



Directline Assurance Co. Limited v Unda (Miscellaneous Application E056 of 2023) [2023] KEHC 25947 (KLR) (29 November 2023) (Ruling)

Neutral citation: [2023] KEHC 25947 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS APPLICATION E056 OF 2023
SM GITHINJI, J
NOVEMBER 29, 2023**

BETWEEN

DIRECTLINE ASSURANCE CO. LIMITED APPLICANT

AND

JOSEPHINE CHARO UNDA RESPONDENT

RULING

1. By a notice of motion dated June 21, 2023, brought under section 1A, 1B, 3A, 3B, 79G and 95 of the Civil Procedure Act; order 22 rule 22, order 42 rule 4, 6 and 7, order 50 rule 6 and order 51 rule 1 and 3 of the Civil Procedure Rules, the Applicant seeks the following orders: -
 1. Spent.
 2. Spent.
 3. Spent.
 4. That the court be pleased to strike out Civil Case No. E041 of 2023 Josephine Charo Unda v Directline Assurance Company Ltd.
 5. That the costs of Misa Mugaro be borne by the Respondent.
 6. Spent.
 7. That costs of this application be borne by the Respondent
2. The said application is supported by the affidavit sworn on 21st June 2023 by Kelvin Ngure the Applicant's assistant claims manager who deposed that following a decree and certificate of costs dated 11th January, 2023 issued in CMCC E390 of 2021, the Applicant paid a sum of Kshs. 242,430/- to the Respondent's advocates being the entire decretal sum (inclusive of costs). That despite fully settling the



entire decretal sum, advocates costs and interest, the Respondent has now commenced execution by obtaining warrants of attachment and sale dated 9th June 2023 claiming the sum of Kshs. 381,028.05 amount which is inclusive of the auctioneer fees. He stated that at the time the declaratory suit was filed in court on 7th March 2023, the applicant had fully settled the claim and there was no money owing.

3. In opposing the application, the Respondent filed a Replying Affidavit sworn on 30th June 2023 by Geoffrey Kilonzo, counsel for the Respondent. Mr. Kilonzo deposed that the application is *sub-judice* another application filed in the lower court in declaratory suit Malindi CMCC E41 of 2022. That having remitted part of the decretal amount, the present application is an academic exercise intended to deny the Respondent fruits of her judgment and especially because there is no pending appeal.
4. The court directed that the application be canvassed by way of written submissions. I have considered the submissions as well as the authorities relied upon. The issue arising for determination is whether the stay orders sought are merited.
5. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under 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.”

6. The applicant herein seeks stay of execution pending the hearing and determination of the application. There is no substantive prayer once the application is determined. In the case of [Lydia Wanjiku Mwangi v James Mwangi Mwaniki](#) [2006] eKLR as cited to me by the respondent, the court held that;

“Without a substantive prayer the application is misconceived and incompetent as the relief sought can only be granted if there is a pending substantive prayer, and there is not one such in this application. For the above reason I will, and hereby do, strike out the application...”

7. Similarly, in the absence of a substantive prayer, I am of the considered view that I cannot issue an order for stay in a vacuum. The outcome is that the notice of motion dated 21st June, 2023 lacks merit and the same is hereby dismissed with costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 29TH DAY OF NOVEMBER, 2023.

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S.M. GITHINJI

JUDGE

In the absence of; -

1. Parties absent. They be notified.

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S.M. GITHINJI

JUDGE



29/11/2023

