



**Trident Insurance Company Limited v Abuom (Civil Appeal
177 of 2023) [2024] KEHC 1719 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1719 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 177 OF 2023
SM MOHOCHI, J
FEBRUARY 22, 2024**

BETWEEN

TRIDENT INSURANCE COMPANY LIMITED APPELLANT

AND

JOHN OTIENO OGWEGI ABUOM RESPONDENT

RULING

1. The Applicant moved Court vide the Notice of Motion dated 28th July, 2023 seeking the following Orders:
 - i. Spent
 - ii. Spent
 - iii. Spent
 - iv. That pending the hearing and determination of this Appeal herein there be an Order of stay of execution of the judgment/Decree entered in Nakuru Chief Magistrates Civil Case E152 of 2022 *John Otieno Ogwegi Abuom v Trident Insurance Company Limited* as against the Applicant/Appellant on the 24th of March, 2023.
 - v. That pending the hearing and determination of this Appeal herein there be an Order of stay of Ruling and Orders issued on 29th of June, 2023 by the Honourable Kibelion (PM) in Nakuru Chief Magistrates Civil Case E152 of 2022 *John Otieno Ogwegi Abuom v Trident Insurance Company Limited* as against the Applicant Appellant.
 - vi. That pending the hearing and determination of this Application as well as the main Appeal, there be an order of stay of proceedings in Nakuru Chief Magistrates Civil Case No. E152 of 2022 *John Otieno Ogwegi Abuom v Trident Insurance Company Limited* as against the Applicant Appellant.



- vii. That in the alternative, this Court do make such other orders as it may deem just and expedient pending the hearing and determination of this Application as well as the Appeal herein.
- viii. That the costs of this Application abide by the outcome of the Appeal
2. The Application was supported by the sworn Affidavit of Olga Omare Legal Officer of the Respondent. She stated that the Applicant filed an application to set aside default judgment dated 26th April, 2023 on grounds inter alia that the advocate that was given instructions failed to enter appearance and that they were not the insurers of the said vehicle and indemnifying the Respondent would be prejudicial to them.
 3. It was her contention that the terms imposed by the trial magistrate in allowing the said Application in the Ruling of 29th June, 2023 were tough unfair and unjust necessitating filing of an Appeal vide the Memorandum of Appeal dated 26th July, 2023. She stated that the timelines set were tight and thus the urgent need for the Court to issue stay of execution of the Decree/Judgment as well as the orders and condition as in the impugned Ruling of 29th June, 2023.
 4. The Respondent in opposition filed a Replying Affidavit dated 9th August 2023 and filed on 16th August 2023 sworn by John Abuom. He stated that the Application lacked merit as the default judgment was set aside with conditions which have not been met and are thus should not be granted the orders sought. That the Application is a delay tactic and that the Applicant stands to suffer no loss and that the conditions required to issue the orders ought to have been met.
 5. The Court on 31st July, 2023 directed that the Application be disposed by way of written submissions.
 6. The Applicant in its submissions dated 6th August, 2023 through counsel submitted that the Court should stay the lower Court proceedings pending the hearing of the Appeal. It was their submission that the 45 days were lapsing on 12th August, 2023 failure to which the Respondent would be at liberty to execute. That the proceedings would automatically lapse by operation of the Court own order.
 7. It was also submitted that the threshold for grant of such orders had been met and on the issue of stay pending Appeal he urged Court to exercise its discretion and relied on *Congress Rental South Africa v Kenyatta International Convention Centre: Co-operative Bank of Kenya Limited & Another (Garnishee)* 2019 eKLR the Applicant and in urging Court to exercise its discretion in a way as to not prevent the Appeal and relied on *Amal Hauliers Limited v Abdulnasir Abubakar Hassan* (2017) eKLR.
 8. The Applicant submitted that it was at a risk of substantial loss that the decretal amount was Kshs. 4,083,534, they were condemned unheard, that they were not the insurers of the subject vehicle that at the time of the accident the vehicle was insured by Monarch Insurance and that the vehicle was valued at Kshs. 1,400,000. He added that the Appeal had a high chance of succeeding placed reliance in the case of *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others* (2013) eKLR.
 9. The Respondent on the other hand in his written submissions dated 23rd August, 2023 and filed on 14th September, 2023 submitted that the Application is not merited. That there has been no substantial loss that has been demonstrated and relied on *Siverstein v Chesoni* (2002) 1 KLR 867. It was the Respondent's submission that the Application was a delay tactic.
 10. He also submitted that deposit of security is a requirement under the law. That the Applicant has never deposited or offered an amount to hold as security. He urged the Court to dismiss the Application with costs and that if the Court was inclined to issue stay, then it should direct half of the decretal



amount be paid to the Respondent and the other half to be deposited in an interest earning account in the names of the advocates for the parties.

Analysis and Determination.

11. After careful consideration of the evidence adduced, the parties' rival written submissions as well as the authorities relied on by the parties, what is whether the Applicant has met the threshold to grant the orders sought.

Stay Of Proceedings

12. Granting or declining to grant and order stay of proceedings is a discretionary power to this Court derived from Order 42 rule 6 (1) of the [Civil Procedure Rules](#).

13. In the case of *Re Global Tours & Travel Ltd* HCWC No.43 of 2000 Ringera, J (as he then was) held that:

“...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 justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, 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 case, 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...”

14. For this Court to grant the prayer for stay of proceedings, the Applicant ought to show that it has an arguable Appeal with high chances of success that if stay of proceedings is not granted the Appeal will be rendered nugatory. The Court has not had the advantage of going through the proceedings in the trial Court but has had cursory look at the Memorandum of Appeal which raised 12 grounds.

15. In the case of [Stanely Kinyanjui v. Tony Ketter & 5 Others](#) (2013) eKLR, the Court of Appeal stated that:-

“On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised”.

16. Similarly, the Court of Appeal in the case of [University of Nairobi v Ricatti Business of East Africa](#) (2020) eKLR held that:

“An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous”.

17. It would not be accurate in the instant case to say that the intended Appeal is not arguable. Courts have held that, an arguable appeal is not one which must necessarily succeed, but one which ought to be argued to its logical conclusion. The Appeal in the instant case relates to the question of whether the Trial Court misinterpreted the law and considered irrelevant factors. The Court is of the opinion that the Appeal needs to be determined by weighing the Applicants contestation and the Trial Court's reasoning. The Appeal therefore passes the agreeability test



18. From the orders sought, it appears that the Applicant desires this Court to exercise its discretion to stay execution of the judgment/decree of Court, stay of the Ruling while at the same time, staying the proceedings to allow time for appeal.
19. In the case of *Kenya Wildlife Service v James Mutembei* (2019) eKLR, Gikonyo J held that:

“Stay of proceedings should not be confused with stay of execution pending appeal. (emphasis mine) Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”.
20. The trial Court set aside the judgment and decree of Court conditionally. The Applicant felt it was not supposed to have conditions set by Court if the decree was set aside. The Court is not convinced that the Appeal will be rendered nugatory by the mere fact that the trial may proceed and a judgment on merits given.
21. It is the Court’s considered opinion that it would not be in the interest of justice to exercise Court’s discretion and grant stay of proceedings as the same will only serve the purpose of delaying the suit Nakuru CMCC No E152 of 2022 having that the judgment was set aside to the detriment of the Respondent. In any event the Applicant will have an opportunity to ventilate its issues during trial to alleviate its grievance of being condemned unheard
22. The Court is therefore not satisfied that the Applicant has demonstrated that the instant Application warrants issuance of the orders of stay of proceedings.

Stay of Execution Pending Appeal

23. The principles on granting orders of stay of execution pending appeal are well settled and provided for under Order 42 rule 6(2) of the *Civil Procedure Rules*, 2010 which provides:
 - (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 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 orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
 - (3) Notwithstanding anything contained in subrule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”



24. The rationale behind granting orders of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties while still considering the circumstances of the case. On the same vein, the power of Court to grant or refuse stay of execution is discretionary as submitted and aptly emphasized by the Respondent. The discretion should however be must not be exercised whimsically but judiciously. It ought to be exercised so as not to prevent a party pursuing an Appeal does not suffer irreparably should the decision be overturned on Appeal. This position was echoed by the Court of Appeal in [RWW v. EKW](#) (2019) as hereunder:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should 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.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

25. Therefore, the import of the above is that, for this Court to grant the orders sought the Applicant has to demonstrate;

- a. that it will suffer substantial loss unless the orders are not granted
- b. that the application has been made without unreasonable delay, and
- c. that such security as the Court orders for the due performance has been given.

Undue Delay

26. The Applicant lodged an Appeal against the Ruling of 29th June 2023 withing a month of delivery and that was within the statutory timeline. The instant Applications was also filed on 38th July, 2023 which was also within 30 days after delivery of the decision. There has therefore been no undue delay.

Substantial Loss

27. The Court in [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR, observed that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

28. The Applicant in this case stated that it stood to suffer substantial loss for reason that;

- a. The decretal amount was Kshs, 4,083,534 and the vehicle was valued at Kshs. 1,400,000
- b. The Applicant was not the insurer of the vehicle but Monarch Insurance



- c. The stay orders stood to expire if the conditions were not met by the applicant and the Applicant would suffer in a matter it was condemned unheard.
29. The Respondent on his part has insisted the Application is a delay tactic and mere excuses and has insisted that the substantial loss has not been clearly stated. This Court while balancing the interests of the parties, must ensure that that no party would suffer undue prejudice. The trial Court allowed the Application to set aside the default judgment as there were reasons to it. The Applicant would be placed in a more disadvantageous position having looked at the grounds advanced in their application dated 26th April, 2023.
30. The Applicant did state that it was apprehensive that the Respondent may not be able to repay them should the Appeal go in its favour. The Respondent neither did not demonstrate that he had the means to refund the Applicant the decretal amount. This Court has not had the benefit of looking at the trial Court file but there are issues of fraud and insurance scheme that have been raised as well as the decretal amount being extreme in the circumstances. Kshs. 4,083,534 is not a small amount of money. The Court is satisfied that the Applicant has demonstrated sufficiently that it stands to suffer substantial loss.

Security

31. The Applicant is required to furnish to the Court security for the performance of the judgment debt should the appeal fail. The Applicant has insisted that it is not appeal against the judgment but rather the Ruling of the Court requiring it to deposit security and yet the judgment has been set aside. That an order of deposit of security is necessary where a judgement debtor has preferred an appeal against the judgment. The Respondent on the other hand submitted that if the Court was inclined to grant the stay, the Applicant deposits half the amount in Court and the other half be paid to him.
32. In *Arun C. Sharma v. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, where the Court while demonstrating the purpose of security stated:-
- “The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”
33. The Applicant was expected to deposit half the decretal amount in Court within 45 days of the decision of the trial Court as a condition for setting aside the default judgment. The Applicant is yet to comply with the set conditions. The Applicant has not even suggested other ways of offering security. The Applicant argued that since judgment had been set aside and it was not challenging the judgment of the trial Court on appeal there was no need to deposit the security.
34. It appears that the Applicant wanted to have the judgment set aside without any conditions whatsoever. There were conditions set that are yet to be fulfilled by the Applicant. When the Applicant approached the Court for discretionary orders, it was not for the Applicant to determine the terms of granting the orders thereto. The Applicant is at best attempting to have his cake and eat it.



35. The Court has to be guided by the requirement set out in Order 42 Rule 6(b) which is pegged on mandatory terms. The Court is alive to the fact that there is a pending Appeal and the reluctance of the Applicant to deposit security. The Court cannot at this stage delve on the grounds of appeal but will only limit itself to the requirements of granting stay of execution withing the legal framework. The Applicant must satisfy the requirements set and furnish the security as envisaged. To decide otherwise would be to rewrite the law. It does not matter whether the Applicant is appealing the conditions of the Ruling or the judgment of the trial Court. The Court has to follow through with the parameters set out in Order 42 Rule 6(b).
36. The Respondent has suggested being paid half the decretal amount while the other held be deposited in a joint account in the names of the respective advocates. The Court is of the considered view that despite the fact that the Applicant has not furnished security, giving half of the decretal sum to the Respondent would exposé the Applicant to irreversible consequences if the Appeal succeeds and the Trial Court rules in favour of the Applicant. Further even if the consequences were likely to be reversed there would be considerable hardship meted upon the Applicant thus prejudicial.
37. Consequently, I find that the Application partially succeeds and direct that:
- a. That pending the hearing and determination of this Appeal herein there be an Order of stay of execution of the judgment/Decree entered in Nakuru CMCC No. E152 of 2022.
 - b. The Applicant shall deposit half of the decretal sum into an interest earning joint account in the names of the parties' advocates in a reputable commercial Bank, within 60 days of this Ruling;
 - c. The Appellant to file and serve a record of appeal within thirty (30) days of this Ruling;
 - d. Parties shall comply with Order 11 withing 30 days of this Ruling and the Trial Court shall place the matter for hearing as a matter of priority.
 - e. Costs shall be in the cause;

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 22ND DAY OF FEBRUARY 2024.

MOHOCHI S. M.

JUDGE

