



Directline Assurance Company Limited v Wambui (Suing as legal administrator of the late James Njoroge Wathigo) (Civil Appeal 133 of 2023) [2024] KEHC 4197 (KLR) (15 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4197 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 133 OF 2023
PN GICHOHI, J
APRIL 15, 2024**

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED APPLICANT

AND

ESTHER WAMBUI RESPONDENT

**SUING AS LEGAL ADMINISTRATOR OF THE LATE JAMES NJOROGE
WATHIGO**

RULING

1. By a Notice of Motion dated 18/07/2023 filed under a certificate of urgency through the firm of Cootow & Associates Advocates and brought under Section 1A, 1B, 3A, 63 (e), 65 (1) (b) of the [Civil Procedure Act](#), Order 42 Rule 6 and Order 51 of the Civil Procedure Rules 2010, the Applicant seeks orders that:
 1. Spent
 2. Spent
 3. Pending the hearing and determination of this Appeal, there be a stay of execution of the judgment, decree execution order and all consequential orders in Nakuru Civil Case No. E659 of 2022 Esther Wambui (Suing as legal administrator of the late James Njoroge Wathigo (deceased) V Directline Assurance Company Limited.
 4. The costs of this application and other costs abide the outcome of the Appeal.
2. The Application is supported by the Affidavit sworn by Kelvin Ngure on 10/07/2023 as the Deputy Claims Manager of the Appellant/ Applicant. The main grounds are that:-



1. The Appellant has since filed an Appeal against the whole judgement made on 31/07/2023 which will be rendered nugatory unless the stay orders are granted.
 2. The Appellant is willing to give a security in form of a Bank Guarantee for due performance of the decree or order as shall be directed by this Court pending hearing and determination of the Appeal.
 3. No loss, damage and /or prejudice will be suffered by the Respondent as the Applicant is agreeable to abide by the terms imposed by this Court.
 4. The Application has been brought without unreasonable delay.
3. The Respondent has opposed this Application by a Replying Affidavit which she swore on 15/12/2023 and filed through the firm of Muchiri Gathecha & Co. Advocates. Terming the Application frivolous and vexatious, she depones that the Application is meant to deny her the fruits of her judgment for the reasons that :-
1. The Respondent filed a suit against the Appellant's insured vide Nakuru CMCC No. 912 of 2017 Esther Wambui (suing As Legal Administrator Of The Late James Njoroge Wathigo (deceased) V James Chege Thuo seeking damages under *Fatal Accidents Act* for the benefit of the Estate of the deceased, special damages of the sum of Kshs. 79,350/= . Costs of the suit and interest.
 2. The Appellant's insured failed to enter Appearance and therefore judgment was entered against him on 05/04/2018.
 3. The Appellant's insured failed to settle the said and as a result, the Respondent filed a declaratory suit against the Appellant's insured being Nakuru Civil Case No. E659 of 2022 Esther Wambui (Suing as legal administrator of the late James Njoroge Wathigo (deceased) V Directline Assurance Company Limited seeking a declaration order directing the Appellant judgment in the primary is bound to satisfy the judgment in the primary suit.
 4. The Appellant has not demonstrated that it will suffer substantial loss.
 5. Respondent does not believe the Appellant has a meritorious case against her.
4. In short, the Respondent urged the Court to dismiss the Application herein for not warranting stay of execution but only meant to deny her enjoyment of the fruits of her judgment.
 5. However, the Respondent urged that in event the Application is allowed, then the same be on condition that they deposit the entire decretal sum in an interest earning account in the joint names of the advocates for the parties.
 6. Further to that, the Respondent filed submissions dated 31/01/2024 emphasising on the contents of the replying affidavit and expounding on then conditions to be satisfied before stay is granted under Order 42 (6) (2) of the Civil Procedure Rules.
 7. On whether the Application has been brought without unreasonable delay, the Respondent submitted that the Application was brought two (2) months after the delivery of judgment and therefore the delay was unreasonable.
 8. On the on what constitutes a substantial loss, the Respondent relied on the case of James Wangalwa & another v Agnes Naliaka Chesoto [2020]eKLR and submitted that the Appellant has not discharged it burden.



9. On security for due performance of decree, the Respondent relied on the case of Arum C. Sharma vs Ashana Raikundalia t/a Raikunda & Co Advocates & 2 others [2014]eKLR among others and submitted that though the Appellant has offered a bank guarantee from a reputable bank, the Court is not bound on the type of security offered. She therefore urges the Court to make appropriate orders in the interest of justice, taking into account that money depreciates unless kept in an interest earning account for the period of Appeal.
10. For those reasons, he the Respondent urged that should the Court be inclined to grant stay, then it be on condition that the Appellant deposits in Court the entire decretal amount or alternatively, deposit the entire decretal sum in an interest earning account in the names of both the Appellant's and Respondent's advocates.
11. The Appellant relied on the Application and Replying Affidavit.

Determination

12. This Court has considered the application herein, and the Affidavits. It has also considered the submissions by the Respondent and the authorities cited therein and it is clear that parties appreciate the three conditions that the Applicant must meet in an application for stay of execution pending appeal as provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules, that is:-
 - i. The application must be brought without unreasonable delay.
 - ii. The applicant must demonstrate that they will suffer substantial loss unless the order sought is granted.
 - iii. The applicant must furnish 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.
13. This Application was brought about two months after delivery of the judgment and High Court granted conditional stay on 20/07/2023 for inter-partes hearing on 25/09/2023 and it was complied with. Those orders were again extended or mention on 27/11/2023. When they appeared before this Court as scheduled, parties could not agree to compromise on the matter and proceed with the main appeal.
14. While that was the proposal by the Appellant having deposited the Bank Guarantee, the Respondent argued that the orders were granted ex-parte and therefore urged that the Appellant deposits half of the decretal amount in a joint interest earning account. That led to the extension of orders and directions on filing the Replying Affidavit and the submissions herein referred.
15. This Court does not have the lower Court file to confirm if stay was granted immediately after delivery of judgment or not. From the annexures, there is no doubt that the Appellant filed a Memorandum of Appeal on 29/06/2023 against the judgment delivered on 31/05/2023. That was a period of one month. The execution proceedings commenced about two weeks after filing of the Memorandum of Appeal. In the circumstances herein, it cannot be said that the delay is inordinate.
16. On the second issue, the Appellant stated on the body of the certificate of urgency that the Appellant will suffer irreparable injury if stay of execution is not granted for reasons that the amount sought is Ksh. 2,501,304/= which amount is quite substantial.
17. In the Supporting Affidavit, the Appellant states:- "In the event that the Appeal succeeds, the Respondent most probably not be in a position to compensate the Applicant of the losses that may



be incurred and/or the amounts worth of any movable properties that may be impounded and sold to satisfy an execution order issued as the Respondent is not a woman of means.”

18. Regarding the burden on the parties, the Court of Appeal in *Superior Homes (Kenya) Limited vs Musango Kithome* [2018] eKLR had this to say:-

“... the issue of substantial loss is the cornerstone of both jurisdictions ...The law, however appreciates that it may not be possible for the applicant to know the Respondent’s financial means. The law is therefore that all an Applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum.”

19. Despite that averment by the Appellant, the Respondent herein did not show that she was in a position to refund this money and therefore should not be kept out of her money. She has failed to discharge the evidential burden.
20. On security for costs, there is no dispute that the Appellant has deposited a bank decree in a reputable bank. Since the security is already in place in terms of a bank guarantee pursuant to the orders issued pending hearing and determination of this Application, it is for good order that this Court maintains it in the circumstances .
21. Consequently :-
1. The Bank Guarantee deposited by Applicant for the entire decretal sum to remain as a condition for stay of execution pending hearing and determination of this Appeal
 2. The costs of this Application to abide the outcome of the Appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 15TH APRIL, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Ms Omolo for Appellant/ Applicant

Ms Soi for Mr. Gathecha for Respondent

Ruto- Court Assistant

