



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E339 OF 2020

BENARD KAMAU WAINAINA.....1ST APPELLANT

FORWARD TRAVELLERS SACCO.....2ND APPELLANT

ERICK KIETL.....3RD APPELLANT

- VERSUS -

PATRICK MUSEMBI MASAKU.....RESPONDENT

RULING

The Applicant filed a Notice of Motion dated 14th January, 2021 under the provisions of Order 22 Rule 22, Order 42 Rules 4 and 6, Order 50 Rule 4, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 3, 3A and 100 of the Civil Procedure Act, and all enabling provisions of the Law. The prayers before this court for determination are;

1. Spent

2. Spent

3. THAT this Honourable Court be pleased to stay the execution of the Judgment/Decree obtained herein pending the full hearing and determination of the Appellants/Applicants Nairobi Civil Appeal No. E339 OF 2020.

4. THAT the application be heard inter parties on such date and time as this Honourable Court may direct.

5. THAT the costs of this Application abide the outcome of the Appeal.

The application is premised on the grounds on the face of the application and the supporting affidavit of **Pauline Waruhiu**, the Head of Legal and Claims Department at Directline Assurance Company Limited, sworn on 14th January, 2021. The Respondent opposed the application through his Replying Affidavit sworn on 3rd February, 2021. The parties agreed to have the application canvassed by way of written submissions. The Applicants and the Respondent filed their submissions dated 29th April, 2021 and 2nd April, 2021 respectively.

The present application is based on the grounds that on 30th October, 2020 judgment was entered against the Applicants in Milimani CMCC No. 4644 of 2019 by Honourable P. Muholi, Senior Resident Magistrate and being aggrieved by the said judgement, the applicant has filed a Memorandum of Appeal. That the appeal, if successful, will be rendered nugatory and that they will suffer irreparable loss and damage if execution is not stayed; that, the Respondent has not disclosed nor furnished this court with any documentary evidence to prove his financial standing as such, the applicants are apprehensive that they may not be able to recover the decretal sum if the same is paid out to the Respondent. Further, the Applicants are willing and able to furnish security in the form of a bank guarantee and that the Respondent shall not suffer any prejudice if the application is allowed as it is brought in good faith.

In her affidavit supporting the application, **Pauline Waruhiu**, has reiterated the grounds of the application and depones on behalf of the Applicants that their appeal has high chance of success. She further states that she is duly authorized and competent to swear the affidavit by dint of being the head of claims and legal at Directline Assurance Company Limited, the insurers of motor vehicle KCR 117A; the subject matter of the lower court case. The Applicants have relied on the case of **Joseph Kangethe Kabogo & Anor. V Michael Kinyua Ngari[2012]eKLR** where the court held that an application can be supported by the affidavit of any person who has explained legal nexus with the applicant.

On the conditions for grant of orders of stay, the Applicants referred to the case of **Elena Doudoladova Korir v Kenyatta University**

[2014]eKLR which cited with authority the case of *Halai & Another v Thorton & Turpin(1963) LTD [1990] KLR 365* where the Court of Appeal held that the High Court's discretion to order stay of execution is fettered by three conditions; sufficient cause, substantial loss and security and that the application must be made without unreasonable delay.

On substantial loss, the applicants submit that the judgement is of substantial amount and that they are apprehensive that if the Respondent is paid and the appeal succeeds then they may not be able to recover the decretal amount as they are not aware of the Respondent's financial standing. To buttress this position, the Applicants have relied on the case of *Kenya Orient Insurance Co. Ltd V Paul Mathenge Gichuki & Another[2014] eKLR* where it was held that the burden of proof on the ability to refund the decretal sum shifts to the Respondent once the Applicant states that is unaware of the Respondent's resources. The Applicants further submit that it filed this present application without unreasonable delay as the same was filed within forty five (45) days after the lapse of the thirty (30) days stay issued on 30th October, 2020. While reiterating their willingness to furnish security to secure the Respondent's Decree in exchange of stay of execution pending the hearing and determination of this appeal, the Applicant further states that they have a good and arguable appeal as evidenced by the annexed memorandum of appeal.

The Respondent opposed the application and avers that it is made in bad faith and is aimed at delaying payment thereby preventing him from enjoying the fruits of his judgment. On his part, the Respondent has relied on the case of *Antoine Ndiaye V Africa Virtual University [2015]eKLR* where Gikonyo J. reiterated the principles as provided for under Order 42 Rule 6 of the Civil Procedure Rules and the importance of relying on the said principles as elucidated in the case of *Machira T/A Machira & Co. Advocates vs East African Standard[2002]eKLR*. Further averments are that the application is fatally defective and incompetent as the supporting affidavit is sworn by a person who is not a party to the suit hence the application should be struck out. The Respondent has submitted extensively on this and has relied on the Court of Appeal decision in *Moiyo Matanya ole Keiwua –vs- Chief Justice of Kenya & 6 Others [2008] eKLR*, *Paul Ngila & Another vs Musili Malonza & Another (Suing as the administrators to the estate of the late Isika Musili)[2020]eKLR*, the decision by Mutungi J. in *P.M.M. Private Safaris v Kevin Ijatia[2006] eKLR*, where the court held that since the insurer was not a party to the proceedings, hence the affidavit sworn by counsel for the insurer was sworn by a stranger. While in *Kenya Power & Lightning Company Limited v Julius Wambale & Another [2019]eKLR* Githua J. referred to *Halsbury's Laws of England 4th Edition 2003 Reissue Volume 25 at Paragraph 490* where the learned author set out the circumstances under which the doctrine applies 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 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.”

The Respondent deposes that there has been unreasonable delay of over two months in making the present application, which delay has not been explained by the applicant since lodging of appeal is not an automatic stay of execution. It is contended that there has been no demonstration by the Applicants on the loss they would suffer if the stay orders are not granted. To buttress this position, the Respondent has referred to the case of *Macharia T/A Macharia & Co. Advocates vs East Africa Standard [2002]KLR 63* where the court held that details and particulars of substantial loss must be proved and that this burden does not shift to the respondent. The respondent relies on the case of *James Wangalwa & Another vs Agnes Naliak Cheseto[2012]eKLR* where it was held that substantial loss entails establishment of other factors which show that execution will create a state of affairs that will irreparably affect the applicant's position in case the appeal is successful. Similarly in the case of *New Wide Garments EPZ (K) Ltd v Ruth Kanini Kioko[2019]eKLR*, *Odunga J.* held that substantial loss is a factual issue which must be raised in the supporting affidavit and supported by evidential materials.

Additionally, and in the alternate, the Respondent while relying on the case of *Edward Kamau & Another vs Hannah Mukui Gichuki [2015]Eklr*, submits that the court should ensure it strikes a balance between the right of both parties. The Respondent argues that should stay be granted then the court do order the Applicants to pay him 2/3 of the decretal sum and have the balance deposited in a fixed deposit joint interest earning account of both advocates.

Analysis/ Determination:

The issues for determination by this court are:

- i. Whether the supporting affidavit is defective and incompetent for want of capacity by the deponent;
- ii. Whether the applicants have satisfied the conditions precedent to grant of an order of extension of time to file an appeal and order of stay of execution pending appeal.

On the first issue, the respondent has argued that *Pauline Waruhiu* is a stranger to the proceedings and did not have capacity to swear the affidavit as the insurance company was not a party to the primary suit. In the supporting affidavit is sworn by *Pauline Waruhiu*, she describes herself as:

“...the Head of Legal and Claims Officer at Directline Assurance Company Limited who are the insurers of the motor vehicle registration number KCR 117A and at whose instance this claim from is claimed from and which is being appealed from and i am conversant with the issues relating to this suit and i am duly authorized and competent to make this affidavit by dint of M/s Directline Assurance and at Common law and its right to defend, settle and/or prosecute any claims in the insured's name”

It is not disputed that the deponent was indeed a legal officer working with the insurance company that had insured the motor vehicle that was involved in the fatal accident which was the subject matter of the primary suit. Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405 provides that an insurance company which has issued a motor vehicle policy against 3rd party risks is under a mandatory

legal duty to satisfy any judgment entered in favour of a 3rd party against the owner of the motor vehicle in question who is its insured while *Section 10 (2)* of the same Act provides that the insurer will only be liable to satisfy the judgment entered against its insured if it was notified of the proceedings in which the judgment was delivered before or within 14 days of the commencement of the proceedings.

This court is of the view that the above sections of the law bestows upon the insurer an interest in the proceedings, judgment, appeal and any other application thereof because it is required by law to satisfy the judgment obtained. Therefore, as an officer of the insurer, it goes without saying that Pauline Waruhui had knowledge and is conversant with the proceedings in the trial court. In view of the foregoing, this court finds that the supporting affidavit is properly before the court, the respondent's claim that the supporting affidavit is incompetent for want of capacity by the deponent is not well founded and cannot be sustained.

The present application invokes the discretionary powers of the court which must be exercised judiciously. It is brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 that empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided for under Rule 6(2) of Order 42 and states as follows:

“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.”

The Court of Appeal in **Butt v 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.”

In the Court of Appeal case of **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (UR)** as cited by the High Court in **Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa [2016] eKLR** it was held;

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a Respondent or lack of them. Once an applicant expresses 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.”

In the case at hand, the Respondent has not disclosed any source of income that he would use to refund the Applicants the decretal amount should the appeal succeed, I am satisfied that the Applicants have established that they will suffer substantial loss if execution is not stayed. It also follows that if the Respondent executes the judgement and the Applicants' appeal succeeds, then not only will the Applicants suffer substantial loss but the appeal will also be rendered nugatory.

The Applicants have indicated their readiness to furnish security for the due performance of the decree by offering a bank guarantee to act as security for the entire decretal amount. The Respondent proposes payment of two thirds of the decretal sum and the balance be deposited in a fixed joint interest account of the parties' advocates.

The upshot is that the application dated 14th January, 2021 is merited and the same is hereby granted on condition that the Applicant do issue a bank guarantee in favour of the Respondent for Kshs. 203,550 being the total decretal amount within 60 days from the date of this ruling, failure to which the stay of execution orders shall stand vacated and the respondent shall be at liberty to execute. The costs of the application shall abide the outcome of the appeal and shall follow the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JUNE, 2021

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S. CHITEMBWE

JUDGE