



REPUBLIC OF KENYA



**KENYA LAW**  
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**APA Insurance Co Limited v Masengeli (Civil Appeal E103 of 2023)  
[2024] KEHC 4508 (KLR) (Civ) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4508 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
CIVIL  
CIVIL APPEAL E103 OF 2023  
CM KARIUKI, J  
APRIL 11, 2024**

**BETWEEN**

**APA INSURANCE CO LIMITED ..... APPLICANT**

**AND**

**GILBERT MASENGELI ..... RESPONDENT**

*(Being an appeal against the Judgment and decree of the Hon. E. Kiago Chief Magistrate  
in Nyahururu CMCC No. 307 of 2021 dated and delivered on 4th August 2023)*

**RULING**

1. By Applicant dated 21/8/2023. The applicant seeks the orders.
  1. spent
  2. spent
  3. That this Honourable court be pleased to stay the execution of the judgment/decree in Nyahururu MCCC No. 307 of 2021 – Gilbert Masengeli vs APA Insurance Co. Ltd pending the hearing and determination of this appeal.
  4. The costs of this application be provided for:
  5. It is supported by the grounds on the notice of motion namely;
  6. The respondent is keen on executing the judgment of the trial court in pursuit of the value of the vehicle and the general damages awarded by the amounting to Kshs. 4,520,000



7. Unless the orders sought herein are granted the Appellant/Applicant stands to suffer irreparable loss considering that it will be compelled to pay for the value of a vehicle that was repaired and further pay for general damages which are unjustified.
  8. That the respondent will not be in a position to refund the decretal sum if paid thereby rendering the Appeal an academic exercise and exposing the Appellant/Applicant to monumental losses.
  9. That Appellant/Applicant is ready to offer reasonable security for the due performance of the decree.
2. It is supported by the affidavit of Shelmith Ngure sworn on 21/8/2023 which reiterates the grounds aforesaid.
  3. The respondent Gilbert Masengeli swore an Affidavit on 4/9/2023 to reply to the same.
  4. Finally, the Applicant filed a supplementary Affidavit sworn by Shelmith Ngure which was filed along with the submissions.

### **Applicant submissions.**

5. The applicant is an individual businessman who insured a motor vehicle truck with the Respondent organization. The said motor vehicle got Involved in to accident, to which his driver was never to blame. He duly notified his insurer who then instructed their chosen garage to tow the vehicle to Nairobi for purposes of repair. The garage never returned that motor vehicle to him, even after a demand notice was issued to them on or about 13<sup>th</sup> August 2021.
6. The matter eventually ended up before the Nyahururu Chief Magistrate's Court which eventually found in favor of the applicant and ordered the Insurer to either release the motor vehicle, having been satisfactorily repaired to the Applicant within 14 days from the date of judgment or pay up the Insured amount. The Respondent did neither and chose to lodge the present appeal in addition to applying for a stay of execution of the lower court's judgment they ended up being granted interim orders, which they are enjoying up to now.
7. The appellants have, however, shown no interest whatsoever in prosecuting Their appeal. As will be demonstrated in the Applicant's supporting affidavit to the application, the Appellant is yet to even move to the lower court for a request for proceedings and a certification of the judgment. The business of the Applicant has severely suffered as a result of this inaction and lethargy given the fact that the suit motor vehicle was being used for commercial purposes.
8. The applicant submits that the following are the issues that should be determined by this honorable court:

### **whether the Application is deserving of the orders sought?**

### **Who beats the costs of this application?**

9. The Applicant Application is premised under Sections IA, 1B & 3A of the *Civil Procedure Act* as well as Order 42 Rule 35(1) of the Civil Procedure Rules 2010, which provides as follows:
  - i.

"(1) Unless three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty



either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.”

10. It is instructive to note that despite being served with the present application on 6/12/2023, the Appellant has yet to file a response to the same. They are also yet to initiative to have their appeal set down for the giving directions. They have further chosen to let their application, under which they obtained ex parte stay of execution orders, clog the judicial system by not taking any initiative to have the same dispensed with to have the main appeal canvassed. This outright display of abuse to the court process with a singular objective of vexing the Respondent/ Applicant should not be allowed to continue In co-perpetuity. It is manifestly against this court’s overriding objective of giving substantive justice to the parties appearing before it.
11. Reliance is made on the case of Peter Kipkurui Chemoiwo v Richard Chepsergon [2021] eKLR,
12. This is a matter of failure to comply with the statutory timelines within which an appeal must be set down for hearing or the taking of directions. Compliance with timelines is not a matter of a technicality that can be cured by Article 159(2) and the lethargy displayed by the Appellant in prosecuting its appeal, more after obtaining interim orders ought not to be tolerated by this court. Reliance is made on the case of AP Insurance Company -Versus- Vincent Nthuka [2018] eKLR,
13. The court looks at substantive justice based on the principle of “The overriding objective” in civil litigation is a policy issue that the court invokes to obviate hardship, expense, and delay and to focus on substantive justice. The issue of procedure through fundamentals should not be used to deny a person a right that cannot prejudice the other party claiming that such a right should not be given. Reliance is made on the case of Abdirahman Abdi also known as Abdirahman Muhumed Abdi V. Safi Petroleum Products Ltd. &6 others. approvingly quoted in Nicholas Kiptoo Arap Korir Salat v- Independent Electoral and Boundaries Commission & 6 others [2013] eKLR
14. The overriding objective principle aims to enable the Court to achieve fair, Just, speedy, proportionate, time, and cost-saving disposal of cases before it. In the circumstance of your Lordship and considering the effect of not striking the said appeal, the Respondent/Applicant will suffer a greater prejudice that may not be remedied by cost. The Applicant is a businessman who followed the law and duly insured his motor vehicle. The insurer agreed to repair it before ending up detaining the vehicle.
15. This case should further be viewed from the prism of a businessperson who lost the goodwill he had already started establishing before the impugned traffic accident and the Appellant’s offer to repair it on his behalf. He cannot be compensated for the loss of future business prospects and that is the overriding objective this Court has to have in mind while looking at this application. In Furtherance to the foregoing, it is evident that if this application is allowed no prejudice be suffered by the Respondent as they have not filed a response to it hence a clear demonstration that they have nothing to lose by their Memorandum of Appeal being stuck out with costs to the Respondent/ Applicant.
16. On the degree of prejudice court the Appellant/Respondent, THE Court to balance the competing interests of the parties, that is, the injustice to the Applicant, in denying him an opportunity to enjoy the fruits of the judgment delivered in his favor, against the prejudice to the Respondent, a corporate body with huge financial muscle and which may not be thrown out of business by being ordered to honor the judgment delivered in favor of the Applicant.
17. Given the Application is not opposed, in this circumstance, the Appellant was not shown the Court what has occasioned the inordinate delay in setting up their appeal for directions. They went to sleep



immediately upon obtaining the interim orders in their favor and have not even bothered to embark on obtaining certified proceedings and judgment delivered on the 4<sup>th</sup> day of August 2023.

18. From the circumstances of the application before you, the applicant has demonstrated the existence of the parameters set out in Peter Kipkurui Chemoiwo v Richard Chepsergon (supra)
19. The upshot is that the application should be allowed accordingly.
20. The circumstance it is prayed that you consider the affidavit evidence and the various facts that are submitted particularly by the Applicant in persuading this court to grant the orders as prayed. These matters as elaborated as of necessity paint a picture of a grave detriment and injustice which is likely to be suffered by the Applicant in the event the Appellant's Memorandum of Appeal is sustained without certainty as to its disposition.
21. That the application be allowed as prayed. The Applicant filed a Memorandum of Cross Appeal and wishes to prosecute the same.

### **Appellant/Respondent Submissions**

22. Respondent submits that Order 42 Rule 35 of the Civil Procedure Rule 2010 envisages two scenarios for the dismissal of an appeal for want of prosecution. The first scenario is when an appellant fails to cause the matter to be listed for directions under section 79B of the *Civil Procedure Act* as is envisaged in order 42. Rule II of the Civil Procedure Rules. The second scenario is that if after service of the memorandum of Appeal, the appeal would not have been set down for hearing the registrar shall on notice to the parties list the appeal before the Judge for dismissal.
23. Order 42 Rule 13 of Civil Procedure Rules provides that directions must have been given before an appeal can be dismissed for want of prosecution. Directions have not been issued herein as such it is our humble submission that this application is pre-mature frivolous, vexatious, and scandalous.
24. Reliance is made on the case of Charles Kitwi v Peter, Ngola Mutua [2020] eKLR
25. In light of the foregoing court is invited to conclude that the application dated 5/12/2023 is premature and frivolous. Vexatious and scandalous and proceed to dismiss the same with costs to the Applicant.
26. The court is to be persuaded by the Appellant. Respondent submissions herein above and proceed to dismiss the application dated 5/12/2023 with costs to the Appellant/Respondent.

### **Analysis and Determination**

27. The court having gone through the pleadings and submissions, finds the issues are whether the application dated 5/12/2023 seeking dismissal of appeal for want of prosecution meets the thresh hold for the grant of orders sought and the order as to costs; Further there is an application dated 21/8/2023 seeking stay pending appeal and issues are whether it satisfies parameters of order 42 CPC and costs.
28. On the first application, it is submitted that the applicant is an individual businessman who insured a motor vehicle truck with the Respondent organization. The said motor vehicle got Involved in to accident, to which his driver was never to blame. He duly notified his insurer who then instructed their chosen garage to tow the vehicle to Nairobi for purposes of repair. The garage never returned that motor vehicle to him, even after a demand notice was issued to them on or about 13th August 2021.
29. The matter eventually ended up before the Nyahururu Chief Magistrate's Court which eventually found in favor of the applicant and ordered the Insurer to either release the motor vehicle, having been satisfactorily repaired to the Applicant within 14 days from the date of judgment or pay up the Insured



amount. The Respondent did neither and chose to lodge the present appeal in addition to applying for a stay of execution of the lower court's judgment they ended up being granted interim orders, which they are enjoying up to now.

30. The appellants have, however, shown no interest whatsoever in prosecuting Their appeal. As will be demonstrated in the Applicant's supporting affidavit to the application, the Appellant is yet to even move to the lower court for a request for proceedings and a certification of the judgment. The business of the Applicant has severely suffered as a result of this inaction and lethargy given the fact that the suit motor vehicle was being used for commercial purposes.
31. The respondent in the same application rejoinder is that Order 42 Rule 13 of Civil Procedure Rules provides that directions must have been given before an appeal can be dismissed for want of prosecution. Directions have not been issued herein as such it is submitted, that this application is premature frivolous, vexatious, and scandalous.
32. The court to be persuaded by the holding in *Charles Kitwi v Peter, Ngola Mutua* [2020] eKLR where the High at Nairobi held as follows:
33. "The provisions of the law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any penalty where an appellant fails to proceed as per Order 42 Rule II and Order 42 Rule 13 of the Civil Procedure Rules, 2010.
34. This court took the view that an appeal could not be dismissed before directions had been given. As no indications had been given herein, the Appeal herein could not be dismissed under Order 42 Rule 35 (1) of the Civil Procedure Rules.
35. In any event, there was also no evidence that the Registrar had issued a notice under Order 42 Rule 12 of Civil Procedure Rules. There was also no indication that the lower court file and proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid. Notably, every person is entitled as envisaged under Article 50(1) of *the Constitution* of Kenya, 2010 to have a fair trial. The said Article 50(1) of *the Constitution* of Kenya Provides as follows:

“ Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”
36. It therefore follows that every person ought not to be shut out from accessing court or having a day in court. Indeed, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction. It was therefore the considered opinion of this court that allowing the present application would be shutting out the Appellant from accessing the court and would be contrary to Article 50(1) of the Constitutions of Kenya.
37. In light of the foregoing court is invited to conclude that the application dated 5/12/2023 is premature and frivolous. Vexatious and scandalous and proceed to dismiss the same with costs to the Applicant.
38. The court is to be persuaded by the Appellant. Respondent submissions herein above and proceed to dismiss the application dated 5/12/2023 with costs to the Appellant/Respondent.



### **Determination of Application Dated 5/12/2023**

39. Order 42 Rule 13 of Civil Procedure Rules provides that directions must have been given before an appeal can be dismissed for want of prosecution. Directions have not been issued herein as such thus this application is premature. This is persuaded by the holding in *Charles Kitwi v Peter, Ngola Mutua* [2020] eKLR where the High at Nairobi held as follows:

"The provisions of the law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any penalty where an appellant fails to proceed as per Order 42 Rule II and Order 42 Rule 13 of the Civil Procedure Rules, 2010"

40. This court is of the view that an appeal cannot be dismissed before directions have been given. As there were no indications directions had been given herein, the Appeal herein could not be dismissed under Order 42 Rule 35 (1) of the Civil Procedure Rules.
41. In any event, there was also no evidence that the Registrar had issued a notice under Order 42 Rule 12 of Civil Procedure Rules. There is also no indication that the lower court file and proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid. Notably, every person is entitled as envisaged under Article 50(1) of *the Constitution* of Kenya, 2010 to have a fair trial. The said Article 50(1) of *the Constitution* of Kenya attests to that vide

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

42. It therefore follows that every person ought not to be shut out from accessing court or having a day in court. Indeed, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction. It was therefore the considered view of this court that allowing the present application would be shutting out the Appellant from accessing the court and would be contrary to Article 50(1) of the Constitutions of Kenya.
43. The court is to be persuaded by the Appellant. Respondent submissions herein above and proceed to dismiss the application dated 5/12/2023 with costs to be in the main cause.

### **On the Application Dated 21/8/2023**

44. The application for dismissal has failed, the next application is for stay pending appeal.
45. The application for a stay of execution pending appeal dated 21/8/2023 sought a stay of the decree in Nyahururu CM's Court Civil Case No. 307/2021 of the value of Kshs. 4,520,000.
46. The same was supported by the Affidavit of Shelmith Ngure sworn on 21/8/2023 and grounds on the Notice of Motion application and another supplementary affidavit of the same person.
47. The Respondent Gilbert Masengeli swore an affidavit on 4/9/2023 to oppose the stay of application. The core issue in the application was whether the decretal amount IF paid to the respondent HE would be able TO refund the RESPONDENT in the event the appeal succeeds.
48. The respondent did not demonstrate the ability to refund the same if the appeal succeeded. The applicant showed appeal would be rendered NURGATORY if execution proceeds.



49. The parties were to canvass applications via submissions but on record, only appellant/Applicant filed submissions. The principles for granting a stay of execution are provided for under Order 42 Rule 6 (1) of the Civil Procedure Rules as follows:

“No appeal or a second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”

50. Order 42, rule 6 (2) states: “No order for stay of execution shall be made under sub-rule (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.”

51. In *Pauline Yebei & Another v estate of Kiprotich Letting represented by Andrew Kipkoech Kiprono* [2017] eKLR the Court of Appeal affirmed its decision in *Ishmael Kagunyi Thande Vs. Housing Finance Kenya Ltd., Civil Appln No. Nai 157 Of 2006 (Unreported)* where the court held as follows on the principles for stay of execution: -

“The jurisdiction of the Court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are well settled. For an applicant to succeed he must not only show that his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory.”

52. In *Hamisi Juma Mbaya v Amakecho Mbaya* [2018] eKLR it was held: -

“The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

Substantial loss may result to the applicant unless the order is made.

The application has been made without unreasonable delay, and

Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.”

53. For money decree stay of execution is only considered in special circumstances

54. In the case of *Ujagar Singh vs Runda Coffee Estates Limited* [1966] EA 263 it was held: -

“It is not normal for a court to grant a stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that



the amount payable under the decree being substantial, and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful.”

55. The Respondent bears the burden to show the capability to refund the amount in the decree if the appeal is successful.

56. In *Boniface Kariuki Wahome v Peter Nziki Nyamai & another* [2019] eKLR it was held:-

“In view of the foregoing, the evidential burden resides with the Respondents to prove that he is not a man of straw as alleged. None of the two Respondents in the instant case has made any attempt to discharge this burden. It is expected that a respondent would depone and show the means she has to refund the decretal sum. It is enough for the applicant to depone that they are not able to refund. He cannot be expected to dig deep into the financial standing of the respondents, which is for the respondent to produce and prove. The law is that as stated by the Court of Appeal in *National Industrial Credit Bank Limited -V- Aquinas Francis Wasike and Another* (UR) C.A. 238/2005, the evidential burden is on the respondent to prove that he can be refunded. I am of the view that the Respondent has not discharged the burden to prove that she has the resources to pay back the decretal sum. The Respondents merely stated that they are capable of repaying the decretal amount that the Court grants after hearing and determination of the Appeal if it exceeds the sum to be released to the Respondents.”

57. All in all, as the applicant offers to deposit part of the decretal amount in court, and the respondent has not shown the ability to refund the decretal amount in the event appeal succeeds, I find it fair to balance the interests of the parties by ordering the ksh 2 million proposed to be deposited to be shared as follows, ksh 1,000,000 be paid to the respondent within 30 days and the other ksh 1 million be deposited in interest-earning account in joint names of the parties advocates within 45 days.

58. The final orders are thus,

- i. Application dated 5/12/23 is dismissed with costs being in main cause.
- ii. The application dated 21/8/2023 is allowed on condition that ksh 1,000,000 be paid to the respondent within 30 days and the other ksh 1 million be deposited in an interest-earning account in joint names of the parties' advocates within 45 days.
- iii. In default of (ii) above execution to issue.
- iv. The appeal be heard on a priority basis.

**DATED, SIGNED, AND DELIVERED AT NYANDARUA ON THIS 11<sup>TH</sup> DAY OF APRIL 2024.**

.....

**CHARLES KARIUKI**  
**JUDGE**

