



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

**Misc. Civ. Appli. 267 of 1997**

**GATI KAGO.....APPELLANT**

**VERSUS**

**STEPHEN NJOROGE KIGOCHI.....RESPONDENT**

**RULING**

1. By his application dated 26/07/2007, the appellant/applicant Gati Kago seeks one substantive order staying execution of the decree issued by this Honourable Court for payment of costs to the respondent by the applicant in respect of this matter pending the hearing and determination of CA No.160 of 2006 lodged by the applicant in the Court of Appeal against the whole of the decision of Honourable Mr. Justice Visram delivered on 8/12/2004. The applicant also prays that the costs of this application be provided for. The application is brought under Order 41 Rule 4 and Order 50 Rule 1 of the Civil Procedure Rules and also under section 3A of the Civil Procedure Act.

The application is premised on grounds:-

1. *THAT the Appellant/Applicant being dissatisfied with the whole of the judgment of Honourable Justice Mr. Alnashir Visram delivered on 8<sup>th</sup> December 2004 have lodged an Appeal in the Court of Appeal being the Court of Appeal Civil Appeal No. 160 of 2006. (sic)*

2. *THAT the respondent herein has filed an application to the court for the applicant's arrest and committal to civil jail if the applicant does not pay Kshs.55,080/= awarded to the respondent as taxed costs, and the applicant has been served with a notice to show cause why he should not be committed to civil jail. The notice to show cause is scheduled for hearing on 27/7/07.*

3. *THAT unless the orders sought herein are granted the applicant may be committed to civil jail in execution of the said decree and thus render the said Appeal nugatory.*

4. *THAT the applicant stands to suffer irreparable and substantive loss and damage should the respondent execute the decree herein while the determination of the Appeal is pending. (sic)*

5. *THAT the application has been brought to this Honourable Court without unreasonable delay.*

2. The application is also supported by the sworn affidavit of Gati Kago dated 26/07/2007. The deponent says that being dissatisfied with the whole of the judgment of the Hon. Mr. Justice Visram delivered on 8/12/2004, he has already lodged appeal No. 160 of 2006 against the said judgment. He says that Hon. Mr. Justice Visram dismissed his (applicant's) first appeal with costs to the respondent. According to the deponent's further averments, the Respondent's Bill of costs was taxed at Kshs.53130/= and that an application for execution of the decree has infact already been filed as per annexure marked

'GK3' whereby the deponent is required to either pay the sum of Kshs.53130/= or show cause why execution should not be granted. He says further that he is unable to pay the said sum of Kshs.53130/= due to lack of the means to do so, and further that in view of the pending appeal, if the money is paid out to the respondent and the appeal succeeds, he may not be able to recover it from the respondent. The deponent says that he is ready and willing to provide such security as the court may order, save that he wants the court to take into account his current economic situation. Finally, the deponent says that he brought the application without unreasonable delay.

3. The application is not opposed. Even at the hearing hereof, counsel for the respondent did not appear despite the fact that the hearing date for the application was taken by consent of the parties.

4. This application is governed by the provisions of Order 41 Rule 4(2) of the Civil Procedure Rules. These state that for an order for stay of execution to be granted, the applicant must satisfy the court that:-

(i) *substantial loss may result to the applicant unless the order is made.*

(ii) *the application has been made without unreasonable delay; and*

(iii) *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.*

5. I have considered the reasons put forth by the applicant in support of this application and make a finding that the Notice of Appeal dated 25/12/2004 was filed in court on the same date; that the applicant is indeed desirous of pursuing his appeal in the Court of Appeal against the judgment of the Hon. Mr. Justice Visram. Although it may appear that the application was not filed without undue delay from the date of the lodging of the notice of appeal, I am persuaded that there is a good reason for whatever delay there may be. I find that by filing the appeal, the applicant has demonstrated that he wants to pursue his right of appeal but if there is no order for stay of execution, the respondent is likely to execute for the costs.

6. I am also persuaded that if the decretal sum is paid out to the respondent before the appeal is heard and determined the applicant may find it hard to recover the money which will now be within the custody and control of the respondent. If such an eventually were to occur, the applicant would suffer substantial loss.

7. The applicant says that he is ready to provide such security as may be ordered by this court. Though the applicant says in his affidavit that his advocate has been representing him on a *pro bono* basis, Mr. Musyoka who appeared for him at the hearing of the application did not say so. All that Mr. Musyoka said was that the respondent's means of income are unknown.

8. In the result, I do find and hold that the applicant's application has merit. I allow the same and make the following orders:-

(a) *That there shall be a stay of execution of the decree issued by this Honourable Court for payment of costs to the respondent by the applicant in respect of the judgment delivered by Visram J on 8/12/2004 until Civil Appeal No.160 of 2006 lodged by the applicant in the Court of Appeal is heard and determined.*

(b) *That as security for costs of the appeal, the applicant shall deposit into court the sum of Kshs.53130/= within thirty (30) days from the date of this ruling.*

(c) *In default of (b) above, the stay granted herein shall lapse.*

(d) *Costs of this application shall be in the cause.*

It is so ordered.

Dated and delivered at Nairobi this 2<sup>nd</sup> day of May 2008.

**R.N. SITATI**

**JUDGE**