



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CIVIL APPEAL CASE NO. E031 OF 2021

MWALIMU DAVID.....APPELLANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

(Being an appeal from the Judgement of Hon. Israel Ruhu, Resident Magistrate

dated and delivered on 29th April, 2021 in Mwingi Principal Magistrate Court

Case No. 36 of 2018)

R U L I N G

1. MWALIMU DAVID, the Respondent/ Applicant herein, through a Notice of Motion dated 5th November, 2021 moved this court for the following orders: -

- i. That this Hon. Court be pleased to set aside the order of the Lower Court made on 30.09.2021 in Mwingi PMCC No. 36 of 2018 granting stay of the appeal.
- ii. That the appellant's application dated 28th May 2021 in Mwingi Principal Magistrate Civil Case No. 36 of 2018 be dismissed with costs.

2. The grounds upon which this application has been brought are listed as follows: -

- a. That the Respondent has judgement in its favour in Mwingi Principal Magistrate Civil Case No. 36 of 2018.
- b. That on 30.09.2021, the lower court granted a stay of execution of the decree pending the appeal herein following an application by the appellant.
- c. That the Respondent was aggrieved by the said order as the application filed by the appellant was totally unmerited as it did not fulfil mandatory conditions necessary for grant of stay of execution pending cited reasons;
 - i. That the appellant did not demonstrate that he would suffer any substantial loss if stay was declined.
 - ii. That the security offered by the appellant and accepted by the lower court being a motor vehicle logbook is a worse form of security and amount to no security at all since there is no guarantee that by the time this appeal is determined, the vehicle will be of the same value or available at all and that the security offered in the circumstances was not satisfactory.
- d. That the respondent in this appeal has been placed at a disadvantaged position as it may not recover the decretal amount.
- e. That the said order unjustly prejudices the respondent and that the appellant has unjustly benefited at the expense off the respondent.
- f. That the respondent's right to equal protection and equal benefit of the law and fair hearing guaranteed under **Article 27(1) and 50 of the Constitution 2010** has been severely circumscribed and curtailed.

g. That unless the said order is set aside, the respondent is bound to suffer extreme prejudice as there is no security for due performance of the decree should the appeal fail.

h. That the Orders sought herein are just and it is in the interest of justice to grant them.

3. The applicant has based this application on a supporting affidavit sworn by one Godfrey Njenga on 5th November, 2021. The deponent avers that he is a Recoveries Officer at First Assurance Co. Ltd. and claims to be seized with all the facts of this application.

4. The deponent avers that the respondent/applicant obtained judgement in its favour to the tune of Kshs. 366,570 vide Mwingi Principal Magistrate Court Case No. 36 of 2018.

5. The deponent further avers that the suit in the lower court was a subrogation action by the First Assurance Co. Ltd seeking to recover loss incurred by the said company in indemnifying the respondent following an accident that occurred on 27th May, 2015 involving its insured motor vehicle Registration No. GKB 801F and the appellant's motor vehicle Registration No. KAV 752D.

6. That following the delivery of judgement, the appellant lodged the appeal herein and moved the trial court with an application for stay of execution pending the hearing and determination of the appeal.

7. That in that application the appellant offered a logbooks of motor vehicle Registration No. KBS 114M and KCP 497S as security.

8. That the lower court granted stay of execution on condition that the two logbooks in respect to motor vehicles Registration Nos KBS 114M and KCP 497S be deposited in court within 30 days of the ruling.

9. That the respondent/applicant is aggrieved by the said Order as the application was not merited according to them because there was no demonstration of likelihood to suffer substantial loss if stay was declined and the security offered also were inadequate.

10. That the respondent is apprehensive that the appellant may dispose-off the motor vehicles to frustrate execution process.

11. In Oral submissions made through Counsel, the applicant submitted that this court has jurisdiction and discretion to grant the prayers being sought in this application Mr. Ngugi, the learned Counsel for the applicant reiterated the grounds listed in the application faulting the lower court for not addressing the question of substantial loss.

12. He further submitted that a logbook is insufficient to act as security for due performance of the decree. He relied on the case of **Simba Coach Ltd versus Kiriiyu Merchants Auctioneers [2019] eKLR** where the court held that a logbook is not an ideal form of security because there is no guarantee that by the time the appeal will be heard and determined the motor vehicle will be worth the same or at all.

13. The Learned Counsel also submitted that the deponent of the affidavit in support of this application is not a stranger because the Insurance Company had paid in the lower court to indemnify the insured. He submitted that the doctrine of subrogation was in its favour. He however laid no evidence before this court to prove that fact.

14. The Appellant/Respondent has opposed this application through grounds of objection and his replying affidavit sworn on 18th December 2021.

15. The Appellant/Respondent contends that a grant of stay is a discretionary matter and that the trial court exercised its jurisdiction and discretion by granting it.

16. He contends that while this court in its appellate jurisdiction can exercise its original jurisdiction and grant stay, once the lower court has exercised its discretion, this court as an appellate court has no jurisdiction to interfere with it.

17. The appellant further faults this application on grounds that it is strange in law and a short cut to attempt an appeal against the decision made by the trial court.

18. He avers that the lower court upon his application for stay of execution ordered that he deposits log books of his motor vehicles Registration Nos. KBS 114 M and KCP 497S which conditions he claims he promptly met by depositing the said logbooks in court.

19. The Appellant/Respondent avers that the applicant was aggrieved by the conditions set and sought leave to appeal against the ruling but failed to do so. He contends that this application is an appeal in disguise which to him is strange in law.

20. He insists that he has already filed the record of appeal and the fear expressed that he might dispose the motor vehicle is mere speculative and unfounded since the logbooks are secured in court.

21. In his submissions made through learned Counsel Mr. Muigai, the appellant/respondent contended that the applicant is Teachers Service Commission and not Insurance Company He submitted that the issue of payment by the Insurance Company is contested and so to the issue of subrogation.

22. He submitted that in his estimation, the value of the motor vehicles offered as security is three times the value of the decree passed against him.

23. He insisted that he is ready to expedite the hearing of the appeal and its disposal adding that he is ready and willing to have the lorries comprehensively insured to have the applicant's fears addressed.

24. This court has considered this application and the response made. This is an application brought under the provisions of **Order 42 Rule 6(1) of the Civil Procedure Rules**.

The application has raised the following issues for determination namely: -

- i. Whether this court has jurisdiction to entertain and determine this application.
- ii. Whether the deponent of the affidavit in support of the application is a stranger.

25. (i) Whether this court is seized with jurisdiction to grant the Orders of stay of execution

The appellant/respondent has submitted that once the subordinate court has exercised its discretion and jurisdiction under **Order 42 Rule 6(1) of the Civil Procedure Rules** this court as an appellate court cannot interfere with the decision unless on appeal. That contention however appears misplaced if one looks at the provisions of **Order 42 Rule 6(1) of Civil Procedure Rules**. The Rule provides;

“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, appealed from except in so far as the court appealed from may Order but, the court appealed from may for sufficient cause Order of 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.” (Emphasis added)

26. The above provision shows that the applicant is quite in order to move this court in the manner it has done and this court certainly has jurisdiction to entertain and grant the Orders sought in this application. The prayers sought in this application are rarely sought but the above provisions clearly provide an avenue for a party aggrieved by Orders issued under **Order 42 Rule 6(1) of Civil Procedure Rule** to seek redress through a motion such as the one before this court.

27. (ii) Whether the deponent of affidavit in support of this application is a stranger.

The application before this court is supported by an affidavit sworn by one Godfrey Njenga who depones that he is a Recoveries Officer at First Assurance Co. Limited. He also says he is well acquainted with the facts of this matter and competent to swear the affidavit in support.

28. The provisions of **Order 19 Rule 3(1) of the Civil Procedure Rule** clearly state that an affidavit should be confirmed to such fact as the deponent is able to prove of his own knowledge. The law also allows a deponent to swear upon facts or information and belief but showing the sources of the same.

29. To begin with, the first requirement that is prove that the facts deponed to are matters of own knowledge and able to prove, the deponent falls short because he is not a party to the proceedings. Secondly, he has not stated that the information or facts have come to his knowledge from a credible source. It is not clear how Mr. Godfrey Njenga got the facts and information regarding the suit in **Mwingi Principal Magistrate Court Case No. 36 of 2018** or the appeal pending herein.

30. It is even more significant that the deponent has failed to prove that the Insurance Company covered the Respondents motor vehicle and owing to the cover, it indemnified the Respondent. That way the doctrine of subrogation could have kicked in and give the Insurance Company the capacity and authority to swear the affidavit in support.

31. A representative of an insurance company can swear an affidavit on behalf of the company in a suit in which the company has an interest in however the insurance company can only do so when it settles the claim against its insured.

32. In **Kenya Power & Lighting Company Limited v Julius Wambale & Another (2019) eKLR Githua J** held;

“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 of insurance.”

33. Furthermore, **Paragraph 490 of the Halsbury's Laws of England 4th Edition 2003 Reissue Volume 25** sets out the circumstances under which the doctrine of Subrogation applies. It states in part;

“Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportion-able 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 is 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.....”

“...In short, the insurer, on payment of the loss, is entitled to the advantage of every right of the assured, whether it consists in contract or in remedy for tort, or to anything he has received or is entitled to receive in diminution of the loss. The insurer is not entitled to sue a third party in the name of the assured unless the assured has assigned to the insurer his right of action.”

34. In the case of *Egypt Air Corporation vs. Suffish International Food Processors (U) Ltd and Another* [1999] 1 EA 69 the court held as follows: -

“The whole basis of subrogation doctrine is founded on a binding and operative contract of indemnity and it derives its life from the original contract of indemnity and gains its operative force from payment under that contract; the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity. If there is no contract of indemnity, then there is no juristic scope for the operation of the principle of subrogation.”

35. It was further held in *Indemnity Insurance Co. of North America and Another vs. Kenya Airfreight Handling Ltd and Another* [2004] 1 EA 52 that:

“Under insurance law principles, for an insurer to be subrogated to the rights of the insured, the latter must have been indemnified by the former; only then can the insurer step into the shoes of the insured.”

36. The deponent, Mr. Godfrey Njenga has not laid any evidence to prove that it compensated the respondent herein and that he has sworn this affidavit because of doctrine of subrogation.

37. The net effect of the above omission, is that the application before this court is rendered incompetent by dint of *Order 51 Rule 4* which provides as follows: -

“Every Notice of Motion shall state in general terms the grounds of the application and where the motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.”

38. The motion before me, is based on an incompetent affidavit because it is sworn by a person who has not proved that he is competent to swear it.

This application therefore fails for being incompetent and to that extent it is struck out. However, this court under its inherent powers under **Section 3A & 63 (e) of the Civil Procedure Act** hereby directs the appellant to comprehensively insure the lorries he has offered as security for the duration the appeals herein takes. The appellant offered to do this on his own motion during the hearing of this application and this court finds that the gesture will meet the ends of justice. He has 21 days from today to deposit evidence in this court of comprehensive insurance of the two motor vehicles.

The costs of this application shall be in the appeal herein.

DATED, SIGNED AND DELIVERED AT KITUI THIS 20TH DAY OF APRIL, 2022

HON. JUSTICE R. K. LIMO

JUDGE