



**Fidelity Shield Insurance Co Limited v Machini (Civil Appeal  
E545 of 2022) [2023] KEHC 18399 (KLR) (Civ) (29 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18399 (KLR)

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

**CIVIL  
CIVIL APPEAL E545 OF 2022**

**AN ONGERI, J**

**MAY 29, 2023**

**BETWEEN**

**FIDELITY SHIELD INSURANCE CO LIMITED ..... RESPONDENT**

**AND**

**CYRUS OMBUNA MACHINI ..... APPLICANT**

**RULING**

1. The application coming for consideration in this ruling is the one dated 25/1/2023 seeking the following orders;
  - i. That the application herein be certified as urgent and the same be heard on priority basis.
  - ii. That this honourable court be pleased to grant an order of stay of proceedings herein pending the hearing and determination of the Civil Appeal no. E557 of 2022. Cyrus Ombuna Machini versus Fidelity Shield Insurance Co. Limited In the Court of Appeal At Nairobi.
  - iii. That this honourable court be pleased to grant any further orders as may be just and expedient and for the interest of justice.
  - iv. That costs be in the cause.
2. The application is based on the ground that the applicant has already lodged on appeal against the ruling of this court dated 15/7/2022 which granted the respondent leave to appeal out of time and stay of execution.
3. The application is supported by the affidavit of Cyrus Ombuna Machini dated 25/1/2023 in which it is deponed that the applicant has already lodged an appeal against the ruling by Hon. Justice Serгон



dated and delivered on 15<sup>th</sup> July 2022 granting leave to the respondent to file the instant appeal out of time and staying the execution in the lower court.

4. That if the appeal is allowed to proceed for hearing the application would be rendered nugatory. That applicant has an arguable appeal which merit sacrosanct judicial consideration. That grave prejudice would be occasioned to him should the present motion be declined as his rights to access to justice, have his appeal determined on merit and to its logical conclusion could be at stake.
5. The respondent filed a replying affidavit dated 21/2/2023 by Sammy Kamau Wanjiku opposing the application in which it is deponed that he is the claims manager at Fidelity Shield Insurance Company. He indicated that the appeal before this court arises from the decision and order of the trial court in refusing to set aside an *ex parte* judgement and give the respondent an opportunity to testify in support of their statement of defence.
6. That the applicant is now hellbent to benefit from the *ex parte* judgement by the present application which is geared towards denying the court an opportunity of hearing the merits of the respondent's appeal. That the applicant has filed an application at Nairobi Miscellaneous Application No. E316 of 2022 seeking leave to appeal and is scheduled for hearing on May 17, 2023. That the judge is unlikely to grant the application because the event has already taken place.
7. That since this appeal was filed a period of 7 months has since lapsed and this application thus has been brought inordinately late as the respondent has already filed the record of appeal and the matter is pending before the judge for directions on appeal.
8. The applicant filed a further affidavit dated 6/3/2023 where he reaffirmed that his application dated January 25, 2023 meets the criteria set under the law for grant of the orders sought. He added that the respondent shares the same view that a party ought not to be condemned unheard and therefore it has no reasonable grounds to oppose his application.
9. The sole issue for determination in this application is whether the applicant should be granted stay of proceedings pending appeal.
10. The legal provision governing stay pending appeal is as follows; order 42 rule 6(1) of the [Civil Procedure Rules](#) states that:-

“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.”

11. In the case of *Re Global Tours & Travel Ltd* HCWC No.43 of 2000 Ringera, J (as he then was) held that:

“...As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or



not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...”

12. I find that the applicant did not seek leave to file the appeal against the court’s ruling.
13. The application for stay of proceedings is not merited.
14. The same will serve the purpose of delaying timely disposal of the suit.
15. I accordingly dismiss the application dated 25/1/2023 with costs to the respondent.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29<sup>TH</sup> DAY OF MAY, 2023.**

.....

**A. N. ONGERI**

**JUDGE**

**In the presence of:**

..... for the Respondent

..... for the Applicant

