



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 240 OF 2019**

**TRIDENT INSURANCE CO. LIMITED.....APPELLANT/APPLICANT**

**-VERSUS-**

**MIRRIAM WAYUA DAUDI & FESTUS MWANZIA MUTUNE**

**(Both suing as legal representatives of the estate of DAUDI MUTUNE-Deceased).....RESPONDENTS**

**R U L I N G**

1. The appellant/applicant has lodged the Notice of Motion dated 18<sup>th</sup> June, 2019 supported by the grounds set out on its body and the facts deponed to in the affidavit sworn by *Susan Radido*, its Assistant Legal Officer. The following are the orders being sought in the Motion:

**(i) Spent.**

**(ii) Spent.**

**(iii) THAT this Honourable Court be pleased to grant an order for a stay of execution of the decree issued on 28<sup>th</sup> March, 2019 in CMCC NO. 9447 OF 2018 pending the hearing and determination of the appeal.**

**(iv) THAT this Honourable Court be pleased to vary and/or review the condition for a stay of execution granted by the trial court by instead ordering the applicant to furnish a reasonable security of Kshs.1,000,000/= either by way of a bank guarantee or by depositing the said amount in an interest earning account to be opened in the joint names of the advocates for the parties, pending the hearing and determination of the appeal.**

**(v) THAT the costs of the application be provided for.**

2. In her affidavit, the deponent stated that the trial court summarily struck out the applicant's statement of defence, thereby entering judgment in favour of the respondents as prayed in the plaint filed in CMCC NO. 9447 OF 2018.

3. The deponent asserted that the applicant soon thereafter sought from the trial court an order for a stay of execution of the decree pending the hearing and determination of the appeal now before this court. That the order for a stay was granted on the condition that the applicant deposits the entire decretal amount of Kshs.4,113,948/= within 21 days of the date of the ruling delivered on 30<sup>th</sup> May, 2019.

4. It is the deponent's further assertion that the applicant is now seeking to have the above condition varied and/or set aside for the reason that complying with the same will have irreversible financial and operational implications on itself as a general insurer and in any case, there is no guarantee that the decretal sum will be refunded by the respondents once the same is paid and the appeal ultimately succeeds.

5. In opposing the Motion, the replying affidavit of *Paul Maingi Musyimi* was filed on behalf of the respondents averring essentially that the Motion is both an abuse of the court process and *res judicata* since a similar application was previously filed, heard and conclusively determined by the trial court.

6. Further to the above, the deponent deemed the application incompetent for having been brought under wrong legal provisions, particularly in respect to the order for review, which ought to have been sought under Order 45, Rule 1 of the Civil Procedure Rules.

7. It is equally the deponent's assertion that the applicant has offered no reasonable explanation to indicate that it will likely be prejudiced in complying with the order requiring it to deposit the entire decretal sum.

8. Paul Maingi Musyimi went further to propose that should this court be inclined to vary the order made by the trial court, then the applicant

be directed to deposit Kshs.3,000,000/= in a joint interest earning account and the balance of Kshs.1,113,948/= be recovered from the applicant's insured, Mbaluka Masai.

9. At the hearing of the Motion, *Mr. Omugo* advocate for the applicant argued *inter alia*, that the decretal amount exceeds the maximum sum claimable under Section 5 (b) (iv) of the Insurance (Motor Vehicles Third Party Risks) Act, Cap. 405; carefully adding that the application has been brought without unreasonable delay.

10. The advocate also took the position that there is no requirement for the provision of security to be commensurate to the decretal amount.

11. In his response, *Mr. Musyimi* counsel for the respondents reiterated that the current application is a mere abuse of the court process by virtue of the fact that a similar application was heard and determined by the trial court. The case of *Hunker Trading Co. Ltd v Elf Oil Kenya Ltd [2010] eKLR* was cited in support thereof.

12. On the subject of provision of security, *Mr. Musyimi* urged this court to take into account the sufficiency of the security being offered, further arguing that the applicant's proposal to provide a bank guarantee for the sum of Kshs.1,000,000/= does not suffice. That the applicant, standing in the place of the relevant insurance company in this instance, is obligated to compensate the respondents who legally represent the victim of the accident caused by its insured, quoting the case of *Halai & Another v Thornton & Turpin [1990] eKLR*. Ultimately, the counsel speaking on behalf of his clients proposed that Kshs.3,000,000/= be deposited as security.

13. In his rejoinder submissions, *Mr. Omuga* in choosing to rely on the applicant's list of authorities filed, alluded to the fact that the same distinguish those cited by the respondents.

14. I have carefully studied and considered the grounds laid out in the Motion as well as the facts deponed to in the affidavits in support of and in opposition to the same. Likewise, I have taken into account the rival oral arguments brought forth by the parties' respective counsels and the authorities cited in that regard. There are two (2) fundamental issues set before me for determination: the first concerns the competency of the application and the second is whether or not to grant the order for a stay of execution sought.

15. In addressing the first issue, I turn to **Order 42 Rule 6** of the **Civil Procedure Rules** which is the applicable provision in respect to a stay of execution. **Sub-rule (1)** in particular expresses that:

***“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, 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.”***

16. A reading of the above provision enables a party to file an application for a stay of execution before the court that heard the suit, and irrespective of whether or not such application is granted or denied, a similar application can be filed before the appellate court.

17. In the present instance, it is not in dispute that an application similar to that currently before this court was filed before the trial court and which application was granted conditionally. The respondent brought forth the argument that the present application is now *res judicata* and an abuse of the court process.

18. The respondents quoted the case of *Musyoki Chris & another v Muthama Katolo & another [2016] eKLR* where the High Court considered an application brought under circumstances by and large similar to those currently before this court. In that case, the court deemed the second application for a stay of execution incompetent on the premise that the trial court had already entertained a similar application and granted the same, conditionally. In the end, the High Court reasoned that the applicant could only lodge an appeal against the trial court's decision as opposed to raising the same issues afresh.

19. The applicant as well relied upon two (2) Court of Appeal decisions which I have studied: In *Hunker Trading Company Limited v Elf Oil Kenya Limited [2010] eKLR* an application for a stay of execution was granted conditionally by the High Court. Thereafter, the relevant applicant filed another application seeking a similar order. The Court of Appeal in that case noted the said applicant's failure to comply with the conditions previously set by the High Court and the fact that the said ruling/order had not been appealed against. The Court also noted that a notice of appeal had not been filed as required under Rule 5(2) (b) of the Court of Appeal Rules. Having done so, concluded that it would be improper for it to exercise its original jurisdiction in entertaining a fresh application for a stay of execution, citing the oxygen principles which to its mind had been violated by the applicant.

20. The second decision by the Court of Appeal was *Halai & another v Thornton & Turpin (1963) Ltd [1990] eKLR* wherein it went ahead to entertain a fresh application for a stay of execution brought before it following the applicant's dissatisfaction with the conditions provided by the trial court.

21. Drawing from the above, I am of the understanding that the Court of Appeal in the *Hunker* case (*supra*) essentially declined to grant an order for a stay on the basis of non-compliance of the applicant in respect to the conditions previously set by the High Court. Nonetheless, the same court in *Halai & another (supra)* heard and determined a fresh application of the same nature. There is really nothing to indicate that the Court of Appeal arrived at the finding that a party is precluded from bringing a fresh application for a stay of execution irrespective of the fact that such application was previously heard and determined.

22. It is thus my reasoned opinion that the High Court in *Musyoki Chris & another (supra)* may have misconstrued the analysis offered in the *Hunker* case, thereby arriving at a finding that offers no persuasion to me, unfortunately.

23. Turning to the judicial authorities constituting the applicant’s list of authorities, I noted that a majority of them were decisions made by the High Court which are of an equally persuasive nature. Suffice it to say that the Court of Appeal in both **Girbux Singh Suri & another v. Royal Credit Limited [1995] eKLR** and **Equity Bank Limited v West Link Mbo Limited [2013] eKLR** (both cited by the applicant) acknowledged what is referred to as its ‘independent original jurisdiction’ to entertain and determine applications for a stay of execution even after the High Court has already exercised its jurisdiction over the same.

24. From the foregoing, I am convinced that similar to the Court of Appeal, this court pursuant to **Order 42 Rule 6(1) (supra)** equally has the power to entertain the present application afresh. Consequently, I find the *res judicata* principle to be inapplicable in the circumstances.

25. Ultimately, I am persuaded that the application now before this court is competent as relates to the order for a stay of execution sought. I will therefore move to address its merits.

26. The germane principles/conditions to be considered in determining whether to grant the order for a stay of execution are framed under **Order 42, Rule 6 (2)** of the **Civil Procedure Rules** in the following manner:

**a) The application must be brought without unreasonable delay;**

**b) The applicant must demonstrate that substantial loss may result; and**

**c) Provision should be made for security.**

27. On the first condition, I am guided by the record in stating that the impugned decision was delivered by the trial court on 28<sup>th</sup> March, 2019 whereas the present application was filed on 18<sup>th</sup> June, 2019. The record also shows that in between, a similar application was placed before the trial court and granted on 30<sup>th</sup> May, 2019. In the premises, I am satisfied that there has been no unreasonable delay in bringing the Motion.

28. In respect to the second condition, the applicant took the position that once the decretal sum is paid to the respondents, there is a likelihood that the same will not be recovered should the appeal succeed. On their part, the respondents; it would appear; did not address this particular condition. Needless to say that I am aware that as it stands, there is no way of telling whether or not the respondents are in a position to refund the decretal amount. On the subject, the Court of Appeal in **National Industrial Credit Bank Ltd v. Aquinas Francis Wasike & another [2006] eKLR** fittingly reasoned that:

**“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 the lack of them. Once an applicant expresses a reasonable fear that 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...”**

29. In my opinion and being bound by the above rendition, the respondents did not discharge the evidential burden of showing their ability to refund the decretal sum as they ought to have done, which leads me to conclude that the applicant has reasonably demonstrated substantial loss.

30. This brings me to the final condition on the provision of security. I have taken into account the respective propositions made by the parties as set out hereinabove. I have also considered that the quantum of damages constitutes one of the grounds of appeal. That being the case, I find it fitting to exercise my discretion in ordering the provision of a reasonable security.

31. The upshot, therefore, is that I find merit in the Motion. The same is allowed in terms of prayer (iii) on the condition that the applicant deposits the sum of Kshs.3,000,000/= as security in an interest earning account in the joint names of the parties’ advocates/firm of advocates within 30 days from today, failure to which the order for stay shall automatically lapse. Costs of the application shall abide the outcome of the appeal.

**Dated, Signed and Delivered at Nairobi this 30<sup>th</sup> day of July, 2019.**

.....

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Appellant/Applicant

..... for the Respondents