



Okeyo v Metropolitan Cannon (Formerly Known as Cannon Assurance Limited); Kimani (Interested Party) (Civil Case E017 of 2022) [2024] KEHC 3806 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3806 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL CASE E017 OF 2022**

**FR OLEL, J
APRIL 12, 2024**

BETWEEN

JOSEPH OBOSI OKEYO APPLICANT

AND

METROPOLITAN CANNON (FORMERLY KNOWN AS CANNON ASSURANCE LIMITED) RESPONDENT

AND

KENNETH WAGEMAMA KIMANI INTERESTED PARTY

RULING

1. The application before this court for determination is the Notice of Motion application dated 28th August 2023 brought pursuant to provisions of Section 3A of the *Civil Procedure Act*, Order 42 Rule 6(2), & Order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers (1) and (2) of the said application are basically spent and the main prayers sought are prayers (3) and (4) for stay of execution of the decree dated 17th March 2022, issued in Mavoko CMCC No 300 of 2016, and that the costs of and incidental to this Application be provided for.
2. This application is supported by the grounds on the face of the said application and the affidavit of the Appellant dated 28th August 2023, while the respondent opposed this application through the replying affidavit dated 10th November 2023 sworn by one Brendah Kemunto, the advocate of the interested party.
3. The Applicant averred that Hon Stephen Jalang'o Principal Magistrate delivered his judgment dated 17th March 2022 in Mavoko CMCC No 300 of 2016 and he had filed a declaratory suit seeking to compel his insurer to satisfy the said judgment in light of section 10 of the *Motor vehicle Third party Risks*, Cap 405 Laws of Kenya. On 23rd August 2023, he had been served with warrants of attachment and proclamation requiring him to settle the decretal sum, accrued interest, costs of the suit and



auctioneers fee all totaling of Kshs.539,942/= within 7 days failure of which his goods would be sold to satisfy the decree. The applicant further averred that it would only be fair and just to grant the orders sought to avoid him incurring substantial loss.

4. The interested party did oppose this application through the Replying Affidavit filed by one Brendah Kemunto Advocate. She deponed that they had granted the applicant over one year to settle the decree and he had failed to do so and therefore to be granted stay execution orders at this point would be unfair and unjust to the interested party who had been deprived of the fruits of judgment for a long period of time. The applicant had not shown the court what substantial loss he would suffer, if he paid out the decretal sum to the interested party and that the filing of a declaratory suit did not in law bar the interested party from executing the decree issued. The interested party thus urged the court not to grant the orders sought and direct the applicant to settle the decree and seek indemnity from his insurance company.
5. In the alternative, if the court was inclined to grant and order of stay pending appeal, the Interested party urged the court to order the applicant to deposit the entire decretal sum as security for due performance of the decree in the interested party Advocate account. The interested party urged this court to find that the application was not merited and prayed that it be dismissed with costs.

Analysis & Determination

6. I have carefully considered this Application, its Supporting Affidavit, the Respondent's Replying Affidavit and the only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay pending appeal.
7. Stay of execution pending appeal is governed by Order 42 Rule 6 of the *Civil Procedure Rules*. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant. See *Amal Hauliers Limited v Abdulnasi Abukar Hassan* (2017) eKLR & *Butt v Rent Tribunal* (1982) KLR 417.
8. On the likelihood of suffering substantial loss, and security of the appeal, The court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of his judgment. In other words, the court should not only consider the interest of the Applicant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of his judgment. See *Attorney General v Halal Meat Produces Limited* Civil Application No. Nairobi 270 of 2008; *Kenya Shell Ltd v Kibiru & another* (Supreme); *Mukuma v Abuoga* (1988) KLR 645.
9. The law is that where the Applicant succeeds, he/she should not be faced with a situation in which he would find himself unable to get back his money. Likewise, the Respondent who has a decree in his favour should not, if the applicant is eventually unsuccessful in his intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. See Court of Appeal in *Ndubiu Gitabi v Warugongo* (1988) KLR 621; IKAR 100;(1988-92) 2 KAR 100.
10. Unfortunately for the Applicant herein, there is no appeal filed as against the Judgment of Hon Stephen Jalang'o (PM) dated 17th March 2022. secondly the applicant will be paid and/or be indemnified by his insurer should he settle the decretal amount and a such there is no substantial loss, which he will suffer and which cannot be compensated. The court sympathizes with the Applicant as he has been exposed to a precarious situation by failure of his insurer to indemnify him, but the



courts hands are tied. The applicant has obviously failed to satisfy the condition's for granting stay of execution as provided for under Order 42 rule 6 of the civil procedure code.

11. The Applicant may also wish to take refuge Article 159(2)(d) of the Constitution , but as stated in In Raila Odinga v. I.E.B.C & others (2013) eKLR He is not a panacea for all procedural ills. In the said citation, the Supreme court did observe that;

“ Article 159(2) (d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.”

Disposition

12. The long and short is that , I do find that the Application dated 28th August 2023 lacks merit and the same is dismissed with costs to the Respondent.

13. It is so ordered.

RULING WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 12TH DAY OF APRIL, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 12TH DAY OF APRIL, 2024

In the presence of:

Mrs Maina for Appellant

Ms Nyakera for Respondent

Sam Court Assistant

