



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Toli (Civil Appeal E006 of 2022)
[2023] KEHC 807 (KLR) (Civ) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 807 (KLR)

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

CIVIL

CIVIL APPEAL E006 OF 2022

JN MULWA, J

FEBRUARY 16, 2023

BETWEEN

JOSEPHAT GITAU KAMAU APPELLANT

AND

ELLY MUKOLWE TOLI RESPONDENT

RULING

1. By a notice of motion dated May 25, 2022 the appellant seeks a stay of execution order of the judgment and decree delivered on December 10, 2021 by Hon D. Mburu (SPM) in Milimani CMCC No 3170 of 2019 pending the hearing and determination of this appeal. The appellant also prays that he be allowed to furnish security in the form of a bank guarantee from the Family Bank and, that the costs of this application do abide the outcome of the appeal.
2. The application is based on the grounds set out on the face of the motion and supported by the applicant's supporting affidavit and further affidavit sworn on March 4, 2022 and July 4, 2022 respectively.
3. The respondent opposed the application through a replying affidavit sworn on June 14, 2022 sworn by Elly Mukolwe Toli the respondent.
4. The court has considered the affidavits in support of and against the application and opines that the only issue for determination is whether the appellant has met the conditions necessary for the grant of an order of stay of execution pending appeal.



5. Stay of execution pending appeal is governed by provisions of order 42 rule 6(1) & (2) of the [Civil Procedure Rules](#) which provides that:

- “6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 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.”

6. From the above provisions, it is clear that in order to succeed in an application for stay of execution, an applicant must demonstrate that substantial loss may result unless the order of stay is issued; that the application has been brought without undue delay; and must give security for the due performance of any decree or order that may ultimately be found to be binding on the applicant.
7. As regards substantial loss, the appellant averred that he is reasonably apprehensive that if the respondent is paid the substantial judgment sum of Kshs 1,302,000/-, he may not be able to refund it in the event that the appeal succeeds as the respondent’s financial standing is unknown.
8. It is well settled that where a judgment debtor expresses such reasonable fears, the evidential burden of proof shifts to the decree holder to demonstrate his financial ability by way of affidavit evidence as that is a matter which is peculiarly within his or her knowledge- see [National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another](#) [2006] eKLR. The decree holder has not shown in any way his financial ability to refund the same should he be called upon to refund. I am therefore satisfied that in this case, the appellant stands to suffer substantial loss if stay is not granted.
9. On whether the application has been brought without undue delay, the respondent contends that there was an unexplained delay of five months before it was filed. The trial court’s judgment was delivered on December 10, 2021 and the instant application was filed on April 5, 2022. There is no doubt that the application was filed without unreasonable delay.
10. On security, the appellant has already deposited a sum of Kshs 500,000/= in court and urges the court to consider the same as sufficient security. Alternatively, he avers that should the court require more security his Insurer Directline Assurance Company Limited is ready willing and able to provide a bank guarantee to cover the remaining amount. On the other hand, the respondent urges that the appellant be ordered to pay half of the decretal sum to him and deposit the balance in a joint interest earning account in the names of both advocates pending the hearing and determination of the appeal.



11. The appeal herein arises from a claim for damages arising a road traffic accident wherein the respondent was a pedestrian. From the memorandum of appeal, it is evident that the appellant has preferred the appeal against both liability and quantum and the same raises arguable issues, which upon consideration may have an effect on the decision of the trial court as regards both liability and quantum. It would therefore not be wise to order the appellant to pay the respondent half of the decretal sum at this point. Further, the court notes that the appellant made a unilateral decision to deposit the sum of Kshs 500,000/- in court without a court order or by consent of both parties. Whereas this is a sign of good faith on the appellant's part, that alone cannot be considered as sufficient security.
12. In the premises, the court allows the application dated May 25, 2022 upon the applicant complying with the following conditions:
 1. The appellant shall deposit 50% of the decretal sum into a joint interest earning account in the names of the parties' advocates at a reputable bank in Nairobi within 30 days from date of this ruling;
 2. The balance (50%) shall be secured by a bank guarantee, drawn from Family Bank in favour of the respondent, within 30 days from date of this ruling.
 3. In default of order (1) or (2) above, the stay orders shall lapse automatically.
 4. To progress the appeal, the appellant shall file the record of appeal and exchange within 60 days of this ruling with a mention for compliance on the May 16, 2023.

Orders accordingly.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 16TH DAY OF FEBRUARY 2023.

J. N. MULWA
JUDGE

