



Fidelity Shield Insurance Co. Ltd v Musoni Microfinance Limited (Civil Appeal E074 of 2025) [2025] KEHC 10636 (KLR) (17 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10636 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E074 OF 2025
FN MUCHEMI, J
JULY 17, 2025**

BETWEEN

FIDELITY SHIELD INSURANCE CO. LTD APPELLANT

AND

MUSONI MICROFINANCE LIMITED RESPONDENT

RULING

Brief Facts

1. The application dated 1st April 2025 seeks for orders of stay of proceedings in Ruiru CMCC No. 164 of 2021 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 24th April 2025.

Appellant's /Applicant's Case

3. The applicant states that it was sued as a third party in Ruiru SPMCC No. E164 of 2021 in a matter filed by one Kineticar Auto Garage Limited for recovery of repair charges in respect of motor vehicle registration number KCS xxx. In the third party notice, the respondent set out the grounds of enjoining the applicant as:-
4. That at all material times to this suit Fidelity Shield Insurance Company Limited did instruct the plaintiff to undertake repairs on motor vehicle registration number KCS xxx which forms the subject of this suit as more particularly set out in the plaint attached herewith.
5. Upon conclusion of the trial, the trial court entered judgment in favour of Kineticar Auto Garage directing that the decretal sum be paid in 14 days from the date of the judgment and in default the vehicle be sold. In the event the vehicle is sold, the 3rd party to indemnify the 1st defendant of any loss that it may suffer as a result of the sale of the motor vehicle.



6. Being aggrieved by the decision, the applicant lodged an appeal at Kiambu HCCA No. E193 of 2021 on 28th July 2022 where the Judge returned a negative order.
7. On 20th December 2024, the respondent moved back to the trial court with an application seeking to reopen the suit to determine the losses incurred by the 1st defendant/applicant and assessing the loss and damages incurred by the 1st defendant/applicant due to the sale of motor vehicle registration number KCS xxx. the said application was opposed by the appellant on the grounds that the trial court became *functus officio* as it had already determined the matter on 7th October 2021 and an appeal was preferred. Further, the applicant did not cross appeal to be allowed to reopen the court's record for assessment of damages and the appellate court did not issue an order for the reopening of the proceedings for the assessment of damages. Additionally, the applicant in its defence did not plead or specify any particulars of loss and thus in the unlikely event of the court allowing prayer 4 of the application, the applicant is likely to amend the defence and change the entire structural architect of the pleadings and substantially introduce a new cause of action. Further, the applicant did not plead or specify any loss in the pleadings, therefore the application is filed as an afterthought intended to fill gaps in evidence.
8. By a ruling dated 20th February 2025, the trial court allowed the impugned application and reopened the proceedings with leave to the respondent to file a schedule account of losses incurred to assessment and directions by the court.
9. The applicant avers that the appeal raises arguable points of law which have high chances of success. Unless the orders sought are granted, the applicant argues that there is likely to be a fundamental abuse of the court process which will be prejudicial to them. Further, the respondent shall not suffer any prejudice since payment of the alleged loss can be assessed.

The Respondent's Case

10. The respondent states that judgment in the trial court was delivered on 7th October 2021 to which the applicant appealed but the same was dismissed for lack of merit on 28th July 2022. On 26th October 2024, the respondent states that its counsel served the applicant with a demand letter requesting for Kshs. 838,062/- as the assessed damages incurred by virtue of losing their security.
11. The respondent argues that the applicant ignored the demand letter forcing it to seek the refuge of the trial court by filing an application dated 20th December 2024 which sought the court to assess the damages incurred by virtue of losing the only security to a loan facility. By a ruling dated 20th February 2025, the trial court rendered its decision which indicated that the judgment had not crystallized until the respondent was indemnified given the applicant's defiance of the court orders.
12. The respondent argues that the conditional judgment of the trial court was sound and despite the applicant's initial appeal, the learned Judge nodded to the trial court's sound judgment by dismissing their appeal for lack of merit.
13. The respondent states that the allegations that the trial court became *functus officio* is just an afterthought since the conditional judgment was very elaborate and the applicant opted to ignore the terms of the judgment.
14. The respondent states that the trial court directed it to file a schedule of the losses incurred and serve the same upon the applicant to give them an opportunity to verify the documents and give their proposal hence the viva voce evidence proposal is basically a delay tactic which ought to be disregarded.
15. The respondent argues that the orders of stay of proceedings will be detrimental to their business of lending monies since they need the liquidity to stay afloat in the financial market.



16. The respondent states that in the event the application is allowed, the applicant be directed to deposit the decretal amount, which is more or less the value of the sold motor vehicle as security in a joint interest earning account. The respondent further states that the right of appeal must be balanced against the weighty rigid right of its right to enjoy the fruits of the judgment.
17. Parties put in written submissions.

The Applicant's Submissions

18. The applicant relies on the cases of *Kenya Wildlife Service v James Mutembei* [2019] eKLR; *Global Tours & Travels Limited* Nairobi HC Winding Up Cause No. 43 of 2000 and *Halsbury's Law of England*, 4th Edition Vol 37 page 330, d, 332 and submits that the power to grant the orders herein are discretionary and ought to be exercised upon considering the facts set out in the application before the court. The applicant argues that according to the third party notice, the respondent did not plead for compensation of its losses, if any. The alleged losses were not an issue before the trial court. Granted, the trial court made a finding on the same without stating the specific sum of the alleged compensation. That was a relief which emerged at the final orders of the court and thus the relief was not tested at the trial of the case.
19. The applicant submits that although the High Court at Kiambu returned a negative order, the said court did not direct for the reopening of the proceedings before the trial court for the reassessment of the alleged losses. Thus the trial court became *functus officio*.
20. The applicant further submits that the issue of the respondent's losses having not been an issue before the trial court was not given an opportunity to interrogate the alleged losses and thus it will be condemned unheard if the same is allowed. Further, by the trial court's decision to allow the respondent to submit evidence on the alleged losses from the bar, the decision lies on the face of our judicial system and therefore make mockery of our legal procedures. To support its contentions, the applicant relies on the cases of *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others* (2009) eKLR and *Port Florence Community HealthCare v Crown Health Care Limited* [2022] eKLR.

The Respondent's Submissions

21. The respondent relies on Order 42 Rule 6 of the *Civil Procedure Rules* and the case of *Matata & Another v Rono & Another* (Civil Appeal E034 of 2024) [2024] KEHC 2799 (KLR) and submits that the applicant has proved the elements of substantial loss and reasonable time of filing the application. On the issue of security of costs, the respondent refers to the cases of *Gianfranco Manenthi & Another v Africa Merchant Assurance Co. Ltd* [2019] eKLR and *Ndubiu Gitabi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 and submits that the law is that where the applicant intends to exercise his undoubted right of appeal, and in the event, that he were eventually to succeed, he should not be faced with a situation in which he would find himself unable to get back its money and likewise the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. The respondent thus submits that the applicant ought to deposit the decretal sum of Kshs. 518,710/- which is refundable should the appeal succeed.



The Law

Whether the applicant has met the conditions for grant of stay of proceedings pending appeal.

22. It is trite law that whether or not to issue an order for stay of proceedings is a matter of the court's discretion exercised after due consideration of the merits of the case and the likely effect on the ends of justice. The exercise of that discretion should be premised on conscientious and judicious decision based on defined principles which were expounded by Ringera J in *Global Tours & Travels Limited*, Nairobi HC Winding Up Cause No. 43 of 2000:-

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justicethe sole question is whether it is in the interest of justice to order a stay of proceedings and if it is so, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the *prima facie* merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

23. Similarly the threshold for stay of proceedings has been illuminated in the passages in [*Halsbury's Law of England*](#), 4th Edition, Vol. 37 page 330 and 332 that:-

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show merely that the plaintiff might not, or probably would not, succeed but that he could not possible succeed on the basis of the pleading and the facts of the case.”

24. In that regard, for an order of stay of proceedings to issue the following points of consideration ought to be adhered to:-

- a. Whether the applicant has established that he has a *prima facie* arguable case;
- b. Whether the application was filed expeditiously; and
- c. Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.



Whether the applicant has established that they have a prima facie arguable case

25. Cognizant of the fact that an arguable appeal needs only raise a single bona fide point worthy of consideration by the Judge who will hear the appeal and it need not be one that must necessarily succeed. *Cooperative Bank of Kenya Ltd v Banking Insurance of Finance Union (Kenya)* [2015] eKLR.
26. I have keenly perused the memorandum of appeal and noted that the applicant's main contention is that the trial court became *functus officio* after delivering judgment in Ruiru CMCC No. 164 of 2021 on 7th October 2021 therefore it cannot allow the respondent to reopen the case and file a schedule or account of losses against it. I have perused the trial court ruling but not the trial record and therefore had a chance to look at the trial court's reasoning. I have however noted that judgment was delivered on 7th October 2021, whereby the applicant was directed to pay the decretal sum in 14 days and in default, the vehicle to be sold. In the event the vehicle is sold, the applicant was to indemnify the 1st defendant of any losses that it may suffer as a result of the sale of the motor vehicle. After judgment, the applicant did not pay the sums as directed and the motor vehicle was released and sold. Further despite being notified of the said sale, the applicant has failed to compensate the respondent for the losses it incurred as a result of the sale of the motor vehicle. Thus it is evident that the losses could only come about if the applicant failed to pay the requisite sums leading to the sale of the motor vehicle and the respondent having undertaken its responsibility as per the dictates of the judgment. Therefore without going to the merits of the appeal, I find that the applicant has not raised any arguable grounds of appeal.

Whether the application was filed expeditiously.

27. The ruling was delivered on 20th February 2025 and the applicant filed the instant application on 1st April 2025. Thus the application has been filed expeditiously.

Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought

28. In an application to stay proceedings the court is required to exercise judicial discretion in the interest of justice. This has been demonstrated in the case of *Christopher Ndolo Mutuku & Another v CFC Stanbic Bank Limited* (2015) eKLR the court observed that:-

“.....what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”

29. The applicant states that they will suffer substantial loss and irreparable damage if the proceedings in the trial court are not stayed as the case will be opened and re-heard yet the trial court became *functus officio*; the issue of losses was never raised in the trial court thus they will be condemned unheard and whether the respondent can be allowed to submit evidence on the alleged losses from the bar.
30. On perusal of the impugned ruling, the trial court upon allowing the re-opening of the respondent's case stated that losses incurred by the respondent would only crystallize when the applicant failed to pay the requisite sums leading to the sale of the suit motor vehicle and thus the finalization of the claim would only be upon the default taking place which had happened at the time. Thus the orders sought by the respondent are not new but a mechanism to actualize the orders given on 7th October 2021. Therefore as the applicant hereby failed to honour the judgment dated 7th October 2024, the respondent was forced to actualize the judgment by seeking the court's intervention to reopen the case and allow them file a schedule of its losses. In that regard, the court is not convinced that it would



be in the best interests of justice if the proceedings in the trial court are stayed. Conversely, it would be prudent to allow the respondent to draw up the schedule of losses and the applicant can cross examine on the same to assist the trial court reach a logical conclusion on the matter. Furthermore, the allegations by the applicant that it was condemned unheard is not true although they were enjoined as third parties in the proceedings in the court below they did not bother to defend the claim.

31. In this regard, it is my considered view that the applicant has not shown sufficient cause to warrant stay of proceedings in Ruiru CMCC No. E164 of 2021.

Conclusion

32. It is my considered view that the application dated 1st April 2025 lacks merit and is hereby dismissed with costs.
33. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 17TH DAY OF JULY 2025.

F. MUCHEMI

JUDGE

