



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO.30 OF 2015**

**Consolidated with Civil Appeal Nos.31 of 2015 & 29 of 2015**

***(Appeal from the judgment of Hon. Mugendi Nyaga (RM) dated and***

***delivered on 5<sup>th</sup> February 2015, in the original Kisii CMCC No.400 of 2013)***

CO-OPERATIVE INSURANCE CO. LTD - - - - APPELLANT/APPLICANT

VERSUS

RICHARD MACHUKI ORANGI - - - - RESPONDENT

**RULING**

**Introduction**

1. Before me are 3 similar applications all dated 9<sup>th</sup> March 2015 brought by way of Notice of Motion pursuant to **Order 51 Rules 1, 3 and 13, Order 42 Rule 6** of the **Civil Procedure Act (2010)**.

In all the applications, the applicant/appellant seeks the stay of execution of the ruling/decision dated 5<sup>th</sup> February 2015 made in **Kisii CMCC Nos.399 of 2013, 400 of 2013 and 401 of 2013** pending appeal.

**Background of the applications:**

2. In **Kisii CMCC No.399 of 2013**, Daniel Bwana Marube sued the applicant/appellant herein, Co-operative Insurance Group Ltd (*Insurance Company*) by way of a declaratory suit following a judgment he had obtained against Peter Kebabe Tungai and Njuguna Angela Wanjiru (*insureds*) in Kisii **CMCC No.41 of 2012** in which he sought damages for injuries sustained in a road accident.
3. In **Kisii CMCC No.399 of 2013**, judgment was entered against the insurance Company after its defence was struck out and it is this striking out of the defence and entry of judgment that has given rise to **Kisii High Court Civil Appeal No.31 of 2015** in which the applicant/appellant has filed the instant application for stay of execution pending appeal.
4. In **Kisii CMCC No.400 of 2013**, Richard Machuka Orangi filed a declaratory suit against the Insurance Company after obtaining judgment against the insureds in **Kisii CMCC No.39 of 2012**. Judgment in the declaratory suit, was entered in favour of Richard Machuka Orangi after the Insurance Company's defence was struck out and it is this striking out of defence and entry of judgment that has precipitated the filing of **Kisii High Court Civil Appeal No.30 of 2015** in which the instant application for stay of execution has been filed.

5. Lastly, and similarly, in Kisii CMCC No.401 of 2013 Seme Mokuia Orege filed a declaratory suit against the Insurance Company in respect to damages arising out of a road accident involving a vehicle insured by the Insurance Company after successfully obtaining judgment against the insured in Kisii CMCC No.37 of 2012. In the declaratory suit, the insureds' defence was struck out and judgment was entered in favour of the said Seme Mokuia Orege. It is therefore the striking out of the insureds' defence and entry of judgment against the insured that has resulted in the filing of Kisii HCCA No.29 of 2015 in which the instant application for stay of execution has also been filed.
6. From the above narrative, it is quite clear that Kisii High Court Civil Appeal Nos.29, 30 and 31 of 2015 all arise from the same road traffic accident and as such I observe it would be desirable to formally consolidate the 3 appeals for ease of their determination upon either of the parties making an application to that effect.
7. All the decrees in the above appeals are money decrees, being awards made for damages arising out of injuries suffered in a road traffic accident.
8. In the instant application dated 9<sup>th</sup> March 2015 the Insurance Company has sought orders as follows:-
  - a) Spent.
  - b) Spent.
  - c) **There be a stay of execution of the ruling/decision dated 5<sup>th</sup> February 2015 herein and all consequential orders emanating therefrom pending the hearing and determination of the appeal herein.**
  - d) **Costs of the application be provided for."**
9. In the affidavit in support of the instant application the applicant Insurance Company has, through its Assistant Claims Manager, deponed inter alia, that the insured had breached the terms of the insurance policy thereby entitling the insurance company to repudiate liability to pay and or indemnify the Respondent.
10. The Assistant Claims Manager further deponed that the Insurance Company had filed a civil/Suit against the insured being Kisii HCCC No.159 of 2012 seeking declaratory orders to repudiate liability which suit was still pending determination.

**Appellant's Submissions:**

11. In its submissions filed on 8<sup>th</sup> October 2015, the appellant has for reasons this court cannot fathom referred to itself as "*the 2<sup>nd</sup> Defendant*" and in some instances, referred to the motor vehicle, the subject matter of the appeal as **KAT 379E** instead of **KBJ 799Y**. Be that as it may and taking into account the fact that the heading and the substance of the appellant's submissions refer to an earlier case in which the Insurance Company was the defendant and the accident motor vehicle was KBJ 799Y, I will ignore the erroneous information contained in the submissions and concentrate on the substance of the subject matter of the appeal and application in the interest of dispensing substantive justice to the parties.
12. The applicant submitted that even though it had insured the accident motor vehicle, the insured breached the terms and conditions of the insurance policy by using the said vehicle to ferry passengers (PSV) instead of the intended purposes which was solely for social, domestic and pleasure, and as such, the Insurance Company was entitled to repudiate liability. The applicant added that it had already filed a suit in the High Court within the stipulated time, being Kisii

HCCC No.159 of 2012 in which it sought to avoid or repudiate the policy in which suit, the claimant had been joined as an interested party and the said suit was still pending determination and therefore, the lower court ought to have taken note of the above salient facts before striking out its defence and entering judgment for the claimant.

13. It was the applicant's submission that its appeal had merit and thus the need to stay the execution pending its outcome.
14. The applicant relied on the case of Kenya Orient Insurance Co. Ltd –vs- Paul Mathenge Gichuki & Another in which under similar circumstances as this instant application, the court ordered for stay of execution of the judgments pending appeal.

**Respondent's Submissions:**

15. The Respondent submitted that he was a lawful passenger in the insureds' motor vehicle and having obtained judgment in the primary suit between him and the insured, he was entitled to the fruits of his judgment.
16. The Respondent argued that the applicant should be ordered to deposit the decretal sum in an account to be opened by the advocates' law firms as security for granting a stay of execution in line with the provisions of **Order 42 Rule 6 (2) (b) of the Civil Procedure Rules**.
17. The Respondent further submitted that the declaratory suit No. Kisii HCCC No.159 of 2012 filed by the applicant against the insured seeking to avoid/repudiate liability on account of breach of the Insurance Policy terms, would not entitle the applicant to benefit from that declaration as against the respondent even if it had obtained it.
18. The Respondent relied on the case of Blue shield Insurance Co. Ltd –vs- Raymond Bwuri M. Rimeria Nbi Civil Appeal No.107 of 1997, in which it was held, inter alia:

**“Thus once statutory liability under Section 5(b) is covered by the terms of the policy, which in the instant case was, and is not denied by the appellant, the insurer is obliged under Section 10(1) of the Act to satisfy the judgment obtained against the insured and pay to the person entitled to the benefit of that judgment all sums payable there under with costs and interest, notwithstanding that the insurer may be entitled to avoid or cancel the policy *vis a vis* the insured or may have even avoided or cancelled it.”**

**Analysis and Determination:**

19. All the 3 applications are based on **Order 42 Rule 6(1) and (2)** which provides as follows:

***“6(1) No appeal or second appeal shall operate as a stay of a decree or order 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.***

- (2) ***No order for stay of execution shall be made under sub-rule (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 as been given by the applicant.”***

20.From the above rule, an applicant for stay pending appeal needs to establish that:

- a. **The applicant has filed an appeal against the decree**
- b. **Substantial loss may result to the applicant if stay is not granted.**
- c. **The application for stay has been filed without unreasonable delay.**
- d. **The applicant must be ready to provide security as may ultimately be binding upon him.**

**Substantial Loss:**

21.The applicant stated at paragraph 12 of the affidavit in support of its application as follows:

**“That I am apprehensive that the respondent is a person of no means and ability to reimburse any monies that might be secured by him in execution of the judgment herein in the likely event that court’s ruling/decision is upset on appeal filed.”**

22.The Respondent did not counter the applicants’ apprehension on his financial means in his affidavit in response to the application. In effect, the respondent did not prove that he was capable of refunding the decretal amount should the applicant succeed in its appeal. The burden was on the respondent to prove that the appeal would not be rendered nugatory if the stay sought is not granted (see **ABN AMRO Bank N.V. –vs- LE MONDE FOODS LTD. NBI Civil Application No.15 of 2002**).

**Reasonable time:**

23.The applicant’s instant application was filed on 9<sup>th</sup> March 2015 and the decision appealed against delivered on 5<sup>th</sup> February 2015. I am satisfied that the said application was filed timeously without unreasonable delay.

24.The applicant has however not offered to abide by any orders on security that the court may make or offered to furnish security for the performance of the court’s decree in favour of the respondent. This is a pre-requisite to the grant orders of stay of execution in line with the provisions of **Order 42 Rule 6(2)** of the **Civil Procedure Rules**.

25.I have perused the appellants/applicants Memorandum of Appeal and I note that the same has merit.

26.I have taken into account the parties pleadings submissions and the authorities cited. I find that the application dated 9<sup>th</sup> March 2015 has merit and I allow it in the following terms:

- a. **An order is hereby issued staying execution of judgments/decisions dated 5<sup>th</sup> February 2015 in Kisii CMCC No.399 of 2013, 400 of 2013 and 401 of 2013 pending the hearing and determination of the respective appeals.**
- b. **The applicant shall deposit the full decretal sum awarded in Kisii CMCC No.399 of 2013, 400 of 2013 and 401 of 2013 in a joint interest earning account held by the applicants and respondent’s advocates as a condition for the stay within 45 days from the date of this ruling failure of which the stay granted shall stand vacated and execution of the decree to issue.**
- c. **The costs of the 3 applications shall abide the outcome of the appeals.**

27.It is so ordered.

**Dated, signed and delivered in open court this 11<sup>th</sup> day of November, 2015**

**HON. W. OKWANY**

## **JUDGE**

### **In the presence of:**

- M/S Nyambati for M/S Mose for the Applicants
- M/S Bosire for Sonye Ondari for the Respondents
- Mr. Ogega: court clerk