



Kenya Agricultural Research Institute ((As Taken Over by Kenya Agricultural and Livestock Research Organization) v Mutie (Suing as the Legal Representative of the Estate of Kennedy Muendo Mativo - Deceased) ((Suing as the Legal Representative of the Estate of Kennedy Muendo Mativo-Deceased)) (Civil Appeal E024 of 2024) [2024] KEHC 6762 (KLR) (7 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6762 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E024 OF 2024**

FR OLEL, J

JUNE 7, 2024

BETWEEN

KENYA AGRICULTURAL RESEARCH INSTITUTE (AS TAKEN OVER BY KENYA AGRICULTURAL AND LIVESTOCK RESEARCH ORGANIZATION APPELLANT

(AS TAKEN OVER BY KENYA AGRICULTURAL AND LIVESTOCK RESEARCH ORGANIZATION

AND

JAMES MATIVO MUTIE RESPONDENT

(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KENNEDY MUENDO MATIVO-DECEASED)

RULING

A Introduction

1. The application before this court for determination is the Notice of Motion application dated 6th February 2024 brought pursuant to provisions of Section 1A, 1B, 3 3A of the *Civil Procedure Act*, Order 42 Rule 6(1)&(2) 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 prayer sought is prayer (3) that;
 - (c) That pending hearing and determination of this Appeal, this Honourable court be pleased to issue an order of stay of execution of the judgement and decree in Machakos CMCC 551 of 2021, James Mativo Mutie(suing as the legal representative of the estate of Kennedy Muendo-deceased) vs. Kenya Agricultural Research Institute
 - (d) That costs of this Application abide the outcome of the Intended Appeal.



2. The application is supported by the grounds on the face of the said application and the supporting affidavit of one Patricia Ngutu, while it has been opposed by the Respondent, who filed a replying affidavit dated 22nd February 2024 sworn by himself.

B. The Application

3. The applicant averred that it insured its motor vehicle registration number KCD 361 G Mitsubishi Double Cabin (Hereinafter referred to as the suit Motor vehicle) with M/s Africa Merchant Assurance Company Limited pursuant to provisions of the Insurance Motor vehicle (Third party Risks) Act, Cap 405 laws of Kenya and out of use of the said suit vehicle, it was involved in a road accident on 12th October 2018. The accident became subject of litigation under Machakos CMCC No 551 of 2021 (Hereinafter referred to as the primary suit) filed by the respondent (plaintiff) against the appellant, wherein he sought compensation for loss suffered by the death of his son. That, though informed, its insurer, AMACO declined to defend the suit on its behalf under the doctrine of subrogation and ultimately the suit was decided in favour of the respondent.
4. The appellant further averred that, they filed a declaratory suit (Machakos CMCC No E430/2023- herein after referred to as the secondary suit) seeking to compel AMACO to meet its statutory obligations and settle the judgement and decree issued in Machakos CMCC No 551 of 2021 and simultaneously sought for stay of execution of the decree issued in the primary suit pending determination of the secondary suit. The said application was urged on merit and vide a ruling delivered on 02.02.2024, the same was dismissed, hence this Appeal. This the appellant argued exposed them to execution, of the decretal sum in the primary suit by the respondent and would render the appeal filed to be an academic exercise, and ultimately exposing them to substantial and irreversible loss.
5. The appeal as filed raised several arguable issues worthy of consideration by this court exercising its appellate jurisdiction and it was only just and fair to have it urged on merit. The primary judgment had condemned the appellant to pay the respondent a sum of Ksh.1,316,850/= plus costs and interest and if compelled to pay, they would be exposed to substantial loss. They were therefore willing and able to deposit security as the court deems fit and/or abide by any stay conditions the court deems fit.

C The Response

6. This application was opposed by the Respondent who averred that the same that the same was frivolous, vexatious and constituted an abuse of the court process. He had a valid judgement/decree issued in the primary suit and which the applicant had not been appealed against. It was therefore clear the provisions of Order 42 rule 6 of the *civil procedure rules* were not applicable and there was no basis of granting stay of execution. Further the respondent emphasized that he was not privy to any agreement between the applicant herein and its insurers and their contractual dispute cannot be a basis for denying him a right to enjoy the fruits of his judgement.
7. The Applicant had not demonstrated any substantial loss they would suffer if the decretal sum in the primary suit was paid, and further applicant has instituted a declaratory suit against the insurer and would have an opportunity to recover any sums paid out through the said suit. Finally, the applicant had not demonstrated any good faith in offering security for the Appeal and therefore prayed that this Application be dismissed.

C. Submissions

8. The appellant filed its submissions dated 27th February 2024 and submitted that conditions for granting stay of execution are provided for under Order 42 Rule 6(2) of the *civil procedure Rule*.



The respondent had obtained judgement in the primary suit, resulting in them filing the declaratory (secondary suit) where they sought for stay of the decree issued in the primary suit pending its hearing and determination. The same was heard and dismissed hence this Appeal.

9. There is no doubt that they had filed a declaratory suit to compel their insurer AMACO to pay the decretal sum issue by the primary suit and so as not to render this appeal to be a mere academic exercise, it was necessary to stay execution of the primary decree. The appeal as filed raised triable issues which merited full determination by the court. The converse would be that the Appellant would be rendered to be a pious explorer in the judicial system, who would have succeeded on appeal, only to have a barren decree incapable of being enforced or executed. Reliance was placed on *Jeraiyo Vrs SO (Minor suing through SOO)* (Civil Appeal No 186 of 2022), {2023}KEHC 20434(KLR) & *UAP Insurance Company Ltd Vrs Justus Moseti Oketch* (2022) Eklr.
10. The appellant further submitted that they were willing to provide security by depositing the decretal sum pending hearing and determination of the Appeal and therefore the appellant would not be prejudiced since in the event the appeal was not successful, he could have the security released to him. The balance of convenience too favored granting of the orders of stay of execution pending appeal as sought. The Appellant therefore prayed that this Appeal be allowed.
11. The respondent filed their submissions in opposition to this application dated 6th February 2024 and submitted that the appellant had not demonstrated the arguability of the intended Appeal as he was not privy to the contractual relationship between the Appellant and his insurer. The Appellant was appealing against the ruling dated 02.02.2024 and not as against the judgment/decreed issued in the primary suit dated 31.10.2023 and therefore there was no basis under Order 42 Rule 6 of the *civil procedure rules* to stay the said Judgment. Reliance was placed on *Kassam Hauliers Limited Vrs Mezgebu Gatachew Mammo* (2022) Eklr, where it was held that provisions of the said Order 42 rule 6 of the civil procedure Rules, could not be used to apply for stay of a decree not Appealed against.
12. The respondent further submitted that the Appellant had not demonstrated that they would suffer substantial loss, should they settle the decretal sum as they could recover the same from their insurer AMACO, when they succeeded in the declaratory suit. Reliance was placed on the courts finding in “Kassam Hauliers (supra),” where it was held that statutory right of action does not bar a person injured from executing a decree issued in his favour directly, even if a declaratory suit had been filed.
13. The respondent therefore prayed that this court finds that this Application is not merited and proceed to dismiss the same with costs.

D. Analysis & Determination

14. I have carefully considered the Application, Supporting Affidavit, the Respondent’s Replying Affidavit and written submissions filed by both parties and discern that the issue which arise for determination is whether

a. Whether this court should grant stay of execution of the Judgment/Decree issued in Machakos CMCC No 551 of 2021.

15. 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 *Butt Vs Rent Restriction Tribunal* (1982) KLR 417 and *James Wangalwa & Another Vs Agnes Nalika Chereto* (2012) eKLR)
16. The case of *Masis Mwita vrs Damris Wanjiku Njeri* (2016) eKLR provided the guiding principles which the court should consider while determining an application of this nature. These were;
- a. The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - b. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not to be rendered nugatory should that appeal court reverse the judge’s discretion.
 - c. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
 - d. The court in exercising the discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the cases and unique requirements.
17. This Appeal arises from the ruling dated 02.02 2024 relating to the court’s refusal to grant stay of execution. Though the Appellant has undoubtable, the right to Appeal as against the said ruling, the order issued therein is a negative order incapable of being executed and therefore there is nothing to stay. In *Kaushik Panchamatia & 3 others Vs Prime Bank Limited & Ano* (2020) Eklr, the court of appeal stated that;
- “that a negative order is incapable of being stayed because there is nothing to stay. It therefore follows that in light of the above threshold we have no mandate to grant stay order in the manner prayed for by the applicants”
18. Secondly the Appellant seeks to stay execution of the Judgement/ decree issued in Machakos CMCC No 551 of 2021 dated 30.10.2023. There in no Appeal filed challenging the said decree and that being so, it is obvious that this court is divested of jurisdiction to further consider the other parameters as to whether stay of execution should be granted with respect to the said decree.
19. Finally, even if the court were to consider the said application in light of the “oxygen principles” the Court still has to weigh the likely consequences of granting the stay or not, and in doing so lean towards a determination which is unlikely to lead to an undesirable or absurd outcome.
20. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman vs. Amboseli Resort Limited* [2004] 2 KLR 589.
21. The applicant expressly acknowledges in their pleading that they do not have any issue with the decree dated 30.10.2023, issued in Machakos CMCC No 551 of 2021. Their only problem was with their insurer who had failed to settle the same under the principle of subrogation. In this instant ,it is obvious that it is the respondent who will be more inconvenienced as he has a valid decree, and should not be keep waiting as the appellant and his insurer fights over their contractual obligation to which he is not a party. The appellant too, as shown in the garnishee proceeding has the financial capacity to pay the



decree. The said amount is not too astronomical to rendered then financially handicapped by settling the same.

E. Disposition

22. Taking all relevant factors into consideration I do find that the application under consideration is bereft of merit and dismiss the same with costs to the respondent

23. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 7TH DAY OF JUNE, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 7TH DAY OF JUNE, 2024

In the presence of:-

Mr. Ng'ethe for Appellant

Mr. Mundia for Respondent

Sam Court Assistant

