



**Real Insurance Company Limited & another v Maina (Civil Appeal
E132 of 2024) [2024] KEHC 14735 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14735 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E132 OF 2024
DO CHEPKWONY, J
NOVEMBER 22, 2024**

BETWEEN

REAL INSURANCE COMPANY LIMITED APPLICANT

AND

FRANCIS KIBUGI APPELLANT

AND

MONICAH WANJIRU MAINA RESPONDENT

RULING

1. This is a ruling in respect of a Notice of Motion application dated 29th July, 2024 which seeks the following orders:
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of this appeal, this Honourable court be pleased to issue stay of execution of the Judgment rendered in Limuru CMCC No. 259 of 2020 Michael Kihara Wambui versus Real Insurance Co. Ltd & 3 Others delivered on 4th July, 2024 by Honourable Jared O. Magori
 - d. That the costs of and incidental to this application be provided for.
2. The application is based on the grounds as set out on its face and the Supporting Affidavit sworn by Edinah Massanya, the Principal Legal Associate at Britam General Insurance Co. Ltd. the Appellant's Insurer of sworn on the instant date.



3. It is the Applicants case that the trial court delivered a Judgment against the Appellants for a sum of Kshs. 529,690/= plus costs and interest of the suit. The Appellants were aggrieved with the decision and they lodged the present appeal through a Memorandum of Appeal dated 29th July, 2024.
4. The Applicants contend that since the thirty (30) days stay of execution lapsed, the Respondent may proceed with execution which will prejudice the appeal. The Applicants undertake to file the Record of Appeal once they are in receipt of the trial court's proceedings which they have already requested for. They also hold that they have filed the application expeditiously and are willing to abide by the terms set by the court. They contend that it would be in the interest of justice that the application is allowed.
5. The Respondent opposed the application through the Replying Affidavit sworn by Cheruiyot 12th August, 2024. According to the Respondent, the application is misconceived, incompetent, without merit and an abuse of the court process. The Respondent holds that the applicant filed the application at the tail end of the stay period after he had sought payment through a letter dated 26th July, 2024 wherein the Applicant had promised to pay and it is a bid to stall execution. The Respondent contends that the application has not met the conditions for stay they have not furnished any security for costs. They argue that the appeal has no chance of success but holds that if the court is inclined to grant the orders then the Applicant should be ordered to pay half of the decretal sum to the Respondent's advocates and the other half to court. Otherwise, he has urged the court to dismiss the application with costs.
6. The Applicants filed Further Affidavit sworn by the same deponent, Edinah Massanya on 29th July, 2024 in which she argues that the Replying Affidavit is fatally defective and the same ought to be struck out since it was sworn by an advocate on contentious issues thereby exposing himself as a potential witness for cross examination. The Applicants hold that the appeal has high chance of success and maintain that they are not opposed to depositing half of the decretal sum in court as security and have urged the court to allow the application as prayed.
7. The parties were directed to canvass the application by way of written submissions. However, only the Applicant filed their submissions dated 23rd September, 2024 while the Respondent opted to rely on their Replying Affidavit dated 12th August, 2024.
8. In the submissions dated 23rd September, 2024 Applicant has submitted that the application is enshrined on Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules. They hold that the appeal is arguable and that they stand to suffer substantial loss which would render it nugatory. They have offered to deposit half of the decretal sum in court as security.

Analysis and Determination

9. The court has considered the application by read through the affidavits in support and in opposition thereof alongside the Appellant's submissions. The court finds the issue for determination being whether the Applicants' have satisfied the threshold required for stay of execution orders to issue.
10. The law on stay of execution is enshrined under Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

Order 42 rule 6(2) of the Civil Procedure Rules which provides:-

“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”
11. From the above provision, it is trite law that for a court to grant an order for stay of execution, three conditions must be met:
 - a. The application has been made without unreasonable delay.
 - b. The Applicant will suffer Substantial loss
 - c. The Applicant has offered security for due performance of the decree.
12. On the first condition on filing the application without unreasonable delay, the record shows that the Judgment herein was delivered on 4th July, 2024 and the present application is dated 29th July, 2024. This court finds this timely and without unreasonable delay is undisputed, hence this condition has been fulfilled.
13. On the second condition on suffering substantial loss, the Applicants have stated that they are likely to suffer substantial loss as the Respondent is likely to proceed with execution. In the case of Kenya Shell Limited v Benjamin Karuga Kibiru & Another [1986] eKLR, in addressing the issue of substantial loss, the court held thus:-

“Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the Respondents should be kept out of their money”
14. Finally, on the issue of offering security for the due performance, it is noted that while the Applicant did not expressly offer to deposit/provide security in the Supporting Affidavit, they indicated they were willing to abide by any condition the court would set and indeed, in the further Affidavit, they offered to deposit half the decretal sum in court. They were therefore not opposed to depositing security as would be directed by court.
15. On the purpose of an application for stay of execution pending appeal the court in the case of RWW v EKW [2019] eKLR, the Court held:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
16. In the upshot, this court finds that the Applicants have met the conditions for stay of execution and proceeds to allow the application dated 29th July, 2024 on the following terms:-
 - a. There be a stay of execution of the Judgment rendered in Limuru CMCC No.259 of 2020 on condition that the Applicants deposits a sum of Kshs. 264,845/= in court as security within 30 days from the date of this ruling.



- b. The Appellant/Applicant to file and serve a Record of Appeal within thirty (30) days from the date hereof.
- c. Failure to comply with the said orders will render the application dismissed with costs.
- d. Mention on 20th January, 2025 for parties to confirm compliance and take directions on hearing of the appeal.

It is so ordered.

**RULING DATED AND SIGNED AT KIAMBU THIS 22ND DAY OF ...NOVEMBER...., 2024.
(UPLOADED VIA ELECTRONIC MAIL)**

D. O. CHEPKWONY

JUDGE

