



REPUBLIC OF KENYA



**Real Insurance Company Ltd & another v Wambui (Civil Appeal  
E135 of 2024) [2024] KEHC 14703 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14703 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E135 OF 2024  
DO CHEPKWONY, J  
NOVEMBER 22, 2024**

**BETWEEN**

**REAL INSURANCE COMPANY LTD ..... 1<sup>ST</sup> APPELLANT**

**FRANCIS KIBUGI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MICHAEL KIHARA WAMBUI ..... RESPONDENT**

**RULING**

1. This is a ruling in respect of a Notice of Motion application dated 29<sup>th</sup> 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 4<sup>th</sup> 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 of Edinah Massanya, the Principal Legal Associate at Britam General Insurance Co Ltd, the Appellants' Insurer sworn on the instant date.
3. It is the Applicant's case that the trial court delivered Judgment against the Appellants for a sum of Kshs. 158,550/= 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 29<sup>th</sup> July, 2024.



4. The Applicants hold that since the thirty (30) days stay of execution have lapsed, the Respondent may proceed with execution which will prejudice the appeal. They contend that they 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, are willing to abide by the terms of the court and 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 on 12<sup>th</sup> 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 26<sup>th</sup> July, 2024 wherein the Applicants 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 as he has not furnished any security for costs. He argues that the appeal has no chance of success but holds that if the court is inclined to grant the orders, then the Applicants should be ordered to pay half of the decretal sum to the Respondent's advocates and deposit the other half in court. Otherwise, he has urged the court to dismiss the application with costs.
6. The Applicant filed a Further Affidavit sworn by the same deponent Edinah Massanya on 29<sup>th</sup> July, 2024, wherein 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 contend that the appeal has a high chance of success and maintain that they are not opposed to depositing half of the decretal sum in court as security and they have urged the court to allow the application as prayed.
7. The parties were directed by the court on 7<sup>th</sup> August, 2024 to canvass the application by way of written submissions. The Applicants filed their submissions dated 23<sup>rd</sup> September, 2024 while the Respondents opted to rely on their Replying Affidavit dated 12<sup>th</sup> August, 2024.

### **Applicant's Submissions**

8. In the submissions dated 23<sup>rd</sup> September, 2024, the Applicant has submitted that the application is enshrined on Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules. According to the Applicants, the appeal is arguable, and they stand to suffer substantial loss which would render it nugatory. The Applicants have offered to deposit half of the decretal sum in court as security.

### **Analysis and Determination**

9. To determine this application, the court has taken into consideration the grounds for and against the prayers sought as set out in the respective affidavits sworn by the parties, the Applicant's submissions and the cited statute and case law. In view of all these, the issue for determination is whether the Applicant/Appellant has met the threshold for stay of execution orders to be granted.
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. In view of the above provision, it is trite law that for a court to grant an order of 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 within reasonable time, the record shows that the Judgment herein was delivered on 4<sup>th</sup> July, 2024 and the present application is dated 29<sup>th</sup> July, 2024. Clearly, this is timely and without unreasonable delay and this has not been disputed, hence this condition had been fulfilled.
13. On the second condition of suffering substantial loss, the Applicant has stated that it is likely to suffer substantial loss as the Respondent is likely to proceed with execution since the thirty (30) days stay of execution lapsed. In the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] eKLR, in addressing the issue of substantial loss, the court held that:-
- “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. Lastly, is the issue of whether the applicants’ have offered security for the due performance in the Supporting Affidavit, the Applicants expressed their willingness to abide by any condition the court was to set. But on being challenged by the Respondent that they had not offered security, they stated in their further Affidavit that they were not opposed to payment of the decretal sum into court. They offered to deposit half the decretal sum in court as security
15. On the purpose of an application for stay of execution pending appeal, the court in the case of *RWW v EKW* [2019] eKLR, held that:-
- “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 conclusion, this court finds that the Applicants have met the required for stay of execution, to be granted and proceeds to allow the application dated 29<sup>th</sup> July, 2024 on the following terms:-
- a. There be a stay of execution of the Judgment in *Limuru CMCC NO.259 of 2020* on condition that the Applicants deposit a sum of Kshs. 79,275/= in court within thirty (30) days from the date of this ruling.



- b. The Applicant/Appellant to file and serve a Record of Appeal within thirty(30) days from the date of this ruling.
- c. Failure to comply with the orders (a) and (b) will render the application dismissed with costs.
- d. Mention on 20<sup>th</sup> 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 22<sup>ND</sup> DAY OF ...NOVEMBER...., 2024.  
(UPLOADED VIA ELECTRONIC MAIL)**

**D. O. CHEPKWONY**

**JUDGE**

