



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL DIVISION**

**CIVIL APPEAL NO. E386 OF 2020**

**CHEZLUT FREIGHT LIMITED.....APPLICANT**

**-VERSUS-**

**CHRISTINE WAVINYA NTHUKU &**

**MUTHOKA MISI (Suing as the**

**Administrators of the estate of**

**PATRICK MUTIE MISI).....RESPONDENTS**

**RULING**

1. For determination is the motion dated 14<sup>th</sup> January, 2021 seeking *an order* to stay execution of the judgment and decree in **Milimani CMCC No. 11427 of 2018** pending the hearing and determination of the appeal herein. The motion is expressed to be brought *inter alia* Order 42 Rule 6 of the Civil Procedure Rules (CPR). On grounds that **Chezlut Freight Limited** (hereafter the Applicant) being dissatisfied by the decision in **Milimani CMCC No. 11427 of 2018**, delivered on 4<sup>th</sup> December, 2020 in favour of **Christine Wavinya Nthuku and Muthoka Misi** (hereafter the Respondents) and has preferred an appeal against the decision and that it is apprehensive that if stay is not granted the appeal will be rendered nugatory.

2. The motion is supported by an affidavit sworn by **Jackson Karani**, who describes himself as a Legal Officer at Pioneer General Insurance Company Limited, the asserted the insurers of the Applicant during the material time. He deposes that being personally conversant with the matter he is competent to swear the affidavit, and the insurer has full mandate to deal with this matter on behalf of its insured.

3. The deponent amplifies the grounds on the face of the motion and asserts the appeal herein has a very high chance of success as it raises serious points of law and that if stay of execution is not granted, it will render the appeal nugatory. He further deposes the Respondent's means are unknown and if the decretal sum is paid out to them, the Applicant will not likely recoup the same upon the appeal being successful. Thus, exposing the Applicant to substantial loss. Finally, the deponent expresses the Applicant's readiness to furnish security as the court may direct.

4. The motion was opposed by way of a replying affidavit dated 12<sup>th</sup> February, 2021, jointly sworn by the Respondents herein. The Respondents take issue with the motion on grounds that the motion is an afterthought and is procured in bad faith with the sole intent of denying them the fruits of their judgment; that the supporting affidavit is fatally defective as it was sworn by a stranger to the suit; that the Applicant has not demonstrated the loss it will suffer should stay orders not be granted; and that the Applicant has approached this court with unclean hands.

5. On 9<sup>th</sup> March, 2021 parties hereto took directions to canvass the motion by way of written submission. The parties have duly complied. Counsel for the Applicant submitted that the Applicant moved expeditiously to file the instant motion and has satisfied the requisite conditions for the court to exercise its discretion in its favour. Counsel also submitted that the substantive Applicant in the in the matter is Pioneer General Insurance Company Limited and is rightfully participating in the proceedings by dint of its rights under the doctrine of subrogation.

6. Relying on **Butt v Rent Restriction Tribunal (1979)**, **James Wangalwa & Anor v Agnes Naliaka Cheseto [2012] eKLR** and **Century Oil Trading Company Ltd v Kenya Shell Limited [2008] eKLR**, counsel further asserted that the Respondents have not demonstrated their ability to refund the decretal sum in the event of a successful appeal and thus the Applicant stands to suffer irreparable loss if stay of execution is not granted. Finally, counsel submitted that Pioneer General Insurance Company is a reputable insurance company that has the capacity and ability to settle the decree, and has expressed willingness to furnish reasonable security as the honorable court may impose.

7. Counsel for the Respondent raised an objection to the supporting affidavit as a preliminary issue. Citing High Court decisions in **P.M.M Private Safaris v Kevin Ijatia [2006] eKLR, Kitui Civil Misc. Application No. 98 'B' of 2019 Paul Ngila & Anor v Musili Malonza & Anor, Kenya Power & Lighting Company Limited v Julius Wambale & Another [2019] eKLR** and the Court of Appeal decision in **Moiwo Matanya Ole Keiwa v Chief Justice of Kenya & 6 Others [2008] eKLR** counsel for the Respondent submitted that the insurers right under the principle of subrogation had not yet accrued, and thus the supporting affidavit was sworn by a stranger to the proceedings. In the result, the motion was incurably defective and incompetent and ought to be dismissed.

8. The Respondent's proceeded to submit on the merits of the motion and argued that the Applicant has not demonstrated likelihood of suffering substantial loss if stay of execution is not granted and relied on the decisions in **Machira t/a Machira & Co. Advocates v East Africa Standard (No. 2) (2002) KLR 63, New Wide Garments EPZ (K) Ltd v Ruth Kanini Kioko [2019] eKLR** and **James Wangalwa & Another (Supra)**. Finally, while relying on **Edward Kamau & Another v Hannah Mukui Gichuku & Another [2015] eKLR** counsel urged the court to balance the rights of the parties to the appeal by requiring the Applicant to provide security.

9. The court has considered the material canvassed in respect of the motion. As a preliminary issue, the Court must determine whether the motion before it is fatally defective as argued by the Respondents. By their joint replying affidavit, the Respondents raised an objection to the fact that the motion was supported by an affidavit sworn by a stranger to the proceedings. The matter was further raised in their written submissions.

10. On its part, the Applicant addressed the objection in its submissions by stating that the affidavit in support of the motion is duly sworn by a legal officer of Pioneer General Insurance Company Limited, and the company is justly participating in the instant proceedings under its rights of subrogation.

11. The Court has reviewed the Respondent's submissions and the Applicant's affidavit in support of the motion. No authority to plead on behalf of the Applicant has been filed by the deponent to the supporting affidavit. However, at paragraph 1 and 2 of the affidavit in support, it is deposed that the deponent is:

**"1. ...a Legal Officer at Pioneer General Insurance Company Limited which were the insurers of the Appellant/Applicant herein at the material time and we have full mandate to deal with this matter on behalf of the insured.**

**2. ....conversant with the facts of this matter and therefore competent to swear the affidavit".** (Emphasis added).

12. The insurance company asserted in submissions to be acting within its rights under the doctrine of subrogation in their capacity as the Applicant's insurers. Have the Applicant's rights under the doctrine crystallized in this instance? The answer is in the negative, as undeniably, the insurance company has not settled the Respondents' claim against its insured, the Applicant herein, and in whose behalf the insurance company purports to approach the Court.

13. In **Africa Merchant Assurance Company v Kenya Power & Lighting Company Limited (2018) eKLR** the Court of Appeal had this to say:

**"26. The essence of the doctrine of subrogation is not in contention. It allows an insurer after compensating an insured for any loss under the insurance contract to step into the shoes of the insured. In that, the insurer is entitled to all the rights and remedies the insured might have against a third party in respect of the loss compensated...."**

**28. As it stands, the law in that respect is settled, that is, that an insurer cannot under the doctrine of subrogation institute a suit in its own name against a third party. See this Court's decisions in **Octagon Private investigation Security Services vs. Lion of Kenya Insurance Co. [1994] eKLR** and **Michael Hubert Kloss & another vs. David Seroney & 5 others [2009] eKLR.**"**

14. In the case of **Egypt Air Corporation vs. Suffish International Food Processors (U) Ltd and Another [1999] 1 EA 69** the Court defined the basis of the doctrine of subrogation 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."** (Emphasis added)

15. The Court stated in **Opiss vs. Lion of Kenya Insurance Company Civil Appeal No. 185 of 1991:**

**"The right to subrogate does not create a privity of contract between the insurance company and the third party; it only gives the insurance company the right to take over the rights and privileges of the insured and therefore must be brought in the name of the insured."** (Emphasis added)

16. As earlier noted, in this case the insurance company is yet to make good the Respondent's claim but has seemingly assumed to step into the shoes of their insured. The invocation of the doctrine of subrogation by the insurance company is therefore premature, their rights thereunder not having crystallized.

17. This Court agrees therefore with the sentiments expressed by Githua J while dealing with a similar situation in **Kenya Power & Lighting**

Company Limited v Julius Wambale & Another (2019) eKLR, to the effect 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 of insurance....**

**It is not disputed that the insurance company has not yet settled the decretal amount on behalf of the applicant who is its insured. It therefore follows that its right under the doctrine of subrogation has not yet crystallized and even if it had, its recourse would only lie in the filing of a suit against the third party blamed for the occurrence of the risk in question for recovery of the sums expended on its insured ....”**

18. Evidently, the motion before the Court is founded upon a premature invocation of the principle of subrogation by the Pioneer General Insurance Company Limited. Hence the deponent to the affidavit supporting the motion is a stranger to these proceedings. The impugned affidavit sworn in support of the motion is hereby struck out with the consequence that the unsupported motion is defective and must fail. The motion is equally struck out with costs to the Respondents.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2021**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**Mr Ochieng for the Applicant**

**Respondents: N/A**

**C/A: Carol**