold. He avers that the application has been made in good faith and without any unreasonable delay.
4. The application is opposed by the replying affidavit of Wilson Muriuki Kamencu, the respondent herein sworn on May 27, 2022. He feels that the intended appeal does not raise any serious legal issues for consideration by this court since the judgment of the trial court was well reasoned. He depones that the conditional stay orders have since lapsed as they were not complied with, and it was expected that the appellant would express his willingness to deposit the said amount of Ksh 1,000,000 when directions for the hearing of the appeal were taken, but he did not. He wants the application dismissed as it is an abuse of the court process, a waste of the court's time, an intent to delay the matter further and it does not meet the threshold for issuance for review.
5. In urging the application, the appellant informed the court that he had satisfied the requisite threshold for grant of the orders sought, and relied on *Johnson Mwiruti Mburu v Samuel Macharia Ngure (2004) eKLR*, *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another (2006) eKLR* and *Victory Construction v BM (a minor suing through next friend one (PMM) (2019) eKLR*.
6. On his part, the respondent urged that the appellant had not shown what substantial loss he would suffer if stay was refused, and relied on *Congress Rental South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & Another (Garnishee) (2019) eKLR* and *Machira T/A Machira & Co Advocates v East African Standard (No 2) (2002) 2KLR 63*. He urged that appellant had failed to show sufficient cause or offer security as directed by the court, and prayed for the application to be dismissed.

Determination

7. The pre-requisite conditions to be established in every application for review have been stipulated under order 45 of the *Civil Procedure Rules* as follows:
 - i. That there is discovery of new and important evidence which was not available to the 1st applicant when the judgment or order was passed despite having exercised due diligence; or
 - ii. That there was a mistake or error apparent on the face of the record; or
 - iii. That sufficient reasons exist to warrant the review sought. In addition to proving the existence of the above grounds, the 1st applicant must also demonstrate that the application was filed without unreasonable delay.”
8. This court (Cherere J) on December 8, 2021 granted stay of execution of Tigania PMCC 46/2020 “upon the applicant depositing Kshs 1,000,000 (One Million) into court within 14 days.” When the application dated November 30, 2021 came up for hearing on March 31, 2022, the court (Otieno, J) was informed by counsel for the respondent that the conditions for the interim stay had not been complied with and it dismissed the application for non-attendance and non-compliance. The record shows that the appellant's counsel appeared shortly thereafter and told the court that, “we have



tried to effect the deposit but met challenge which we addressed to the court accounts office. That notwithstanding, I will file the record of appeal within the time given.”

9. The appellant now seeks to have those orders of March 31, 2022 dismissing the appellant’s application dated November 30, 2021 set aside, on the basis that he is on the verge of having his properties attached and sold, which will effectively render his appeal nugatory. He avers at paragraph of 8 of his supporting affidavit that, “the insurance company is ready and willing to comply with the court order of depositing Kshs 1,000,000/= as were the conditions for stay of execution of decree emanating from Tigania PMCC No 46 of 2020.”
10. This court notes that the sum of Ksh 1,000,000 has, albeit late, been deposited in court in line with its orders, and the record of appeal was also filed on June 16, 2022 . On the need to do substantial justice and considering that the decretal sum is substantial, this court finds it prudent to have the appeal expeditiously heard and determined to its logical conclusion.

Orders

11. Consequently, for the reasons set out above, the court makes the following orders on the application May 18, 2022:
 1. The record of appeal shall be served upon the respondent forthwith to enable him respond within fourteen (14) days of service.
 2. In the interests of an expedited hearing the parties shall thereafter file written submissions each taking thirty (30) days starting with the appellant.
 3. The prevailing status quo shall be maintained pending the hearing and determination of the appeal, and the court, therefore, grants a stay of execution pending appeal.
 4. Mention for directions as to judgment on March 13, 2023.

Order accordingly.

DATED AND DELIVERED ON THIS 28TH DAY OF NOVEMBER, 2022.

EDWARD M MURIITHI

JUDGE

Appearances

Mr Karimi for Mr Mungai Advocate for the appellant/applicant.

Mr Maranya Advocate for the respondent.

