



Gitau v Sawarini (Civil Appeal E022 of 2024) [2024] KEHC 9026 (KLR) (4 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9026 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E022 OF 2024**

GMA DULU, J

JULY 4, 2024

BETWEEN

BENARD MUCHENE GITAU APPLICANT

AND

ZILIPA MALEMBA SAWARINI RESPONDENT

RULING

1. Before me is an application by way of Notice of Motion dated 27th March 2024 filed under Section 3, 3A of the *Civil Procedure Act* (Cap.21), and Order 42 Rule 6 and Order 50 rule 5, Order 51 rules 1 & 3, and Order 22 rule 22 of the *Civil Procedure Rules*, whose prayer are as follows:-
 1. (Spent).
 2. (Spent).
 3. That the court be pleased to grant stay of execution of the judgment/decre in Taveta Civil Suit No. 020 of 2022 (which) was delivered on 22nd February 2024 pending hearing and determination of the appeal in Voi High Court Civil Appeal No. E022 of 2024.
 4. That upon grant of prayer No. 3 above, this court be pleased to order that the applicant do produce sufficient security in the form of a suitable Bank Guarantee to secure the judgment herein of Kshs. 222,000/=
2. The application has grounds on the face of the Notice of Motion and was filed with a supporting affidavit sworn by Benard Muchene Gitau the appellant/applicant in which it was deponed that an appeal had already been field and that if the stay of execution orders sought are not granted, the appeal will be rendered nugatory.
3. The application was opposed through a replying affidavit sworn on 3rd April 2024 by the respondent Zilipa Malemba Sawarina.



4. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Kimondo Gachoka & Company Advocates for the applicant, as well as the submissions filed by Njoroge Mwangi & Company Advocates for the respondent.
5. This being an application for stay of execution of judgment or decree pending appeal, it is governed by the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, especially Rule 6(2).
6. I note that the appeal is from a money decree and that the appeal is principally challenging the quantum that is, damages awarded of general damages Kshs. 220,000/=, and special damages of Kshs. 2,000/=.
7. The judgment herein was delivered on 22nd February 2024 and this application was filed on 27th March 2024 after appeal was filed.
8. In those circumstances, I find that the application was filed without unreasonable delay.
9. Will the applicant suffer substantial loss if the stay of execution orders sought are not granted? In my view the applicant will suffer substantial loss only if the total decretal sum is paid and then the appeal succeeds and the applicant is not able to recover the whole amount from the respondent.
10. In the circumstances of this case therefore, in my view, stay can be justified subject to payment of part of the decretal amount to the respondent.
11. With regard to consideration of provision of security, I note that the applicant has offered to provide a Bank Guarantee. In my view however, payment of part of the decretal amount to the respondent is adequate security.
12. I thus allow the application and order as follows:-
 - a. I grant stay of execution of judgment or decree herein pending determination of appeal.
 - b. The stay orders granted in (a) above is subject to the applicant paying the respondent part of the decretal amount Kshs. 80,000/= through counsel within fourty five (45) days from today.
 - c. In default of (b) above, the stay orders herein granted will automatically lapse and be of no effect.
 - d. The costs of the application will abide the decision in the appeal.

DATED, SIGNED AND DELIVERED THIS 4TH DAY OF JULY 2024 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Mr. Nganga for applicant

Mr. Kazungu for respondent

