



**Directline Assurance Company Limited v Jefwa (Civil Appeal
E168 of 2023) [2025] KEHC 3479 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3479 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E168 OF 2023**

**M THANDE, J
MARCH 21, 2025**

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED APPELLANT

AND

DHAHABU KADHENGI JEFWA RESPONDENT

RULING

1. By a Notice of Motion dated 30.11.23, the Appellant seeks stay of execution of the ruling and judgement delivered in favour of the Respondent, on 22.11.23 in Malindi CMCC No. E188 of 2023, pending the hearing and determination of the appeal it has filed. The grounds upon which the Application are premises are set out in the Application and in the supporting affidavit sworn on even date by Kelvin Ngunjiri, the Deputy Claims Manager of the Appellant.
2. The Respondent opposed the application through a replying affidavit sworn on 8.1.24 by their counsel, Geoffrey Kilonzo.
3. The Appellant's case is that in the ruling of 22.11.23 trial court struck out its defence and proceeded to enter judgment for the Respondent for Kshs. 1,017,00/= . The trial court failed to take into consideration the triable issues raised in the defence including that the Appellant's insured and or his driver were never sued in the primary suit, namely Malindi CMCC No. E080 of 2022 Dhababu Kadhengi Jefwa v Bwanafae Mohamed Omar. The trial court also failed to consider that the Appellant is bound by the mandatory provisions of Section 10(1) and (4) of the Insurance (Motor Vehicle Third Party Risks) Act.
4. The Appellant is apprehensive that the Respondents may move to execute the judgment at any time thereby occasioning it irreparable loss as the Respondent has no disclosed assets from which the sum of Kshs. 1,017,000/= plus costs can be recovered. Further that unless stay is granted, the appeal which has high chances of success will be rendered nugatory.



5. The Respondents' reply is that the Application is brought in bad faith and is meant to deny the Respondent the fruit of litigation, is bad in law, incompetent and is an abuse of the court process. It was further averred that the Appellants have not offered security, which is a prerequisite for an application for stay of execution. Further that the Appellant does not have an arguable appeal as the lower court properly applied the principles of law in striking out the Appellant's defence which had no triable issues. The Appellant added that the conditions for stay of execution have not been met and further that it is trite that stay of execution of a money decree cannot be granted. Further that the Respondents are capable of compensating the Appellant should the Appeal succeed. Lastly, that the Appellant is duty bound to compensate the Respondent having failed to file a suit seeking to repudiate liability within 3 months after commencement of the primary suit.
6. The jurisdiction of the Court to grant stay of execution is set out in Order 42 Rule 6 of the Civil Procedure Rules. Sub-rule 2 provides:
 - (2) 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 order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
7. A party seeking stay of execution must demonstrate that substantial loss may result to the party unless the order is made, that the application has been made without unreasonable delay, and finally that the party has given such security as the court orders for the due performance of the decree in question.
8. The general rule regarding an order for stay of execution is that first and foremost, it is discretionary. Where the Court is called upon, as in the present case, to exercise its discretion in any application, it must do so judicially, the overriding objective being to ensure that the ends of justice are met.
9. The Court of Appeal set out the factors to be considered in an application for stay of execution pending appeal in the *Butt v Rent Restriction Tribunal* [1982] KLR 417, as follows:
 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.



10. Flowing from the cited decision, it can be discerned that while considering an application for stay, the discretion of the Court must be exercised in a manner that will not prevent an appeal or render an appeal nugatory. The Court will consider whether there is any overwhelming hinderance for the grant of stay; whether good grounds have been advanced; existence of any special circumstances and unique requirements. Lastly the Court may order security for costs.
11. The Appellant has pleaded that it will suffer substantial loss if stay is not granted as the Respondent has no disclosed assets from which the decretal amount may be recovered were the appeal to succeed.
12. In *Standard Assurance Co. Ltd v Alfred Mumea Komu* [2008] eKLR, Lenaola, J (as he then was) stated that substantial loss that would be suffered must be had proved. He stated:

Even if the argument had been that loss would be suffered if the money is paid, there would still be need for tangible proof of such loss and sadly in this case not an iota of proof has been tendered.
13. Where an applicant expresses reasonable fear of substantial loss as a result of a respondent being unable to pay the decretal amount, the respondent is required to demonstrate ability to pay back in the event the appeal succeeds. This was the holding in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, where the Court of Appeal stated:

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 — see for example section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.
14. The Applicant had stated that the decretal amount would be irretrievable as the Respondent has no known disclosed assets, which would render the appeal nugatory. Having expressed its apprehension, the evidential burden shifted to the Respondent to show the resources he had since that is a matter which is peculiarly within his knowledge. In an apparent response to this fear, the Respondent’s counsel averred that the Respondent is capable of refunding the decretal sum since he is not a man of straw. This statement which is unsupported by evidence, is in my view not a demonstration of the Respondent’s ability to repay the decretal sum in the event that the appeal succeeds.
15. It is trite law that the purpose of stay of execution is to preserve the substratum of the matter in dispute. After considering the foregoing, I am persuaded that there is sufficient basis to preserve the substratum of the appeal.
16. The law requires that an application for stay of execution be filed without unreasonable delay. The decision appealed against was made on 22.11.23 while the Application was filed on 4.11.23. The Application was thus filed timeously.
17. Access to justice is a right enshrined in Article 48 of *the Constitution* and extends to the right to appeal. As such, a party’s right to appeal should be protected by ensuring that such party’s appeal is not rendered nugatory. In exercising its discretion, the court must weigh this right against the success of a



litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

18. The Court has formed the opinion that there is no overwhelming hinderance to grant the stay sought herein. Having said that, I am mindful of the fact that the impugned decision was delivered on 22.11.23 and the Applicant has had more than ample time to obtain the typed proceedings. It is therefore imperative that the matter is disposed of expeditiously.
19. In the end, I allow the Application on the following terms:
 - i. The entire decretal sum shall be deposited in Court by 4.4.25.
 - ii. The record of appeal shall be filed and served by 4.4.25.
 - iii. In default, the stay so granted shall lapse.
 - iv. The costs of this application shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 21ST DAY OF MARCH 2025

M. THANDE

JUDGE

