



REPUBLIC OF KENYA



Kivuti v Provincial Insurance Company of EA Ltd & 3 others (Civil Case 3919 of 1994) [2023] KEHC 26509 (KLR) (Civ) (15 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26509 (KLR)

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

CIVIL

CIVIL CASE 3919 OF 1994

AN ONGERI, J

DECEMBER 15, 2023

BETWEEN

LENNY KIVUTI PLAINTIFF

AND

PROVINCIAL INSURANCE COMPANY OF EA LTD 1ST DEFENDANT

JOY IMPORT & EXPORT LIMITED 2ND DEFENDANT

D.S. KANDOLA 3RD DEFENDANT

REGISTRAR OF MOTOR VEHICLES 4TH DEFENDANT

RULING

1. The application dated 14/11/2023 is seeking stay of execution pending appeal to the Court of Appeal.
2. It is brought under Section 1A, 1B & 3A of the [Civil Procedure Act](#) 2010, Order 42 Rule 6 (1) & (2), Order 51 Rule 1 of the Civil Procedure Rules 2010.
3. The application is supported by the affidavit of FRANKLIN NYAGA dated 6/11/2023.
4. The plaintiff/respondent vehemently opposed the application and filed grounds of objection in which he stated that the application seeking stay of execution lacks in merit and is completely incompetent, lacks in merit and is an abuse of the court process.
5. Further, that the application is purely meant to frustrate the plaintiff from enjoying the fruits of his lawfully obtained judgment.
6. The parties filed written submission which I have duly considered. The applicant submitted that it has an arguable appeal which ought to be fully argued before the Court of Appeal.



7. Further, that this court has a discretion to grant stay pending appeal which discretion should be exercised in such a way as to prevent.
8. The applicant also submitted that it stands to suffer loss should the decretal sum be paid to the plaintiff and further that no evidence has been placed before the court to prove that the plaintiff is not a man of straw as stated in the grounds of application. Further that the applicant's constitutional right of appeal should be safeguarded from being rendered nugatory.
9. The applicant also submitted that the application has been brought within reasonable time and further that the applicant is willing to deposit security in an escrow account held jointly by the advocates acting for the parties.
10. The plaintiff submitted that the application is totally incompetent, lacks in merit and is an abuse of the court process and further that the applicant has not shown how the appeal will be rendered nugatory if an order of stay is not granted.
11. The plaintiff also submitted that the cause of action giving rise to this suit is failure by the 1st defendant/ applicant to compensate the plaintiff for loss of his motor vehicle under a valid motor insurance policy which he was violently robbed of his motor vehicle in May 1993 which is 30 years ago.
12. The plaintiff also submitted that due to the procrastination of the 1st defendant/ applicant in making the payment the interest has now accrued and the amount due is kshs.8,082,000/=.
13. Further that the plaintiff has previously demonstrated that he is not a man of straw by refunding the decretal sum to the Applicant when the summary judgment was set aside by the Court of Appeal.
14. The plaintiff submitted that this application was not made in good faith and that it is a repeat of the applicant's negative attitude to settling claims, non-business conduct and procrastinations it has exhibited in this matter for the last 30 years.
15. I have carefully considered the submissions by both parties in the application dated 14/11/2023.
16. The sole issue for determination is whether the 1st defendant applicant should be granted stay of execution pending appeal.
17. The application for stay of execution is premised on Order 42 Rule 6 (1) (2) & (3) CPR 2010 R 6 (2) which provides as follows;
 - (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.
18. It is not in dispute that the 1st defendant/respondent previously refunded the decretal sum after the summary judgment was set aside by the Court of Appeal.
19. It follows that the applicant has failed to satisfy this court that it stands to suffer substantial loss if the stay sought is not granted in the event that the appeal succeeds.
20. I find that the applicant has not shown how the appeal would be rendered nugatory.
21. Article 159 of *the Constitution* of Kenya espouses every court and tribunal to use the principles enshrined therein in the disposal of suits.



- 22. The said Article states as follows;
 - (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
 - (a) justice shall be done to all, irrespective of status;
 - (b) justice shall not be delayed;
 - (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
 - (d) justice shall be administered without undue regard to procedural technicalities; and
 - (e) the purpose and principles of this Constitution shall be protected and promoted. (emphasis added)

23. There has been a delay of over 30 years in the disposal of this suit.

24. I find that the decree herein is a monetary decree capable of being repaid.

25. In the case of Joseph Gachie T/A Joska Metal Works vs Simon Ndeti Muema [2012] eKLR, the Court observed as follows;

“It is not sufficient to merely state that the decretal sum is a lot of money and the applicant would sufferer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted since by granting stay would mean that the status quo should remain as it were before the judgment and that would be denying a successful litigant of the fruits of his judgment which should not be done if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay”.

26. I find that the application for stay of execution pending appeal lacks in merit in view of the age of this case.

27. Justice delayed is justice denied. I find that the application dated 14/11/2023 lacks in merit.

28. The same is dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 15TH DAY OF DECEMBER, 2023.

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A. N. ONGERI
JUDGE

In the presence of:

..... **for the Plaintiff**

..... **for the Defendant**