



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 52 OF 2013**

*(Being an appeal from the Ruling delivered by Honourable Mr. Aminga – Resident Magistrate on 3<sup>rd</sup> April, 2013)*

**1. JUMA ALI MBWANA**

**2. GEOFFREY KITHUKU LINDU ..... APPELLANTS**

**V E R S U S**

**UMI OMAR MUSA ..... RESPONDENT**

**RULING**

1. The application before court is the Notice of Motion dated 6th May 2013 for stay of execution of the judgment delivered Hon. Aminga, SRM on 3rd April 2013.
2. The Application is supported by the grounds on its face and by the Affidavit of MARY KINYANJUI sworn on 6th May 2013. In the said Affidavit, MARY KINYANJUI describes herself as ***“a Legal-Manager-Claims at Directline Assurance Company Limited who are the insurers of motor vehicle registration number KAT 871J whose instance this claim is being defended.”***
3. The Applicants submitted that the appeal is arguable and will be rendered nugatory if stay is not granted. The Applicants also submitted that the Application has been made without unreasonable delay and that the Applicants will suffer irreparable loss if stay is not granted. Finally, the Applicants submitted that they are willing to furnish such reasonable security as the court may deem fit.
4. The Respondent opposed the Application through his Replying Affidavit sworn on 13th May 2013. The Respondent opposed the Application on two main grounds. First is that, MARY KINYANJUI, the deponent of the Affidavit in support of the application is a stranger to the proceedings herein and the probative value of her affidavit is zero.
5. Secondly the Respondent argued that the Applicants have not satisfied the grounds necessary for the grant of stay of execution under **Order 42 Rule 6 of the Civil Procedure Rules** since they have not alleged that they will suffer any substantial and irreparable loss and damage as such allegations were only made by the deponent of the Supporting Affidavit who is a stranger to these proceedings.

6. The Respondent further submitted that stay should not be granted because the subject matter of the application is a money decree which, going by the case of **Kenya Shell Limited v Benjamin Kibiku & Another (Civil Application No. Nai 97 of 1986)**, can only be stayed under special circumstances. That the Applicants have not demonstrated any special circumstances to warrant the grant of stay.
7. In response to the submissions by the Respondent that MARY KINYANJUI is a stranger to the proceedings herein, the Applicants submitted that Directline Assurance Company Limited, through its legal manager could properly swear the affidavit in support of the application. The Applicants relied on the case of **Kavindu & Another v Mbaya & Another [1976-80] 1 KLR 202 (hereinafter “the Kavindu Case”)**, where it was held that an insurance company which has statutory duty to satisfy a judgment is entitled to apply to the court to set aside the judgment in appropriate case.
8. In my view, there are two main issues for the court's determination:
  - i. Whether an officer of the insurance company that had insured the motor vehicle that is the subject of a judgment can swear an affidavit in support of an application for stay of execution of such judgment even where the insurance company is not a party to the proceedings; and
  - ii. Whether the Applicant's have satisfied the conditions necessary for the grant of an order of stay of execution of judgment.

#### **Swearing of Affidavit by an Officer of the Insurer**

9. **Section 10 (1)** of the Insurance (Motor Vehicles Third Party Risks) Act Cap. 405 provides that:

**“If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.”**

10. That Section, in my understanding, mandates the insurer to

satisfy the judgment entered against the owner of the motor vehicle (the insured). In deed that was the position adopted by the High Court in the case of **Thomas Muoka Muthoka & Another v Insurance Company of East Africa Limited [2008] eKLR** where **Onyancha, J.** held as follows at page 11:

**“Section 10 in my finding clearly states that notwithstanding that the insurer may be entitled to avoid or may have avoided the policy, it/he nevertheless, shall pay to the persons, holding the judgment, who in this case are the third parties. This requirement to pay is mandatory as it is qualified by the word “shall”. This, in my view, is the legal duty imposed upon the insurer by the Legislature.”**

11. The requirement that the insurer satisfies the judgment entered

against the insured is further buttressed by the provisions of **Section 10 (2)** of the Insurance (Motor Vehicles Third Party Risks) Act Cap. 405 which requires that the insurer is notified of the proceedings in which the judgment is entered. That section provides as follows:

**“No sum shall be payable by an insurer under the foregoing provisions of this section**

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- a. **in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings.”**

12.The fact that the insurer is required to be notified of the

proceedings leading to the judgment and to thereafter pay the judgment amount means that the insurer has interest in the proceedings leading to the judgment and/or any appeal against the judgment. In the **Kavindu Case (supra)**, **Muli, J.** held that an insurance company which has a statutory duty to satisfy a judgment is entitled to apply to the court to set aside the judgment in appropriate case. The learned judge stated as follows at page 205:

**“The insurance company now applies to set aside that judgment on behalf and in the name of the second defendant. The procedural issue at this stage is whether they are entitled to bring this application. Mr. Vohra, who appeared for the plaintiffs, properly conceded that the insurance company was entitled to bring the application for, and on behalf of, and in the name of, the second defendant to have the interlocutory judgment set aside. I agree.”**

13.The objection raised by the Respondent must also fail because

Mary Kinyanjui, the deponent of the Plaintiff’s affidavit, stated in paragraph 1 of that affidavit-

**“... I am duly conversant with this matter, duly authorized and competent to swear this affidavit ...” (underlining mine)**

It is clear from that deposition that Mary Kinyanjui was authorized to swear the affidavit.

14.The Respondent is wrong to submit that only co-litigants can

swear affidavit. In my view any one, with information relevant to the action, and who is duly authorized can swear any affidavit in an action.

15.On the second issue identified above the Applicant should demonstrate under Order 42 Rule 6 of the Civil Procedure Rules 2010 the following-

- i. **Substantial loss may result if stay is not granted.**
- ii. **That the application for stay was made without unreasonable delay.**
- iii. **That 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.**

16.The Applicants has deponed that they are ready to give any

security this Court may order. In that regard the third requirement has been met by the Applicant.

17.In regard to the second requirement of that Rule, the Applicant

quite rightly submitted that the application for stay was made without undue delay. The judgment of the lower Court was delivered on 3<sup>rd</sup> April 2013. Appellant’s application was filed on 6<sup>th</sup> May 2013. That period in my view was reasonable.

18.Appellants did not set out in their affidavit in support what

substantial loss they would suffer if stay was not granted. In this regard the deponent stated-

**“That unless this application is heard and stay of execution granted as prayed, this application will be rendered nugatory and the Applicant will suffer substantial loss should the Plaintiff (Respondent in the appeal) proceed to execute.”**

The Appellant did not state what loss, if any, they would suffer. It is not enough to state that a party would suffer substantial loss without stating what exactly that loss is. Having failed to set out that loss by evidence under oath, Appellant could not set out in their submissions that the loss they would suffer if stay was not granted. It was submitted on behalf of the Appellant that the Respondent would be unable to refund the decretal sum if the appeal succeeded. Appellants needed to set out the factual basis of alleging that they would suffer substantial loss in their affidavit. Otherwise to rely on their submission on this ground is tantamount to giving evidence from the bar and that is not acceptable.

19. That as it may be the orders that commend themselves to me are-

a. **There shall be a stay of execution of Mbsa RMCC No. 186 of 2010 pending the hearing and determination of this appeal on condition that Appellants shall deposit the decretal sum in an interest earning account of both Advocates within thirty (30) days from this date hereof. Failure to so deposit that amount within the period provided the stay will automatically lapse.**

b. **The costs of Notice of Motion dated 6<sup>th</sup> May 2013 shall be in this cause.**

It is so ordered.

**DATED and DELIVERED at MOMBASA this 9<sup>TH</sup> day of APRIL, 2014.**

**MARY KASANGO**

**JUDGE**