



REPUBLIC OF KENYA



KENYA LAW
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**Gitonga & 2 others v Mutonga (Civil Appeal E098 of 2023)
[2024] KEHC 11030 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11030 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E098 OF 2023
LW GITARI, J
SEPTEMBER 19, 2024**

BETWEEN

JOSEPH GITONGA 1ST APPELLANT

SILAS MUTHURI 2ND APPELLANT

PETER NJUNJI 3RD APPELLANT

AND

JANE SHEILA KAJUJU MUTONGA DEFENDANT

RULING

1. This matter pending before this court is the notice of motion dated 1st July, 2022 which was seeking orders that there be stay of execution of the judgment and/or decree pending the hearing and determination of this application and this appeal. The application was filed under a certificate of urgency and an order of stay was granted on 10/07/2023. The application was based on the grounds on the face of the application which are as follows.
 - a. Judgment herein was entered on 25th May, 2023 and the appellants were found to be 100% liable. Respondent was awarded general damages of Kshs 1,350,000/= and special damages of Kshs 7,200/= with costs and interest.
 - b. The appellants being dissatisfied with the said judgment have preferred an appeal on quantum and filed amended Memorandum of appeal in Meru HCCA E098 of 2023.
 - c. That the appellant's appeal has high chances of success.
 - d. That the appellant is reasonably apprehensive that the respondent, as decree holder, may proceed and levy execution against them since the 30 days stay period granted by the trial court has lapsed.



- e. That the judgment is of substantial amount and the appellant is apprehensive that if the respondent is paid she may deal with the same in a manner prejudicial to the appellant and if the appeal is successful, he might not be able to recover the same from the respondent.
 - f. That the respondent has not disclosed nor furnished the court with any documentary evidence to prove her financial standing.
 - g. Unless stay of execution is granted, and the respondent levy and/or executes the said judgment of 25th May 2023 the appellant's appeal will be rendered nugatory and the appellant will suffer irreparable loss and damages.
 - h. The appellant's insurance is ready, willing and able to furnish the court with a bank guarantee from family bank as security to the court.
 - i. The application is made in good faith and will not occasion any prejudice to the respondent.
 - j. The respondent will not be prejudiced in any way if the application is allowed.
 - k. That the application has been brought without unreasonable or undue delay.
 - l. That unless stay of execution is ordered, irreparable loss will result to the appellant.
2. The summons is supported by the affidavit of Peter Njugi Maina sworn on 1st July, 2022. The deponent has restated the above grounds. He further depones that he has an arguable appeal with high chances of success as the respondent does not deserve the quantum awarded and the liability apportioned was inconsiderate. That the application has been brought promptly and without unreasonable delay. the applicant further contends that the intended appeal is merited, arguable and it raises pertinent points of law and facts, thus it has overwhelming chances of success. He further avers that his insurance company Direct line Assurance Limited is willing and able to furnish the court with bank guarantee from family bank as security to the court.
 3. The respondent has opposed the application and filed written submissions. The respondent has also filed her affidavit sworn on 2/10/2023. Her contention is the appeal is against a money decree and no security has been offered and there is no basis for substituting a money decree with a bank guarantee. The respondent avers that the applicants have not satisfied the conditions for granting of a stay of execution and the application should be dismissed with costs.
 4. The respondent relies on-;
 1. *Auto Selection (K) Limited v Robert Mworira & others* CA No E024/2022
 2. *Meru Nissan Operators Sacco limited & Patrick Muchina Machora v Jane Kainda Mutuera* CA No E007/2022
 3. *Civil Procedure Act.*
 5. The applicant relies on Order 42 Rule 6 *Civil Procedure Rules* and submits that unless stay is ordered they are likely to suffer substantial loss and the appeal be rendered nugatory. He further argues that he has a right of appeal under Article 50 of the *Constitution* which may be denied if the stay of execution is not ordered.
 6. I have considered the application. Order 42 Rule 6 of the *Civil Procedure Rules* deals with stay pending appeal. It provides-

“ 6.



(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from 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 order set aside. (2) No order for stay of execution shall be made under subrule (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. (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application. (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given. (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling. (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

7. The rule provides that an appeal does not operate as a stay unless the court appeal from or the court to which the appeal is preferred orders a stay of execution. In determining whether or not to order a stay of execution, the court is supposed to consider whether the appellant has an arguable appeal, whether the appellant is likely to suffer substantial loss, whether the appeal has been filed without unreasonable delay.
8. I have considered the submissions by the appellant and I find that they have demonstrated that they have an arguable appeal as the quantum of damages in the lower court was substantial and the respondent has not demonstrated that she will be able to refund the decretal sum if stay is not ordered and appeal succeeds. The appellant has demonstrated that he is likely to suffer substantial loss. The appellant filed the appeal without unreasonable delay and has offered to provide security. The right of a party to appeal is enshrined in the constitution. The [Civil Procedure Rule](#) cited above leans on the court granting a stay of execution to enable the party to appeal provided that the party satisfies the conditions set by the court. The court should not therefore deny a party his right to appeal if he is ready to abide by the conditions that the court may set. The overriding objectives of the [Civil Procedure Act](#) is to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The Act also gives the court inherent powers to issue orders that are necessary to meet the ends of justice Section as



provided under 1A, 1B and 3A of the *Civil Procedure Act*. For these reasons, I find that the application has merits. I order as follows-;

1. There shall be stay of execution of the judgment and decree in Meru CMCC No E407/21 pending the hearing and determination of this appeal.
2. The appellant to pay the respondent one third 1/3 of the decretal sum, that is Kshs 450,000 within 14 days.
3. the appellant shall furnish a bank guarantee for Equity Bank as security for the due performance of the decree herein pending the hearing and determination of the appeal. This shall be done within 30 days.
4. The appellant to file the record of appeal within 21 days.
5. The matter shall then be mentioned for directions.
6. Costs in the cause and to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF SEPTEMBER , 2024.

L.W. GITARI

JUDGE

