



**Ndungu v Maisitis & another (Civil Case 35 of 2017)
[2024] KEHC 13329 (KLR) (Civ) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13329 (KLR)

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

CIVIL

CIVIL CASE 35 OF 2017

AN ONGERI, J

OCTOBER 29, 2024

BETWEEN

JOHN NJOROGE NDUNGU PLAINTIFF

AND

HUDSON MAISITIS 1ST DEFENDANT

CELLO THERMOWARE LIMITED 2ND DEFENDANT

RULING

1. The application coming for consideration in this ruling is the one dated 17/11/2023 brought under Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 9 Rule 9; Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions of the law seeking the following orders;
 - i. This application be certified urgent and heard ex-parte in the first instance for purposes of the grant of prayer number 2.
 - ii. Pending the inter-partes hearing and determination of this application, an Order of stay of execution be and is hereby issued staying the execution of the Judgement and Decree delivered and issued on 19th October, 2023.
 - iii. Pending the hearing and determination of the Declaratory Suit filed in Nairobi High Court Civil Suit No E196 of 2023, Cello Thermoware Limited v MUA Insurance (Kenya) Limited & Another, an Order of an Order of stay of execution be and is hereby issued staying the execution of the Judgement and Decree delivered and issued on 19th October, 2023.
 - iv. Leave be and is hereby granted to firm of Rene & Hans Advocates LLP to come on record and act for and on behalf of the 2nd Defendant herein, Cello Thermoware Limited in place of the firm of Maangi & Associates Advocates.



- v. Costs of this application be provided for.
2. It is supported by the affidavit of Amit Doshi sworn on 17/11/2023 as follows;
 1. That I am male adult of sound mind and disposition. I am a director in the 2nd Defendant herein, well conversant with the facts of this dispute and duly authorized to swear this Affidavit on behalf of the 2nd Defendant.
 2. That I have seen, read, had explained to me by our Advocates on record and understood the tenor and purport of the Notice of Motion filed herewith. I swear this Affidavit in support of the Motion.
 3. That I swear this Affidavit in support of the Notice of Motion filed herewith and pray that the Orders sought therein be granted.
 4. That on 19th October, 2023, this Honourable Court entered Judgement against the Defendants and made orders inter alia:-
 1. Judgement be and is hereby entered in favour of the Plaintiff against the Defendants jointly and severally in the sum of Kshs. 26,771,483 plus costs of this suit and interest in respect of the special damages from the date of filing suit and the general damages from the date of this Judgement until payment in full.
 5. That vide Notice of Motion dated 17th November, 2023 filed under Certificate of Urgency, the 2nd Defendant sought Orders including an Order of stay of execution of the aforementioned Judgment pending the hearing and determination of Nairobi High Court Civil Suit No E196 of 2023, Cello Thermoware Limited v MUA Insurance (Kenya) Limited & Another in which the 2nd Defendant seeks an Order that MUA Insurance (Kenya) Limited satisfies the Judgement and Decree issued on 19th October, 2023 in its entirety.
 6. That MUA Insurance (Kenya) Limited has a legal and contractual obligation to satisfy the said Decree but have since declined to do so.
 7. That on 21st November, 2023 this Honourable Court certified the Notice of Motion dated 17th November, 2023 as urgent and further directed that the said application be served upon the Respondents for inter-partes hearing on 18th December, 2023.
 8. That the 2nd Defendant is reasonable apprehensive that unless this application is certified urgent and an Order of stay of execution issued, the Plaintiff herein will proceed to execute the Judgement and Decree against the 2nd Defendant thereby rendering the Motion dated 17th November, 2023 together with Nairobi High Court Civil Suit No E196 of 2023 nugatory and further causing substantial loss to the 2nd Defendant.
 9. That therefore, it is necessary that this Honourable Court grants the Order sought in this application to preserve the substratum/subject matter in Nairobi High Court Civil Suit No E196 of 2023.
 10. That is only fair, lawful and in the interest of justice that the interim Orders sought in this application be granted.



11. That what is deponed to herein is true to the best of my knowledge, information and belief, save what is stated and sources whereof disclosed.
3. The respondent opposed the same with the replying affidavit dated 19th February 2024 in which he stated as follows;
4. That in respect of the application dated 23/11/2023 the same is a duplication of the existing application dated 17/11/2023, it is vexatious completely unnecessary and a manifest abuse of the court process.
5. He deponed that High Court Civil Case No. E196 of 2023: Cello Thermoware Limited v. MUA Insurance (Kenya) Limited and another is a declaratory suit by the 2nd defendant herein against the Insurer over the settlement of the decretal amount herein. It is a fact that he was not party to the suit between the 2nd defendant and MUA Insurance (Kenya) Limited and as such he cannot be held at ransom by a dispute over a contract he is not privy to.
6. He deponed that it is unfair to stay execution of the decree in this matter pending the hearing and determination of a matter that he is not party to over a contract he is not party to. A stay of execution is discretionary which should be granted if the applicant will suffer substantial loss, it ought to be granted where it would render an appeal or matter nugatory and the same ought to be granted in unique circumstances. The 2nd defendant only asserts that it would incur substantial loss but doesn't show an iota of fact of evidence of the substantial loss it would suffer if the orders for execution are not given.
7. The decree in question is a money decree and as such nothing prohibits the 2nd defendant from recovering the same from the said insurer MUA Insurance in the event that is successful in High Court Civil Case No. E196 of 2023. In any case, the 2nd defendant should be only granted these orders if it was willing deposit the said decretal amount in a joint interest earning account or give other such security that this court may deem fit.
8. He indicated that the subject matter of this suit was a road traffic accident which occurred on 15/6/2014 and has left him with debilitating injuries and which has caused so much suffering, so much pain and so much expenses that he is not able to fend for himself or family. It is also almost 10 years from the date of the accident and he made no recovery of any cent that he has used in his medication, hospital bill and upkeep.
9. The parties filed written submissions as follows; the 2nd defendant submitted that its motion dated 17/11/2023 and 23/11/2023 have been filed after judgement. In the circumstances, pursuant to order 9 rule 9 of the Civil Procedure Rules 2010 the firm of Rene & Hans Advocates LLP seek leave to come on record for the 2nd defendant. the firm of Rene & Hans Advocates LLP has complied with the requirements of Order 9 Rule 9 of the Civil Procedure Rules 2010.
10. The 2nd defendant further submitted that the application was filed timeously, without unreasonable delay and this fact has not been controverted by the plaintiff. The 2nd defendant argued that the suit filed in Nairobi High Court Civil Suit No. E196 of 2023 is indeed arguable as they have highlighted. In order that the said suit is not rendered nugatory, it is in the interest of justice that the substratum is preserved. The 2nd defendant indicated that unless an order of stay of execution is granted, it would suffer substantial loss as the plaintiff in this suit has expressly admitted in his replying affidavit of his inability to pay the decretal sum.
11. The plaintiff alternatively submitted that there is no reason set out in the application herein to warrant a stay of execution. Nothing prevents the defendants from settling the decree herein the sue their insurance company for compensation or reimbursement. The plaintiff argued that stay of execution



is sought to exist pending the hearing and determination of Nairobi High court civil suit No. E196 of 2023 Cello Thermoware Limited v MUA Insurance (Kenya) Limited and another. The plaintiff is not a party to the suit.

12. The plaintiff submitted that the 2nd defendant has only made an allegation for suffering substantial loss but did not lead any evidence to prove such a fact. It is not enough to allege it, it need to prove it. The 2nd defendant has not established any fact to show that the execution will create a state of affairs that will irreparably negate the prosecution of the declaratory suit against its insurer. In the present circumstance, the refund of the decretal amount is not in question as the same will be done by the Applicant's insurer.
13. Therefore, it is clear that the Applicant/ 2nd Defendant will suffer no substantial loss as it can get the reimbursement and/ or compensation from the insurer once it finalizes the prosecution of the declaratory suit.
14. The sole issue for determination is whether the defendant is entitled to stay pending determination of the declaratory suit.
15. I find that the plaintiff has a judgment that has not been appealed against.
16. Order 42, Rule 6(2) of the Civil Procedure Rules, 2010 sets out the conditions to be met when it comes to an application for a stay of execution as follows:
 - a) The application must be brought without unreasonable delay;
 - b) The applicant must demonstrate that substantial loss may result; and
 - c) Provision should be made for security.
17. I find that the application was filed without unreasonable delay and is not in dispute that the plaintiff is not a party in the declaratory suit.
18. The issue of substantial loss was dealt with in the case of Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018 thus as follows:

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”
19. In the current case, the legal position is that substantial loss entails that which has to be prevented by maintaining the status quo of the parties involved.
20. The 2nd defendant is granted stay of execution on condition that half the decretal sum is deposited in a joint interest earning account held by counsels for both parties within 45 days of this date.
21. In default, the order for stay shall automatically lapse and execution to issue.
22. The applicant to bear the costs of this application.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF OCTOBER, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:



.....for the Plaintiff

.....for the Defendant

