



Gituku v Farah (Civil Appeal E090 of 2022) [2024] KEHC 473 (KLR) (26 January 2024) (Ruling)

Neutral citation: [2024] KEHC 473 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E090 OF 2022
SN MUTUKU, J
JANUARY 26, 2024**

BETWEEN

JOHN GITUNGENE GITUKU APPELLANT

AND

ABDI DORE FARAH RESPONDENT

RULING

1. The Applicant herein has filed a Notice of Motion application dated 18th November 2022 under the provisions of the law shown on the face of that application seeking the following orders:
 - i. Spent
 - ii. That there be an interim stay of execution of the decree in Kajiado CMCC No. 214 of 2014 *Abdi Dore Farah v. John Gitungene Gituku* pending the hearing and determination of this application inter partes.
 - iii. That there be an interim stay of execution of the decree in Kajiado CMCC No. 214 of 2014 *Abdi Dore Farah v. John Gitungene Gituku* pending the hearing and determination of the appeal herein.
 - iv. That this honourable court be pleased to grant any further and or other order which is just and fair in the circumstances of this matter.
 - v. That costs be in the cause.
2. The grounds in support of the application, found on the face of it and in the supporting affidavit sworn on 18th November 2022 by Hope Wambugu, the Senior Claims Manager at Britam General Insurance Company Limited, are that judgment in the lower court matter was delivered on 27th October 2022; that the Applicant was aggrieved by the judgment and preferred an appeal on the issue of liability and quantum; that the Applicant's insurer is ready, able and willing to secure the decree by depositing the judgment sum in a joint interest earning account in the names of the advocates' names.



3. The Respondent did not file a response to the application.
4. Parties have filed submissions as directed by this court. The Appellant's submissions are dated 30th October 2023 and filed on 13th December 2023. It is submitted that the appeal raises arguable points of law and fact; that the trial magistrate failed to analyze the evidence adduced, especially the role the camel played in the accident and applied erroneous principles on assessing damages.
5. It is further submitted that the Respondent did not file any reply to the application and should the decretal sum be paid over to the Respondent, he has not shown an ability to reconstitute the same to the Appellant should the appeal succeed, thereby rendering the appeal nugatory.
6. The Appellant cited several authorities in support of the submissions including *Deluxe Services Ltd v Erick Onyango Ndege* and *Kenindia Assurance Company Ltd v Patrick Muturi* on the guiding principle on the issue of stay of execution pending an appeal, that the appeal should not be frivolous and must show that it is arguable and that the court should ensure that the appeal is not rendered nugatory.
7. The Applicant urged the court to grant the prayers sought and submitted that he is willing to abide by the directions of the court.
8. The Respondent's submissions are dated 11th December 2023 and were filed on 13th December 2023. The Respondent has submitted that the Applicant did not have any defence in the lower court. It is submitted that this application lacks merit because the appeal has no chances of success; that the appeal is aimed at wasting court's time as the intention of the Applicant is to prolong and sabotage the execution of the decree.
9. It was submitted that the Applicant was present in the lower court during the trial and did not put up any defence for himself and therefore he cannot claim to stop execution of the decree. The Respondent urged that the application be dismissed with no order to costs.
10. I have considered this application and the submissions. Stay of execution pending an appeal is governed by Order 42 Rule 6 of the *Civil Procedure Rules*, which provides that:
 - (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 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.
11. The Respondent has not opposed this application apart from filing submissions. I have considered the application and the grounds in support of the same as well as submissions of the parties. Other than stating in the submissions that the Applicant was present during the trial in the lower court and did



not put up any defence and that the Applicant intends to delay the execution, the Respondent has not presented grounds opposing the granting of the prayers sought by way of a Replying Affidavit.

12. The Applicant raises arguable issues in the memorandum of appeal, and he is willing to provide security. I find that I am persuaded that the Applicant has satisfied this court that he deserves the orders sought in this application.
13. Consequently, I allow the Notice of Motion dated 18th November 2022 and grant stay of execution of the judgment and decree in CMCC No. 214 of 2014 *Abdi Dore Farah v John Gitungene Gituku* pending the hearing and determination of the appeal. He shall deposit the decretal sum in a joint interest earning account in the names of the current advocates for the parties within 30 days from the date of this Ruling.
14. The Applicant has 60 days after this Ruling to file and serve the Record of Appeal.
15. This matter shall be mentioned on a date to be fixed by the court to confirm compliance with these directions.
16. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 26TH JANUARY 2024.

S. N. MUTUKU

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

