



REPUBLIC OF KENYA



KENYA LAW
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**Nduruhu v Wangeci (Civil Appeal E013 of 2024)
[2024] KEHC 12903 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 12903 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E013 OF 2024
GMA DULU, J
SEPTEMBER 19, 2024**

BETWEEN

FREDRICK MWENDA NDURUHU APPELLANT

AND

STPEHEN MUMU WANGECI RESPONDENT

RULING

1. Before me is an application brought by way of Notice of Motion dated 27th March 2024 and filed under Section 3, 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 2010.
2. The application was filed through counsel M/s Kimondo Gachoka & Company Advocates for the applicant and 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 Taveta Small Claims Court Civil Claim No. E007 of 2023 delivered on 6th February 2024 pending the hearing and full determination of the appeal Voi High Court Civil Appeal No. E013 of 2024.
 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. 400,000/=
 5. That costs of the application be in the cause.
3. The application has grounds on the face of the Notice of Motion that judgment was delivered herein on 100% liability; that the applicant has lodged an appeal; that the decretal amount of Kshs. 400,000/



= general damages and 25,000/= special damages was substantial; that the applicant would suffer substantial loss if the orders sought were not granted and that the appeal might be rendered nugatory; 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 27th March 2024 by Fredrick Mwenda Nduruhi the appellant, which amplifies the grounds of the application, which also annexed a number of documents, including the Memorandum of Appeal herein.
5. The application has been opposed through a replying affidavit sworn on 20th June 2024 by the respondent, in which it was deponed that the respondent was not a man of straw and that he was able to refund the decretal amount, and that this application was a tactic meant to delay the enjoyment of the fruits of the applicant's judgment.
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 applicant, as well as the submissions filed by Mogaka Natika Muriuki & Company Advocates for the respondent. I note that, in the submissions filed by counsel for the respondent, it was contended that if the stay orders sought were granted, then the decretal sum be paid into court or in a joint interest earning account.
7. This is an application for stay of execution of judgment or decree pending determination of appeal. As such, it is governed by the provisions of Order 42 rule 6(2) of the Civil Procedure Rules which states as follows:-

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(2) No order for stay of execution shall be made under sub-rule (i) 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. Has the application herein been made without unreasonable delay? The judgment of the trial court herein was delivered on 8th February 2024, while this application was filed on 28th February 2024, a period of less than one (1) month. This is a relatively short period.
 9. In my view, it cannot be said that there was inordinate delay in filing the application. I find that the application was filed without unreasonable delay.
 10. Will the applicant suffer substantial loss if the stay orders sought are not granted? In my view, having perused the judgment of the trial court and Memorandum of Appeal, the applicant will suffer substantial loss only if the whole decretal amount is paid presently to the respondent, and thereafter the appeal succeeds and the respondent is not able to repay the same. As this is a money decree, and the appeal filed is principally on the quantum of damages awarded, in my view stay orders can only be justified if part of the decretal amount is paid to the respondent.
 11. On provision of security by the applicant, I note that the applicant has proposed to provide a bank guarantee as security. On the other hand the respondent has proposed that the decretal amount be either deposited in court or in a joint interest earning account. In my view however, payment of part of the decretal amount to the respondent presently as a condition for granting stay of execution orders, will satisfy the requirement for provision of security by the applicant.



12. 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 Taveta Small Claims Civil Claim Case No. E007 of 2023 pending hearing and determination of this appeal herein.
- ii. The above stay of execution orders are granted subject to the applicant paying the respondent part of the decretal amount Kshs. 150,000/= through counsel within forty five (45) days from today.
- iii. In default of (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 19TH DAY OF SEPTEMBER 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Mr. Nganga for appellant

Mr. Nyatika for respondent

