



**Directline Assurance Company Ltd v Musembi (Civil Miscellaneous Application  
E072 of 2023) [2023] KEHC 23164 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23164 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL MISCELLANEOUS APPLICATION E072 OF 2023  
MW MUIGAI, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**DIRECTLINE ASSURANCE COMPANY LTD ..... APPELLANT**

**AND**

**JOHN MUNENE MUSEMBI ..... RESPONDENT**

**RULING**

**Pleadings**

1. By a Notice of Motion dated 3rd May, 2023 brought under Sections 1A, 1B, 3A and 63 (e) B of the *Civil Procedure Act* and Orders 42 Rule 6, 50 Rule 6 and 51 Rule 4 of the Civil Procedure Rules and Articles 50 (1) and 159 (2) (d) of *the Constitution* of Kenya, the Applicants sought the following orders that:
  1. Spent
  2. Spent
  3. The Court to grant leave to the Applicant/ Appellant herein to appeal out of time against the judgment made by Hon. Andayi W. Francis on 8th March, 2023 in Machakos CMCC NO. 330 of 2022 John Munene Musembi Vs Directline Assurance CO. LTD.
  4. The Court to set aside the garnishee proceedings and order stay of execution of the ruling and order delivered on 8th March, 2023 and all the consequential orders pending the hearing and determination of the appeal filed herein.
  5. The said leave does operate as stay of all execution proceedings and/or execution of the judgement, decree, order and all consequential orders in Machakos CMCC NO. 330 OF 2022 pending the hearing and determination of the intended appeal.



6. The draft annexed Memorandum of Appeal be deemed as filed upon leave being granted and time being extended upon payment of requisite fees thereto.
7. The costs of this application be in the cause.

### **Supporting Affidavit**

2. The application was Supported by Supporting Affidavit dated 3rd May,2023, sworn by Kelvin Ngunjiri Deputy Claims Manager of the Applicant, wherein he deposed that The Applicant's Statement of Defence in Machakos CMCC NO. 330 OF 2022 John Munene Musembi Vs Directline Assurance Co. LTD was struck out on 8th March,2023 and judgment entered against the Appellant for a total of Kshs. 522,301 plus costs and interest. (annexed and marked of the Ruling)
3. He deposed that the Appellant instructed its advocates on record to file an appeal against the said Ruling delivered by Hon Andayi W. Francis on 8th March,2023 in Machakos CMCC NO. 330 Of 2022 John Munene Musembi Vs Directline Assurance CO. LTD and due to administrative error on the part of the advocates on record the Appeal and the Application for stay was not filed on time.
4. It was deposed that the Applicant learnt that the Appeal was not filed on the 25th April,2023 when Diamond Trust Bank forwarded a garnishee application dated 14th April,2023 filed by the Respondent seeking to attach the Applicant's monies contained in the Applicant's account with the said Bank and Safaricom PLC (annexed and marked copy of the Application).
5. It was deposed that upon perusal of the said garnishee application, the Applicant noted that the Honorable Court had granted order garnishee order Nisi on 8th April,2023. (annexed and marked copy of the order) and discovered that the garnishee application is coming up for ruling on 9<sup>th</sup> May 2023.
6. It was further deposed that the Appellant is desirous of lodging the Appeal against the said judgement as they believe that they have a strong and meritorious Appeal which has chances of success and the Appeal if successful shall be rendered nugatory unless orders sought herein are granted. (annexed and marked copy of draft Memorandum of Appeal)
7. It was deposed that he is informed by the Appellant's advocate on record that the Applicant is likely to suffer irreparable loss if garnishee proceedings commenced by the Respondent herein are not stayed noting the decretal amount is quite substantial.
8. It was further deposed that appellant stands to suffer substantial loss, damage and prejudice if the application is not allowed since the Respondent may not be able to refund the sum of Kshs 627,416 as his means and assets are unknown thereby rendering the Appeal nugatory should the same be successful.
9. He deposed that the application has been made in good faith and is not a subversion of the administration of justice and that the applicant be given a chance to be heard on the intended appeal.
10. It was further deposed that Appellant is willing and ready to provide security in form a bank guarantee for the decretal sum for the appeal and abide by any other condition laid down by the court; that there is no prejudice that the Respondent shall suffer that cannot be compensated by an award of costs.
11. It was deposed that the Application has been brought to court expeditiously without any inordinate delay.
12. It was finally deposed that it was in the interest of justice that the application be allowed.



## **Replying Affidavit**

13. The Respondent opposed the application by a Replying Affidavit dated 12th May,2023, sworn by Morris M. Karigi the Respondent's Advocate, where he deposed that the application herein is a nonstarter, brought in bad faith, vexatious, frivolous, devoid of merit, a waste of precious judicial time and meant to clog the justice system and only meant to hood wink this Honorable court to issue orders which the Applicant does not deserve at all.
14. He deposed that that application is devoid of merit for reasons that it does conform to the requirements for stay of execution of decrees as envisaged by civil procedure rules.
15. It was stated that the Respondent vide a letter dated 9th March,2023 and served on 14th March,2023 sent their tabulation of the judgement together with costs. (annexed and marked copy of the duly signed and received letter dated 9th March,2023).
16. It was deposed that there is no plausible explanation for two months' delay in filing the intended appeal and that the Appellant had equally been granted 30 days stay of execution from 8th March,2023 by the trial court which period lapsed on 8th April,2023.
17. He deposed that the Appellant received several reminders with regard to the settlement of the decretal sum and only jolted to action after the Respondent proceeded with execution and filed for the garnishee proceedings that is slated for a ruling on 23rd May,2023.
18. He further deposed that it is unfair and unjust for the Applicant not only to attempt to be issued with orders for stay of execution in a miscellaneous application but seek to delay the Respondent's enjoyment of the fruits of the trial court's judgment despite there being no appeal.
19. He contended that it is trite that no stay of execution can be issued without a substantive appeal on record and that the Applicant has not attached to its application a letter requesting for typed proceedings from the lower court, a clear indication that they do not intend to prosecute the intended appeal expeditiously hence a tactic to delay the matter further and prevent the Respondent from enjoyment of the fruits of the trial court's ruling.
20. He deposed the right of appeal must be balanced against the Respondent's equally weighty right to enjoy the fruits of the judgement delivered in his favor by the Trial Court.
21. He deposed that the Application seeks to obstruct the cause of justice and to allow the same will be repugnant to good practice and timely administration of justice and that the Applicant has not demonstrated that the Respondent is incapable of refunding the decretal amount in the unlikely event the intended appeal succeeds.
22. It was deposed that the intended appeal does not raise any triable issues and the Respondent will continue to suffer prejudice due to the Applicant's indolence if this application is allowed.
23. The Court was urged strike out the application filed since sufficient cause has not been demonstrated and allow the Respondent to proceed with the execution.
24. The matter was canvassed by way of written submissions.

## **Submissions**

### **The Applicant/Appellant's Submissions**

25. The Applicant in its submissions dated 29th May,2023, raised the following issues:



- a. Whether the Applicant/Appellant should be granted leave to appeal out of time.
  - b. whether there should be stay of execution of the ruling delivered on 8th March,2023 in the declaratory suit; the garnishee proceedings filed, the Garnishee Order Nisi issued on 18th April,2023 and the impending Ruling on the Garnishee proceedings pending the hearing and determination of this Application and intended Appeal.
26. On the issue of whether the Applicant/Appellant should be granted leave to appeal out of time, reliance was placed on Section 79G of the [Civil Procedure Act](#) which provides that:
- “Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
- Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
27. Similarly reliance was placed on the case of *Mugo & Others vs Wanjiru & Another* [1970] EA 482, to buttress the general rule the filing and service of the notice of appeal ought to be regularized before or at least at the same time as an application is made to extend the time for filing record.
28. Further the court of Appeal in *Thuita Mwangi vs Kenya Airways Ltd* [2003] eKLR, Court observed factors to consider in exercising the discretion on whether to extend time to file an appeal out of time as follows:
- i. The period of delay;
  - ii. The reason for the delay;
  - iii. The arguability of the appeal;
  - iv. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
  - v. The importance of compliance with time limits to the particular litigation or issue; and
  - vi. The effect if any on the administration of justice or public interest if any is involved.
29. It was submitted that the Applicant through no deliberate action or omission but rather due to an administrative error on the part of the Advocates instructed to take conduct of the suit and appeal did not file in time. Reliance was placed on the case of *Ponangipalli Venkata Ramana Rao & Another Vs Dipit Premchand Chheda & 2 Others* [2021] eKLR, to buttress the point that court of appeal admitted that an administrative error by counsel may be cited as a sufficient reason to allow extension of time to file an appeal out of time.
30. On the issue of whether there should be stay of execution of the ruling delivered on 8th March,2023 in the declaratory suit; the garnishee proceedings filed, the Garnishee Order Nisi issued on 18th April,2023 and the impending Ruling on the Garnishee proceedings pending the hearing and determination of this Application and intended Appeal, reliance was placed on Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010 where it was submitted that the law permits the Courts to grant orders of stay of execution pending appeal upon satisfaction of certain stipulated conditions. Reliance was placed on the cases of *Co-operative Bank of Kenya Limited Vs Banking Insurance & Finance Union [Kenya]* (2015) eKLR and *Chris Munga N. Bichage Vs Richard Nyagaka Tongi & 2 Others* [2013] eKLR, to lay emphasis on the conditions the court needs to consider before granting stay of execution orders.



31. On the issue of whether the intended appeal is arguable, reliance was placed on the case of Chris Munga N. Bichage Vs Richard Nyagaka Tongi & 2 Others [supra], to buttress the point that in law one arguable point suffices for that finding.
32. It was contended that the test as to whether a point is arguable or not can only be found upon perusal of an application and in the present application, significant grounds have been stipulated including being enumerated in the Supporting Affidavit which the said grounds are not frivolous, vexatious and certainly not devoid of merit in the least.
33. Reliance was placed in the cases of Global Tours & Travels Limited ; Nairobi HC winding up Cause No. 43 of 2000 and Chris Munga N. Bichage vs. Richard Nyagaka Tongi & 2 others(2013) to buttress the limb of stay of proceedings, execution or injunction.
34. It was submitted that the intended Appeal raises serious triable issues as stated in the Memorandum of Appeal attached to the Application under question with high chances of success which necessitates this Honorable to grant an order of stay of execution.
35. On the issue of whether the appeal, if successful, would be rendered nugatory, reliance was placed on the case Reliance Bank Limited Vs Northlake Investments LTD [2002] 1 EA 227, and Northlake investments Limited Case(supra)
36. It was submitted that the Appellant is a reputable insurance company serving a wide and diverse range of clients within the whole Republic of Kenya and if orders sought are not granted, the Applicant and indeed the clients stand to suffer substantial and unnecessary loss since the assets of the Applicant are held in trust for the said clients.
37. It was strongly submitted that the intended appeal raises serious triable issues as stated in the memorandum of Appeal with high chances of success which necessitates this court to grant an order of stay of execution to enable the appeal be determined on merit lest it be rendered nugatory.
38. On the issue of whether the appeal was made without unreasonable delay, reliance was placed on the case of Jaber Mohsen Ali & Another Vs Priscillah Boit & Another E & L No. 200 of 2012 [2014] eKLR, where it was stated that even one day after the judgment could be unreasonable delay depending on the judgement of the court and any order given thereafter.
39. It was submitted that the Appellant had expressed the intention to appeal the ruling in the declaratory suit to its Advocates on record, but due to an administrative error on the part of the Applicant's Advocates on record, the Appeal and the Application for stay were not filed on time and that the Applicant was not just sitting on its laurel but it was in active pursuit of the matter and at no stage did they show indolence of whatever nature.
40. It was submitted that the application was timeous and was made without any unreasonable delay and that the application discloses a prima facie and legitimate issues.
41. On the issue of whether the Applicant is willing to abide with such orders as to security as the court may order, it was submitted that the Applicant is willing to abide by any conditions set by this Honorable Court for the grant of the Orders sought herein including any security that court may deem reasonable and necessary.
42. It was prayed that the prayers sought in the Notice of Motion be granted.

### **Respondent's Submissions**

43. The Respondent in his submissions dated 8th June, 2023 submitted on the following issues:



44. On the issue of whether the Applicant satisfactorily explained the delay in filing this application, it was submitted that the Applicant has not rendered any satisfactory explanation as to why it took them that long to file the present application despite the correspondences between the Applicant and the Respondent's Advocate. This smacks lack of interest in the matter and that the contempt with which the applicant herein handled these proceedings can be deciphered from the application herein and the affidavit in support thereof.
45. Reliance was on the case of Dolphin Coaches Ltd Vs Benson Kamau Migwi & Another [2008] eKLR, to buttress the point where court refused the leave to appeal out of time sought as there was no attempt to explain the delay in filing the present application for leave.
46. Further, reliance was placed on the case of Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR, where court set seven principles that a court should consider: -
1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
  2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  3. Whether the court should exercise the discretion to extend time is a consideration to be made on a case-to-case basis;
  4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
  5. Whether there will be any prejudice suffered by the Respondents if the extension is granted;
  6. whether the Application has been brought without undue delay; and
  7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

It was therefore submitted that the delay in filing the appeal has not been satisfactorily explained in the supporting affidavit.

47. On the issue of whether the Applicant has satisfied the conditions for grant of stay of execution, reliance was placed on Order 42 Rule 6 (2) of the Civil Procedure Rules 2010, and it was submitted that the Respondent opposed the application on grounds that the Application is unmerited, misconceived bad in law and purely meant to scuttle the court process and the Applicant is only intent on engaging the Respondent in endless litigation. Reliance was placed on the case of Teresia Kimani vs Githere Investments Ltd- CA NO.944 OF 2003.
48. It was submitted that the orders for stay of execution herein cannot issue in a miscellaneous application, without a substantive appeal being filed. reliance was placed on the cases of Seyani Brothers & Co. (K) Limited Vs Albanus Mwangi Muia [2021] eKLR and Gerald M'limbine vs Joseph Kangangi [2009] eKLR, in which cases it was observed that Section 79G is to the effect that an Applicant seeking an Appeal to be admitted out of time must in effect file such an appeal and at the same time seek leave of court to have an appeal admitted out of the statutory period of time.
49. On the issue of arguable appeal, it was contended that the Applicant has neither demonstrated to this Honorable court that there exists an arguable appeal with high chances of success nor satisfied the prerequisite conditions set out in Order 42 Rule 6 of the Civil Procedure Rules to enable grant of stay



of execution pending the hearing and determination of the intended appeal. Reliance was made on the case of Mohammed Salim t/a Choice Butchery Vs Nasserpukia Memon Jamat [2013] eKLR, it was submitted that the Memorandum of appeal annexed herewith is frivolous and the same does not disclose any triable issues.

50. As to the issue of loss, reliance was placed on Order 42 rule 6 (2) (a). it was submitted that the Applicant failed to demonstrate what substantial loss they would incur should the decree be executed. Reliance was made on the case of Antoine Ndiaye Vs African Virtual University [2015] eKLR, to buttress the point on loss.
51. It was submitted that since the Applicant has failed to fulfil this crucial requirement of proving loss it will incur, stay of execution pending any intended Appeal be declined as the application lacks merit and ought to be dismissed with cost.

### **Determination**

52. The Court has considered the application, affidavits in support and in opposition and the written submissions.
53. The application is premised on Order 42 Rules (2) of the Civil Procedure Rules, 2010 wherein it is stipulated as follows:-
- (2) 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.
54. The Court of Appeal in Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nairobi 15 of 1990 [1990] KLR 365 stated as set out hereunder: -
- “Whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 42 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.”
55. On the first condition, the court in Tropical Commodities Suppliers Ltd and Others vs. International Credit Bank Limited (in liquidation) (2004) E.A. LR 331, defined substantial loss in the sense of Order 42 rule 6 as follows:-
- “...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”
56. According to the Applicant, there is a likelihood that it being a reputable insurance company serving a wide and diverse range of clients within Kenya, if the application is not allowed and orders sought herein granted, the applicant and indeed its clients stand to suffer substantial and unnecessary loss since the assets of the applicant are held in trust for the said clients.
57. The Applicant lamented that if the orders sought are not granted, the Respondent shall proceed to execute the decree against it and shall subsequently not be able to repay the amount in the event the



- applicant is successful in the appeal thereby occasioning the applicant substantial financial loss and damage
58. In *Masisi Mwita vs. Damaris Wanjiku Njeri* [2016] eKLR, Mativo J. relied on the case of *Equity Bank Ltd vs. Taiga Adams Company Ltd*, [2006] eKLR to explain the onus of the Applicant where the court stated as follows: -
- “...The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out—in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant.”
59. However in *James Wangalwa & Another vs. Agnes Naliaka Cheseto*[2012]eKLR it was stated that:-
- “The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.”
60. In *Kenya Shell Limited vs. Kibiru* [1986] KLR 410 Gachuhi, Ag.JA (as he then was) at 417 held:
- “It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”
61. The evidential burden shifted to the Respondent once the Applicant state that they have reasonable fear that the Respondent would be unable to repay the decretal amount in the event the appeal is successful. In *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & another* [2006] eKLR Court of Appeal held thus:
- “Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”
62. The Respondent has not stated in his replying affidavit, whether the Respondent would be capable of refunding the decretal amount.
63. The Applicant has demonstrated that they will suffer substantial loss if the stay of execution is not granted. This ground succeeds.
64. On the second condition, the trial court judgment was delivered on 8<sup>th</sup> March 2023, as per the Memorandum of appeal hence the 30 days stay of execution lapsed on 8<sup>th</sup> April 2023. The application herein was filed less than month later on 4<sup>th</sup> May 2023. The delay of less than a month later after the stay of execution orders lapsed was not an undue delay, although past the statutory period for filing an appeal. The application has therefore been filed without unreasonable delay.
65. On the provision of security for the due performance of the decree, it is submitted that the Applicant has stated that they are willing to furnish security in the form of a bank guarantee of the decretal sum and abide by any other condition laid down by the Court.



66. As regards the requirement of provision of security, in *Equity Bank Ltd vs. Taiga Adams Company Ltd*[2006] eKLR it was held that:-

“of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought ...let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...” which principle was also emphasized in *Carter & Sons Ltd –vs- Deposit Protection Fund Board & 3 Others*”.

67. In *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another* [2018] eKLR, it was stated that:-

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

68. In its averments, the Applicant stated that the applicant was ready and willing to comply with reasonable conditions granted by court.

69. The Court of Appeal in *Butt vs Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how a court should exercise discretion and held that:

- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

70. The Applicant contends that it is a reputable insurance company and if the application is not allowed, the Applicant and its client stand to suffer substantial and unnecessary loss and that the Appeal raises triable issues with high chances of success which necessitates the court to grant an order of stay of execution.



71. On the other hand, the Respondent contends the appeal is to delay and frustrate efforts of reaping fruits of the judgment. Secondly that the application and intended appeal lacks merit and is brought in bad faith.

72. The Court has considered the rival concerns raised by both parties and finds as follows;

This Court recognizes an aggrieved party's right of Appeal. However, the Applicant ought to demonstrate the appeal/application was filed without delay, prove that if not granted stay of execution substantial loss would ensue and that the Appellant shall provide security. That Kshs.627,416/-, the decretal sum, is a substantial amount that would cause substantial loss and damage to the Applicant and the fact of whether in the event of the outcome of the appeal the amount maybe recoverable from the Respondent, remains live and relevant.

### **Disposition**

1. In the circumstances, and to err on the side of caution, favor tilts towards maintaining status quo pending appeal. Stay of execution is granted on the following conditions;
2. There will be a stay of execution pending the said appeal on condition that the Applicant remits to the Respondent half of the decretal sum and balance of the decretal sum be deposited in a joint account of both the Applicants and Respondent's advocates within 90 days from the date hereof and in default, the application for stay shall stand dismissed.
3. Once there is compliance the appeal shall be deemed as filed; LCF retrieved and Record of Appeal filed and served.
4. The cost of the suit shall abide the appeal.

It is so ordered.

**RULING DELIVERED DATED & SIGNED IN OPEN COURT IN MACHAKOS ON 28<sup>TH</sup> SEPTEMBER, 2023 (VIRTUAL/PHYSICAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

