



**Directline Assurance Co. Ltd v Nyanje (Civil Appeal
E20 of 2024) [2024] KEHC 8630 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8630 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E20 OF 2024**

**SM GITHINJI, J
JULY 10, 2024**

BETWEEN

DIRECTLINE ASSURANCE CO. LTD APPELLANT

AND

KATANA JOHN NYANJE RESPONDENT

RULING

Representation:

Cootow & Associates Advocates for the Appellant/Applicant

Mr Kilonzo Advocate for the Respondent

1. The Applicant filed a Notice of Motion dated 29th February 2024 seeking the following orders;
 1. Spent.
 2. Spent.
 3. That pending the hearing and determination of this appeal, this honourable court be pleased to issue an order for stay of execution of the ruling and judgment of the subordinate court in Malindi CMCC No. E238 of 2023 Katana John Nyanje alias Katana Mbudzi versus Directline Assurance Co. Ltd delivered on 28th July 2023.
 4. That cost of the application be in the cause.
2. The application is founded on the grounds on its face and the supporting affidavit of Kelvin Ngure the deputy claims manager of the Applicant who deponed that the Respondent herein instituted a declaratory suit against the Appellant vide Malindi CMCC No. E238 of 2023 seeking to enforce the judgment in the primary suit for the sum of Kshs. 437,020/= . That the appellant entered appearance and filed its statement of defence dated 4th September 2023 in which the Appellant raised a substantive



triable issue. It was stated that the respondent then filed an application dated 22nd September 2023 seeking to strike out the Appellant’s statement of defence and that judgment be entered against the Appellant herein in the sum of Kshs. 437,020/=. That the subordinate court delivered a ruling dated 7th February 2024 allowing the respondent’s application which the appellant herein was dissatisfied with and lodged the instant appeal thus the stay orders sought.

3. The Respondent filed a replying affidavit sworn by Geoffrey Kilonzo counsel for the Respondent stating that there are no orders capable of being granted and that the Applicant has not demonstrated that they meet the conditions for stay of execution.

Disposition

4. The application was disposed of by way of written submissions. I have considered the rival affidavits, the submissions by the parties as well as the authorities relied on. The issue for determination is whether the order sought for stay of execution is merited.
5. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:

“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.
6. In addition, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay, in light of the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#), is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions.
 7. Section 1A(2) of the [Civil Procedure Act](#) provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
 8. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See [Antoine Ndiaye v African Virtual University](#) [2015] eKLR.
 9. As to what substantial loss is, it was observed in [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR, 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.”

10. In the instant case, the Applicant seeks stay of execution of the judgment delivered on 28th July 2023 as per prayer no 3 on the face of the application. I do note that there was a declaratory suit that was filed in the lower court to which the Appellant herein entered a defence. The said defence was struck out vide the ruling dated 7th February 2024 and judgment entered for the plaintiff as sought in the plaint. Given that the matter involves a money decree of Kshs. 437,020/= and the applicant have not shown that if paid and it succeeds on appeal the Respondent would be unable to refund the same, it has failed to satisfy this court that it stands to suffer substantial loss unless the order sought is granted. For the reason the application fails and is hereby dismissed with costs to the Respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 10TH DAY OF JULY, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of: -

1. Ms Onsongo holding brief for Ms Osewe for the Applicant
2. Mr Kilonzo is for the Respondent

Mr Kilonzo; - I apply the money deposited in Court be released to the Respondent’s Advocate.

Ms Onsongo; - I have no instructions on such. I pray for mention to consult before it is released.

Court; - The effect of the Ruling is that execution follows. The amount was deposited as security for the said purpose. It’s suitable it be released to the Respondent.

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S.M. GITHINJI

JUDGE

10/7/2024

