



REPUBLIC OF KENYA



**KENYA LAW**  
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**Karaba v Mauti (Civil Appeal E075 of 2022)  
[2023] KEHC 27298 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27298 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CIVIL APPEAL E075 OF 2022  
SN MUTUKU, J  
DECEMBER 19, 2023**

**BETWEEN**

**GODFREY MUHORO KARABA ..... APPLICANT**

**AND**

**SAMWEL MORANI MAUTI ..... RESPONDENT**

**RULING**

1. The Applicant has filed a Notice of Motion application dated 12<sup>th</sup> September 2022 under Order 22 Rule 22, Order 42 Rules 4, 6 & 7, Order 51 Rules 1 & 3 of the [Civil Procedure Rules](#) and Sections 79G, 3, and 3A of the [Civil Procedure Act](#) seeking the following orders:
  - i. Spent
  - ii. That this Honourable Court be pleased to find that the Memorandum of Appeal to have been filed on time.
  - iii. That the Honourable Court be pleased to grant a stay of execution of the Judgment and/or Decree issued by Honourable L. L. Gicheha on 23<sup>rd</sup> August 2022 in Kajiado CMCC E046 of 2021 pending the hearing and determination of this Application.
  - iv. That the Honourable Court be pleased to grant a stay of execution of the Judgment and/or Decree issued by Honourable L. L. Gicheha on 23<sup>rd</sup> August 2022 in Kajiado CMCC E046 of 2021 pending the hearing and determination of this Appeal.
  - v. That this Honourable Court do allow the Applicant to furnish the Court with security in the form of a Bank Guarantee from Family Bank.
  - vi. That the Application be heard inter partes on such date and time as this Honourable Court may direct.



- vii. That the costs of this Application abide the outcome of the Appeal.
  - viii. That this Honourable Court be pleased to issue any other order and/or direction it deems fit to grant in the circumstances
2. The grounds in support of the application are found on the face of it and in the Supporting Affidavit of Kevin Ngure Deputy Claims Manager at Directline Assurance Company Limited, the insurers of the motor vehicle registration number KCA 214X.
  3. The grounds in support of the application are that the Appellant was held 100% liable by the trial court and the Respondent was awarded Kshs 550,000 as general damages and Kshs 3,900 as special damages plus costs; that the Appellant is dissatisfied with the judgment and has preferred an appeal; that the Appellant was not able to obtain copy of the judgment after delivery because the file was not available until 12<sup>th</sup> September 2022 and that immediately the Appellant was able to obtain the judgment he filed the Memorandum of Appeal.
  4. It is further stated that the Appellant's Appeal is merited, arguable and that it has overwhelming chances of success. It is stated that there is threat of execution of the judgment/decreed hence the need for stay of execution pending the hearing and determination of the appeal. It is stated that the insurance company is willing and able to furnish the court with security for the due performance of the decree in the form of a Bank Guarantee from Family Bank. It is stated that this application has been made in good faith and the same will not occasion any prejudice on the Respondent.
  5. The Application is opposed by the Respondent through a Replying Affidavit of Samuel Morani Mauti sworn on 1<sup>st</sup> November 2022. It is deposed that the Supporting Affidavit ought to be struck out for reasons that it is sworn by a person who is not a party and offends Order 19 of the [Civil Procedure Rules](#); that the averments in paragraph 6 of the Supporting Affidavit that the Applicant is not likely to refund the decretal amount if the appeal succeeds are unsubstantiated; that the Applicant has not fulfilled the requirements for grant of stay and that the likelihood of execution taking place in itself does not amount to substantial loss.
  6. It is deposed that the delay in filing this application is inexcusable and a deliberate effort to deny the Respondent the fruits of the judgment.

### **Submissions**

7. This court directed that this application be canvassed through written submissions. On 19<sup>th</sup> October 2023 Ms Sirma, holding brief for Mr. Muhia for the Respondent, told the court that the Respondent would not be filing submissions. The Appellant or his legal representative were not in court on that date despite the date having been taken in the presence of both counsel. However, the Applicant's submissions, dated 17<sup>th</sup> October, 2023, have been filed.
8. It is the submission of the Applicant that Order 42 Rule 6(2) provides the conditions to be fulfilled before stay pending an appeal can be granted that:
  - (2) No order for stay of execution shall be made under subrule (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.



9. The Applicant relied on the case of *James Wangalwa & Another -vs- Agnes Naliaka Chesoto* (2012) eKLR on what constitutes substantial loss, where it was held that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process.

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.

...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

10. It was submitted that the Applicant stands to suffer substantial loss of over Kshs. 553,950/- as well as costs and interest if stay is not granted; that further, the Respondent has not demonstrated their ability to refund the said sum should the appeal succeed and that he has demonstrated that he is willing and ready to offer security in form of a bank guarantee.
11. The Applicant relied on *RWW -vs- EKW*(2019)eKLR, where the court considered the purpose of a stay of execution order pending appeal as follows:

“The purpose of an application for stay is to preserve the subject matter in dispute so that the rights of the appellant, exercising his right of appeal, are safeguarded if the appeal were to be 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 judgement. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interest of the Appellant with those of the Respondent.”

12. The Applicant argued that the application has been made without unreasonable delay, that he filed the Memorandum of Appeal on 13<sup>th</sup> September, 2022 while the judgement was delivered on 23<sup>rd</sup> August, 2022; that the appeal raises arguable issues with a high chances of success and that in the interest of justice and fairness the prayers sought should be granted.

### **Analysis and Determination**

13. I have considered the application, the affidavit in support and the Replying Affidavit in opposition. I have also considered the submissions of the Applicant.
14. Stay of execution pending an appeal is provided for under Order 42 of the *Civil Procedure Rules*, with Subrule 6 (2) setting out the conditions of granting stay. The issue is whether the Applicant in this Notice of Motion has satisfied those conditions.
15. The Applicant has submitted that he will suffer substantial loss because the Respondent has not demonstrated that he has the capacity to refund the money paid to him should the appeal succeed. He has stated that that the person who has sworn the Supporting affidavit is not a party to this suit; that he did not litigate with the deponent and therefore he would not be in a position to know if



- they are able to refund the decretal sum. Further, he has claimed that the Deputy Claims manager at Directline Assurance Company, which is not a party to this suit, should not descend into the arena of litigants as swearing such an affidavit exposes him to becoming a potential witness if subjected to cross-examination.
16. The Applicant relied on [Order 19 rule 2\(1\)](#) which provides that:

Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.
  17. At paragraph 1 of the Supporting Affidavit, the deponent stated that, “I am conversant, authorized and competent to swear this affidavit by dint of our rights of subrogation and the right to defend, settle or prosecute claims filed against or in the Insured’s name as per the policy of insurance.”
  18. The applicability of the doctrine of subrogation is discussed under Paragraph 490 of the [Halsbury’s Laws of England](#) 4<sup>th</sup> Edition 2003 Reissue Volume 25 in the following terms: -

“Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject matter so paid for, and he thereby subrogated to all the rights and remedies of the assured in and in respect of that subject matter as from the time of the casualty causing the loss... in so far as the assured has been indemnified by that payment for the loss.”
  19. In [Kenya Power & Lighting Company Limited v. Julius Wambale & Another](#) [2019] eKLR, the court held that:

“The parameters within which the principle of subrogation applies are now well settled. The doctrine applies where there is a contract of insurance and following crystallization of the risk insured, the insurer had compensated its insured for financial loss occasioned thereby, usually by a third party. Under this doctrine, the insurer is in law entitled to step into the shoes of the insured and enjoy all the rights, privileges and remedies accruing to the insured including the right to seek indemnity from a third party. The action must however be instituted in the name of the insured with his consent and must relate to the subject of the contract insurance.”
  20. The Applicant did not swear the affidavit in support of his application. Instead, it is Kelvin Ngare who described himself as the Deputy Claims Manager at Directline Assurance company Limited, the insurers of Motor Vehicle No. KCA 214X who swore the affidavit in support of the application. The deponent invokes the insurers right of subrogation. However, I have not seen any evidence that the insurer has fully compensated its insured for financial loss occasioned.
  21. This is a preliminary point raised by the Respondent in the Replying Affidavit. The Applicant has not responded to this issue and as pointed out, I have not found any evidence that the Insurance Company has fully compensated the Applicant and therefore the doctrine of subrogation cannot be invoked in this matter. The deponent is a stranger in this matter and cannot swear affidavit on behalf of the Applicant on matters not within his knowledge. He was not a party to the suit between the Applicant and the Respondent. The claim by the Applicant is therefor left exposed without grounds in support of the same and without legs to stand on.



22. On the above point alone, this application cannot stand. But even if I were to determine substantial loss, it is my considered view that the amount of the judgment is not substantial to an extent that the Respondent is unable to pay should the Appeal succeed.
23. Consequently, I find this application without merit and dismiss the same with costs to the Respondent.
24. It is so ordered.

**DATED, SIGNED AND DELIVERED THIS 19<sup>TH</sup> DECEMBER 2023**

**S. N. MUTUKU**

**JUDGE**

