



**Mwangi & another v Mutua (Civil Appeal E053 of 2023)  
[2024] KEHC 11305 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11305 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CIVIL APPEAL E053 OF 2023  
GMA DULU, J  
SEPTEMBER 18, 2024**

**BETWEEN**

**WILSON WACHIRA MWANGI ..... 1<sup>ST</sup> APPELLANT**

**BEAVERLINE MANCHESTER TRAVELLERS SACCO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MORRIS MBATHA MUTUA ..... RESPONDENT**

**RULING**

1. Before me is an application by way of Notice of Motion dated 16<sup>th</sup> February 2024 filed under Section 3, and 3A of the *Civil Procedure Act* (Cap.21), and Order 42 Rule 6, Order 50 Rule 5, Order 51 Rules 1 & 3, and Order 22 Rule 22 of the *Civil Procedure Rules*.
2. The application, which was filed through counsel M/s Kimondo Gachoka & Company Advocates, seeks the following orders:-
  1. (Spent).
  2. (Spent).
  3. That the court be pleased to grant a stay of execution of the judgment/decree in Voi Civil Case No. E172 of 2022 delivered on 11<sup>th</sup> September 2023 pending the hearing and full determination of the appeal Voi High Court Civil Appeal No. E053 of 2023.
  4. That upon grant of prayer 3 above, the court be please to order the applicant to provide sufficient security in the form of a suitable Bank Guarantee to secure judgment herein of Kshs. 285,750/=
  5. That costs of the application be in the cause.



3. The application has grounds on the face of the Notice of Motion that the applicants had already lodged an appeal; that the decretal amount herein was substantial; that the applicants would suffer substantial loss if the orders sought were not granted and the appeal rendered nugatory; and lastly; that the respondent would not be prejudiced in any way if the orders sought were granted.
4. The application was filed with a supporting affidavit sworn on 16<sup>th</sup> February 2024 by Wilson Wachira Mwangi, one of the applicants, which amplified the grounds of the application. Annexed to the supporting affidavit were number of documents, including the Memorandum of Appeal.
5. The application is opposed through a replying affidavit sworn on 23<sup>rd</sup> February 2024 by Morris Mbatha Mutua the respondent, in which it was deponed that the decretal amount of Kshs. 385,897.50 which constituted special damages, be deposited in a joint interest earning account within 30 days.
6. 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 applicants, as well as the submissions filed by Njoroge Mwangi & Company Advocates for the respondent. I note that in the submissions of counsel for the respondent, it was contended that in case stay orders were granted by the court, then half of the decretal sum be paid to the respondent as a condition.
7. This is an application for stay of execution of judgment or decree pending determination of appeal. Such applications are governed by the provisions of Order 42 rule 6(2) of the [Civil Procedure Rules](#), which states as follows:-
  - 6 (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.
8. The first issue I have to consider, is whether the application herein was made without unreasonable delay? In this regard, I note that the judgment of the trial court herein was delivered on 11<sup>th</sup> September 2023. The present application was filed on 20<sup>th</sup> February 2024, a period of six (6) months, which on the face of it that is a long period.
9. However, I note that the Memorandum of Appeal herein dated 26<sup>th</sup> September 2023, was filed on 27<sup>th</sup> September 2023, thus court registry activities were in motion before the application was filed.
10. In my view therefore, since the applicant took intervening steps or actions to progress the matter and even filed an appeal soon after judgment, it cannot be said that there was inordinate delay in filing the application. I thus find that the application was filed without unreasonable delay.
11. I now go to the second consideration. Will the applicants suffer substantial loss if the stay orders sought are not granted? In my view the applicants will suffer substantial loss only if the whole monetary decretal amount in the form of general and special damages is paid to the respondent presently and thereafter the appeal succeeds and they are not able to recover the same from the respondent. As this is a money decree, and the appeal filed is principally on the quantum of damages awarded, in my view, stay of execution orders can only be justified if part of the decretal amount is paid to the respondent. I don't see the justification for depositing the entire decretal sum in a joint account.



12. On provision of security by the applicants, I note that the applicants have proposed to provide a bank guarantee and therefore have satisfied this condition. In my view however, payment of part of the decretal amount to the respondent as a condition for granting stay orders, will be sufficient security.
13. Consequently, and for the above reasons, I allow the application and order as follows:-
- i. I grant stay of execution of judgment or decree herein in Voi CMCC No. E172 of 2022 pending hearing and determination of the appeal herein.
  - ii. The above stay of execution orders are granted subject to the applicants paying the respondent part of the decretal amount Kshs. 100,000/= (Shillings One Hundred Thousand only) through counsel within forty five (45) days from today.
  - iii. In default of condition (ii) above, the stay orders herein granted herein will automatically lapse and be of no effect.
  - iv. The costs of this application will abide the decision in the appeal.

**DATED, SIGNED AND DELIVERED THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2024 IN OPEN COURT AT VOI VIRTUALLY.**

**GEORGE DULU**

**JUDGE**

In the presence of:-

Alfred/Trizah – Court Assistants

Mr. Nganga for appellant

Mr. Kazungu for the respondent

