

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 720 OF 2017

JOSEPH GITAHU GACHAU

BEATRICE WANGECHI GACHAU.....APPELLANTS/APPLICANTS

V E R S U S –

SAMUEL MAINA WARUI.....RESPONDENT

RULING

1) Samuel Maina Warui, the respondent, sought for judgement of ksh.2,500,000/= against Joseph Gitahi Gachau and Beatrice Wangechi Gachau, the 1st and 2nd appellants herein, before the Chief Magistrate's court. They were eventually found jointly and severally liable for the said amount. The appellant applied for review of the finding by the trial court but the application was dismissed. The appellants/applicants have now taken out the motion dated 18.01.2018, the subject matter of this ruling, in which they sought for *inter alia* an order for stay of execution pending the determination of their intended appeal against the ruling delivered on 21st November, 2017. The motion is supported by the affidavit of Joseph Gitahi Gachau. When served with the motion, the respondent filed a replying affidavit of Francis Njanja to oppose the motion. When the motion came up for interpartes hearing, learned counsels made oral submissions.

2) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavit filed in support and against the application. I have also considered the rival oral submissions made by both counsels.

3) The applicants aver that there is need to maintain the *status quo* by granting an order for stay. It is argued that unless the order is granted the appeal will be rendered nugatory since the applicants will be forced to pay the decretal sum to the respondent. The respondent opposed the motion arguing that no prejudice will be visited upon the applicants if the order for stay is denied.

4) The principles to be considered in determining an application for stay are well stated under Order 42 of the Civil Procedure Rules. First, an applicant must show the substantial loss it would suffer if the order for stay is denied. Secondly, the application for stay should be filed without unreasonable delay. Thirdly that the court should consider the provision of security for the due performance of the decree.

5) On the first principle, the applicants are of the view that they would suffer substantial loss if the order for stay is denied because the objective of the stay is to maintain the status quo pending the hearing and determination of the appeal. It is said that if the order for stay is not given the appeal will be rendered nugatory in that the appellants will be forced to make payment of the decretal sum to their utter detriment. The respondent has argued that the applicants will not suffer any substantial loss if the order for stay is denied. With respect, I am convinced that the applicants have shown that they would suffer substantial loss if the order for stay is denied in that they will have satisfied the decree yet the appeal challenging the judgment is still pending.

6) The second principle is that the application should be filed without unreasonable delay. It is apparent that this appeal was filed on 19.12.2017 while the motion was filed on 19.12.2017. I am satisfied that the motion was timeously filed.

7) The third principle is the provision for security for the due performance of the decree. The applicants aver that, they are willing to furnish security in form of a title deed. The respondents on the other hand have stated that the appropriate security should be the balance of the decretal sum. On my part I think the issue touching on the provision of security for the due performance of the decree should be a deposit of the decretal sum of ksh.2,500,000/= . This will surely ensure that the decree can expeditiously be satisfied in case the appeal fails by the wayside.

8) In the end, the order for stay of execution is granted pending appeal to last for 30 days. Costs of the motion to abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 6th day of April, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Applicants

.....for the Respondent