Meso & another (Suing as Representatives of the Estate of Boaz Wafula Meso , 1st Deceased and Monica Akinyi Meso, 2nd Deceased) v City Hopper Limited (Civil Suit 412 of 2010) [2025] KEHC 8296 (KLR) (Civ) (12 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8296 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 412 OF 2010

JN MULWA, J

JUNE 12, 2025

BETWEEN

FRIDAH MUDIBO MESO .... 1ST PLAINTIFF

PHILIP ODHIAMBO MESO .... 2ND PLAINTIFF

SUING AS REPRESENTATIVES OF THE ESTATE OF BOAZ WAFULA MESO , 1ST DECEASED AND MONICA AKINYI MESO, 2ND DECEASED

AND

CITY HOPPER LIMITED .... DEFENDANT

RULING

1. City Hopper Limited (hereafter the Applicant) by its motion dated 3/2/2025 filed against the Respondents Philip Odhiambo Meso and Fridah Mudibo Meso (hereafter the Respondents) and brought pursuant to Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA) and Order 42 Rule 6 of the Civil Procedure Rules (CPR) seeks orders, inter alia: -

    a. Spent

    b. Spent.

    c. That there be a stay of execution of the judgment delivered on 8/11/2024 pending hearing and determination of the Applicant's intended Appeal.

    d. That there be a stay of execution of the judgment delivered on 8/11/2024 for the duration of the moratorium imposed on Invesco Assurance Company Limited.

e. That this Honorable Court be pleased to grant any other orders and or relief befitting the circumstance.

f. That the costs of the motion be provided for.

2. The motion is supported by an affidavit sworn by Abackson Nduma dated 3/02/2025 whose gist is that the Applicant filed a Notice of Appeal with the intent of challenging the judgment of this Court delivered on 8/11/2025 and that the intended appeal is arguable with overwhelming chances of success. He goes on to depose that if execution were to proceed it would render the intended appeal an academic exercise, as the Respondents have since filed their bill of costs in readiness for execution after taxation. That the Respondents would likely be unable to restitute the sums in execution in the likely event that the intended appeal succeeds considering that the judgment sum is a colossal sum of Kshs. 18,014,488/-.

3. He goes on to state that the suit motor vehicle which was involved in the accident giving rise to the suit was insured by Invesco Assurance Co. Ltd and that the said insurer has since been placed under statutory management with a moratorium being imposed on all payments to the insurer's policy holders and creditors. That on account of the latter, the same has made it difficult for the Applicant's insurer to satisfy the judgment award; meanwhile the Applicant will suffer irreparable loss and injustice should execution proceed during the moratorium period pending the determination of the intended appeal. In summation, he deposes that the Applicant is ready and willing to abide by any conditions that the honorable Court may impose for granting the orders sought in respect of the instant motion.

4. The Respondents oppose the motion by way of a replying affidavit deposed by Fridah Mudibo Meso dated 14/02/2025, arguing that there has been inordinate delay in filing the instant motion, the same having been filed more than three (3) months since delivery of the impugned judgment. She further deposes that the Respondents were never served with a Notice of Appeal and or letter requesting for proceeding, to wit, in effect there is no valid appeal that has since been filed, as required. That the Applicant has equally failed to show the substantial loss which it will suffer in the event the orders sought are not granted whereas no tangible evidence has been shown that the Respondents will be unable to refund the decretal sum in case the intended appeal is successful. She states that the purpose of the moratorium in respect of Invesco Assurance Co. Ltd is not meant to shield the insurer's policy holders from meeting their obligatory liabilities to third parties whether in contract, tort or under statute. In conclusion, she states that the orders sought are merely meant to frustrate the Respondents and deny them the fruits of successful litigation.

5. Directions were taken on disposal of the motion by way of the parties' respective affidavit material, of which this Court has duly considered and postulates that the issues for determination concern:

a. Whether an order of stay of execution of the judgment delivered on 8/11/2024 should be granted for the duration of the moratorium imposed on Invesco Assurance Co. Ltd, and pending hearing and determination of the Applicants intended appeal?

b. Who ought to bear the costs of the motion?

6. At the outset, it is not in dispute that the Applicant's motor vehicle registration number KAS 394B giving rise to the instant suit was insured by Invesco Assurance Co. Ltd going by Annexure AN-4. It is equally not in dispute that the said insurance company was placed under statutory management and a moratorium imposed on all payments by the insurer to its policy holders and creditors for six (6) months from 14/08/2024 by dint of Section 67C(2)(i) of the *Insurance Act* by the Policyholders Compensation Fund (PCF), as further evidenced by Annexure AN-5. That said, it must be stated that the relationship that existed between the Applicant and Invesco Insurance Co. Ltd. was premised on

a Contract of Insurance and or Policy of Insurance, to which the Respondents were neither party to nor privy to.

7. The decree that is being appealed was against the Applicant and not Invesco Assurance Co. Ltd. Further, it warrants mentioning that, the decree before this Court is not as a consequence of statutory obligation imposed by Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act specifically as against the insurer of motor vehicle registration number KAS 394B. Therefore, the purported moratorium, which in any event is without demonstration of extension, expired on 14/02/2025, and therefore of no consequence to the instant proceedings and or a reason, for grant of an order of stay of execution pending appeal.

8. I might add, as rightly deposed by the Respondent, the purpose of the moratorium in respect of Invesco Assurance Co. Ltd is not intended to shield policy holders from meeting their obligatory liabilities to the Respondent, as a third party in tort or under statute. Therefore, the purported moratorium notice by the Policyholder Compensation Fund is of no consequence and an order of stay of execution pending appeal cannot issue on its premise.

9. On whether an order of stay of execution of the judgment delivered on 8/11/2024 should be issued pending hearing and determination of the Applicant's appeal, it is also not disputed that the Applicant has lodged an appeal against the decision of this Court by way of Notice of Appeal. As concerns the competency and or existence of an appeal on accord of the Applicant's failure to promptly serve its Notice of Appeal, in the Court's reasoned estimation, is a question or a preserve for determination before the appellate Court. For this Court, to proceed to address the competency of the appeal on a ground primarily anchored on compliance with Court of Appeal Rules would be to usurp the appellate Court's jurisdiction. As a consequence, this Court will refrain from addressing the said contestation on accord of the aforestated reservation.

10. Moving on to the crux of the motion, the Applicants' prayer for stay of execution pending appeal, is pursuant to Order 42 Rule 6 of the CPR which provides that:

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.
>
> (2) No order for stay of execution shall be made under sub rule (1) unless—
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> 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 has been given by the Applicant".

11. From the said provisions, it is clear that in order to succeed in an application for stay of execution, an applicant must demonstrate that substantial loss may result unless the order of stay is issued; that the motion seeking stay pending appeal has been brought without undue delay; and must give security for the due performance of any decree or order that may ultimately be found to be binding on the applicant.

12. The cornerstone consideration in a motion to stay execution is whether the Applicant has demonstrated the likelihood of suffering substantial loss if stay is denied. One of the most enduring legal authorities on the issue of substantial loss is the case of Kenya Shell Ltd v Kibiru & Another [1986] KLR 410. The principles enunciated in this authority have been applied in countless decisions of the superior courts. The decision of Platt Ag JA, in the Shell case, in my humble view sets out two different circumstances when substantial loss could arise, where a decree being appealed constitutes a money decree.

13. Platt Ag JA (as he then was) stated inter alia that:

> "The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages…It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts… (emphasis added)".

14. The Applicant by its affidavit in support of the motion has expressed apprehension that it stands to suffer substantial loss if the Respondents were to proceed with taxation of their bill of costs and subsequently execution of the said award while the appeal is pending, because it is likely that the Respondents will be unable to restitute the sums in execution of which is a colossal amount. The Respondents' response to the above is that the Applicant has not placed any tangible evidence that they will be unable to refund the decretal sum in case the intended appeal is successful.

15. On this question, the Court of Appeal in the of-cited case of National Industrial Credit Bank Ltd stated that-:

> "This court has said before and it would bear repeating that while the legal duty is on an Applicants 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 Applicants 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."

16. Here, it's not in dispute that the judgment sum is a colossal amount of Kshs. 18,014,488/- and likely to be exacerbated by the taxed costs and further interest. Upon the Applicant expressing apprehension about the Respondents capacity to repay any monies in the event of the appeal succeeding, the burden shifted on the Respondents to controvert the assertion by proving their own means, they failed to do so, save for the blanket condemnation that the Applicant failed to prove the Respondents

inability to reimburse. Difficulty in the recovery of decretal sums upon a successful appeal, not just the impossibility of recovery, is in some cases a relevant factor in considering the likelihood of substantial loss to an applicant. Or in the alternative, and in proper cases, such demonstrated difficulty would qualify as sufficient reason (as anticipated in Order 42 Rule 6(1) of the Civil Procedure Rules) to be considered by the court. The Applicant has raised the possibility of such difficulty in pursuing the Respondents for recovery of monies paid over, to wit, without a counter by the Respondents would not seem farfetched.

17. That said, whatever the case, in the exercise of its discretion, this Court must balance the competing interests of the parties so as not to prejudice the matter pending appeal. In Nduhiu Gitahi & Another v Anna Wambui Warugongo [1988] 2 KAR, the Court citing the decision of Sir John Donaldson M. R. in Rosengrens v Safe Deposit Centres Limited [1984] 3 ALLER 198 and Others, held that:

> " We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff......
>
> It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal..."

18. On this score, the Applicant has expressed willingness to abide by any conditions that the honorable Court may impose for granting the orders sought for. By the said deposition, there is an expression of security if so directed by the Court. The only ground in which the Applicant may be faulted in the instant motion is on delay. As can be gathered from the record, the impugned decision of this Court was delivered on 8/11/2024 whereas it can be noted that the Applicant moved this Court vide the instant motion on or about the 5/02/2025, a delay of about two months.

19. It is trite that the law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary favour. See Patrick Wanyonyi Khaemba v Teachers Service Commission, Board of Management, Kapletingi Mixed Day Secondary School & Francis Tanui [2019] KECA 112 (KLR). Contemporaneous to an explanation on delay, is whether the said delay is so inordinate as to prejudice the other party. While it can be noted that the Applicant moved expeditiously to lodge the Notice of Appeal, there has been no explanation on the delay in presenting the instant motion, which appears inordinate on the face of it. Nevertheless, this Court is of the view that the prejudice likely to be occasioned upon the Respondent on accord of the delay can reasonably be compensated by an award of costs.

20. In the circumstances, and in order to preserve the rights of both parties pending the intended appeal, the Court is persuaded to allow the motion dated 3/02/2025 as hereunder;

    An order of stay of execution of the trial court's judgment delivered on 8/11/2024 is granted pending hearing and determination of the appeal before the Court of Appeal upon the following terms-:

    a. That the Applicant deposits half of the decretal sum in a joint interest earning account of the parties Advocates names within 45 days of this ruling.

    b. Costs of this application to abide by the outcome of the appeal before the Court of Appeal.

    Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF JUNE 2025.

JANET MULWA

JUDGE.