



REPUBLIC OF KENYA



**Karia t/a Garden Veg Agencies v Ndegwa & another (Civil Appeal  
E438 of 2023) [2023] KEHC 24140 (KLR) (Civ) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24140 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E438 OF 2023**

**JN MULWA, J**

**OCTOBER 26, 2023**

**BETWEEN**

**ZACHARIAH GITHINJI KARIA T/A GARDEN VEG AGENCIES . APPELLANT**

**AND**

**JAMES WAHOME NDEGWA ..... 1<sup>ST</sup> RESPONDENT**

**ESTHER WANJIRU MUTURI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This Ruling is in respect to the Applicant's Notice of Motion application dated 14<sup>th</sup> April 2023 brought under Order 42 Rule 6 of the *Civil Procedure Rules* and Sections 1A, 1B and 3A of the *Civil Procedure Act*. The Applicant seeks an order for stay of execution of the ruling delivered on 22<sup>nd</sup> May 2023 by Hon S A Opande in Milimani CMCC No. E328 of 2022 – James Wahome Ndegwa & Anor v Zachariah Githinji Karia, pending the hearing and determination of the Applicant's Appeal. The Applicant also prays that the costs of this application be borne by the Respondent.
2. The Application is premised on the grounds on its face and the Supporting Affidavit of Zachariah Githinji Karia, the Applicant herein.
3. The Respondent opposed the application by way of a Replying Affidavit sworn on 22<sup>nd</sup> April 2022 by James Wahome Ndegwa, the 1<sup>st</sup> Respondent herein.
4. The court has considered the parties respective affidavits in support of and in opposition of the application as well as their rival submissions. The issue that fall for determination is: Whether the Applicant has satisfied the conditions for the grant of stay of execution pending appeal. The court also noted with concern that the Applicant's submissions were on the issue of temporary injunction which was not the case since their application was purely on the issue of stay of execution.



## Whether the Applicant has Satisfied the conditions for Stay Pending Appeal?

5. The conditions necessary for the grant of stay of execution pending appeal are laid out under Order 42 Rule 6(2) of the [Civil Procedure Rules](#) as follows:

“(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 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.”

6. From the above provisions, it is clear that in order to succeed in an application for stay of execution in this Court, an applicant must demonstrate: that substantial loss may result unless the order of stay is issued; that the application has been brought without undue delay; and, must give security for the due performance of any decree or order that may ultimately be found to be binding on the applicant.

7. The court is satisfied that the application was brought timeously and without undue delay. The impugned judgment was delivered on 22<sup>nd</sup> May 2023 and the application was filed a few days later on 30<sup>th</sup> May 2023.

8. As regards substantial loss, the Applicant states that the Honourable Court entered judgment in favour of the Respondent for a colossal sum of Kshs. 8,657,098.96/= together with costs and in the premises the appeal will be rendered nugatory unless a stay of execution is granted to protect the substratum of the Appeal and that the Applicant will suffer irreparable loss and damage as the Respondents will not be able to refund the decretal sum should the Appellant’s Appeal prove successful.

9. It is well settled that once an Applicant expresses a reasonable fear that the Respondent would have difficulties in refunding the decretal sum if paid before the determination of an appeal, the evidential burden shifts to the Respondent to demonstrate his ability by way of Affidavit evidence as that is a matter which is peculiarly within his or her knowledge; see [National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another](#) [2006] eKLR. The Respondent herein has not discharged this burden and thus the court is satisfied that the Applicant herein stands to suffer substantial loss if stay is not granted.

10. 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; see [James Wangalwa & Another v Agnes Naliaka](#) [2012] eKLR. However, it is well settled that once an Applicant expresses a reasonable fear that the Respondent would have difficulties in refunding the decretal sum, the evidential burden shifts to the Respondent to demonstrate his ability by way of Affidavit evidence as that is a matter which is peculiarly within his or her knowledge;

11. The court also finds that the Applicant has satisfied the third Condition on security as it has expressed readiness and willingness to abide by any conditions and terms that the Court may deem fit to impose for the grant of the stay orders sought. On the other hand, the Respondent proposes that the Applicant be ordered to deposit the entire decretal sum in an interest earning account in the joint names of the Advocates for the Applicant and Respondents.



12. For the foregoing, the court allows the Applicant's Notice of Motion dated 14<sup>th</sup> April 2023 upon the Applicant complying with the following conditions that:

1. The decretal sum of Kshs. 8,891,290/- shall be secured by a Bank guarantee from a reputable bank drawn in favour of the Respondent within 30 days from date of this ruling.
2. In default of order (1) above, the stay orders shall lapse automatically.
3. The Respondent shall have the costs of the application.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 26<sup>TH</sup> DAY OF OCTOBER 2023.**

**JANET MULWA**

**JUDGE**

