



Dhanjal Investments Limited t/a Travellers Mwaluganje v Fidelity Shield Insurance Company Ltd (Civil Suit 39 of 2016) [2023] KEHC 2000 (KLR) (10 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2000 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 39 OF 2016
OA SEWE, J
MARCH 10, 2023**

BETWEEN

**DHANJAL INVESTMENTS LIMITED T/A TRAVELLERS
MWALUGANJE PLAINTIFF**

AND

FIDELITY SHIELD INSURANCE COMPANY LTD DEFENDANT

RULING

1. This ruling is in respect of the defendant's Notice of Motion dated August 13, 2021. The said application was brought pursuant to the provisions of Section 1A, 1B & 3A of the *Civil Procedure Act*; Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules, 2010*. The defendant thereby seeks that:
 - (a) Spent.
 - (b) Pending the hearing and determination of the intended appeal to the Court of Appeal, this Honourable Court be pleased to grant a stay of execution of the judgment and decree of this court delivered on June 10, 2021, and all consequential proceedings.
 - (c) Costs of this Application be provided for.
2. The application was premised on the grounds that the plaintiff filed this suit against it asserting a total loss arising from a fire incident in respect of which it sought judgment in the sum of Kshs 78,000,000/= being part of the sum assured under a Fire Policy it had with the defendant. The Court found in favour of the plaintiff in its judgment dated June 10, 2021 and awarded the plaintiff Kshs 68,000,000/=. It was further asserted by the defendant that, being aggrieved with that judgment, it filed a Notice of Appeal on June 15, 2021 and requested for typed proceedings. It therefore contended that, unless a stay of execution pending appeal is granted, there is a real and immediate risk that the plaintiff will take steps to execute the decree; in which event, it risks suffering irreparable harm as the plaintiff, by its



own admission, has no other asset. The defendant expressed confidence that it has an arguable appeal with good prospects of success. It added that it is a reputable insurance company and is ready and able to furnish security for the due performance of the decree.

3. The application was supported by an affidavit sworn on August 13, 2021 by the defendant's Claims Manager, Mr Sammy Kamau Wanjiku in which the foregoing grounds were explicated. The defendant also annexed pertinent documents to its Supporting Affidavit, such as, copies of the Notice of Appeal and the letter requesting for proceedings. Also annexed, at pages 30 to 32, was a draft Memorandum of Appeal, among other documents. Mr Kamau concluded his averments by stating, at paragraph 12 thereof, that the defendant will abide by such terms as the Court may impose as to security for the due performance of the decree, taking into account the interests of the parties and the justice of the case.
4. The application was canvassed by way of written submissions. Hence, on behalf of the defendant, Mr Mugambi filed his written submissions on January 17, 2022. He relied on Order 42 Rule 6(2) of the Civil Procedure Rules and endeavoured to demonstrate that the conditions set thereby for stay of execution have been duly satisfied by the defendant. For instance, on substantial loss, Mr Mugambi relied on [*Tononoka Rolling Mills Limited v James Kilonzo Peter \[2019\] eKLR*](#) to support his argument that the evidential burden shifted to the plaintiff to prove that it is capable of refunding the decretal sum if need be. In his view that burden was not discharged.
5. It was further the submission of Mr Mugambi that the instant application was filed without unreasonable delay; granted that judgment was delivered on June 10, 2021, whereupon the defendant made an informal application for stay of execution which was granted for 21 days. It then proceeded to file a Notice of Appeal together with a request for typed proceedings on June 15, 2021, within 5 days of the date of judgment. Counsel also reiterated the defendant's stance as to security, including the proposal for a bank guarantee for Kshs 6,800,000 or such sum as the Court may direct to be a reasonable proportion of the decretal sum as a condition for stay. He cited [*Focin Motorcycle Co Ltd v Ann Wambui Wanguui & Another \[2018\] eKLR*](#) and [*Gitabi & Another v Warugongo \[1988\] KLR 621*](#).
6. Mr Mugambi urged that, although not expressly provided for under Order 42 Rule 6 of the Civil Procedure Rules, the Court ought to consider the fact that the defendant has an arguable appeal based on the grounds set out in the draft Memorandum of Appeal. He made reference to the case of [*Obadiab Mugambi v Joyce Ncoro \[2021\] eKLR*](#) to buttress his argument.
7. On behalf of the plaintiff, Mr Buti relied on his written submissions filed on January 20, 2022. His approach was that, as an insurer, the defendant is fully re-insured and therefore cannot be heard to argue that it stands to suffer substantial loss, without disclosing the extent, in monetary terms, to which it is re-insured; the sum of monies that the re-insurer will have to pay on its behalf in this claim; and the amount, if any that the defendant would be required to pay directly on its own. He argued that such disclosure would enable the Court to assess and determine whether the allegations that the defendant stands to suffer substantial loss have any factual foundation.
8. Mr Buti further submitted that it is highly unrealistic and unpractical for the defendant to offer security in the sum of Kshs 6,000,000/= in respect of a decree now standing in excess of Kshs 100,000,000/=; and urged the Court to determine what would amount to reasonable security in the circumstances. Counsel relied on [*Machira & Company Advocates v East African Standard \(No 2\) \[2002\] 2 KLR 63*](#) in urging the Court to find that, this being a money decree, the plaintiff should not unnecessarily or unduly be kept away from enjoying the fruits of its litigation. He consequently prayed for the dismissal of the application dated August 13, 2021 with costs.



9. In the light of the foregoing, the only issue that arises for determination is whether an order of stay of execution should be granted against the court's judgment delivered on the June 10, 2021. The conditions for grant of stay of execution pending appeal are provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules, the relevant part of which states as follows:
- (2) 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.
10. From the above provision, an applicant therefore needs to satisfy the Court that substantial loss may ensue unless stay is granted; that the application has been made without unreasonable delay and that the applicant is ready to fulfill such requirements by way of security for the due performance of the decree as may be ordered by court.

On Substantial Loss:

11. The general position as to substantial loss was discussed in the case of *Kenya Shell Limited vs Kibiru [1986] KLR 410*, by Platt, Ag JA (as he then was) at page 416 as follows:
- ' It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.'
12. In the same vein, Gachuhi, Ag JA (as he then was) held, at 417:
- ' It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.'
13. The defendant contends that it risks suffering substantial loss unless stay is granted, for the reason that the plaintiff has not discharged its evidentiary burden to show that it is capable of refunding the decretal sum if need be. It is true that, because the plaintiff opted to rely on its Grounds of Opposition, it missed out on the opportunity to demonstrate that it is indeed the owner of the hotel known as Travellers Beach Hotel, and its value. Instead, the plaintiff was content to rely on the evidence earlier tendered before the court in cross-examination. The plaintiff was under obligation to satisfy the Court, for purposes of the instant application, that indeed it is in a position to refund the decretal sum in the event the the appeal turns out successful. The Court of Appeal made this point in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR* thus: -
- ' This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a



respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge — see for example section 112 of the [Evidence Act](#), Chapter 80 Laws of Kenya.'

14. I am therefore satisfied that, granted the amount of money involved, it was imperative that an affidavit of means be availed by the plaintiff to satisfy the Court that it is in a position refund the decretal sum if need be. Having failed to discharge its evidentiary burden of proof, I would find, as I hereby do, that the defendant has indeed demonstrated that it stands to suffer substantial loss unless stay of execution is granted.

On whether the application was made without unreasonable delay:

15. There is no dispute that a Notice of Appeal was filed herein on the June 15, 2021, within five (5) days of the delivery of the judgment. There is also no dispute that the defendant applied for a copy of the Judgment and the proceedings for purposes of appeal within the same period of time. A perusal of the court proceedings further confirm that, on June 10, 2021 when the Court delivered its judgment, it granted the defendant 30 days' stay of execution. That period lapsed on or around July 10, 2021. The application herein was thereafter filed on August 19, 2021. The Court in the case of [Jaber Mohsen Ali & another v Priscillah Boit & another \[2014\] eKLR](#) held: -

' The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir Eldoret E&L 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.'

16. In the circumstances hereof, I am not convinced that there was unreasonable delay.
17. On security for costs, the applicant at paragraph 11 of Sammy Kamau Wanjiku, averred that they are ready and willing to fulfil any security requirements that will be set by court for the due performance of the decree. A proposal was accordingly made for a bank guarantee for Kshs 6,800,000.00/= or any such sum as may be directed by court being a reasonable portion of the decretal amount as a condition of the stay of execution pending appeal. I agree with the plaintiff that the offer is not commensurate with the purpose for which security is required. In the case of [Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others \[2015\] eKLR](#) held: -

' The security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The Rule does not, therefore envisage just any security. The words 'ultimately be binding' are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost, that is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6(2) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted – which is seldom. The security to be given is measured on that yardstick.'



18. Similarly, in the case of *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd [2019] eKLR*, the court held: -

' The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.'

19. It is trite that security should always be available for the purpose that it was intended and the court in *Gianfranco Manenthi (supra)* further held: -

' Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal. In *Arun C Sharma -V- Ashana Raikundalia T/A Rairundalia & Co Advocates Justice Gikonyo* the Court stated that:

'The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor. Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.'

Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine.'

20. In the result, I find merit in the defendant's application dated June 13, 2021. The same is hereby allowed and orders granted as hereunder:

- (a) An order of stay of execution be and is hereby granted in respect of the judgment of the Court delivered herein on August 10, 2021 together with all its consequential proceedings pending the hearing and determination of the intended appeal to the Court of Appeal on condition that half of the decretal amount be deposited by the defendant in an interest earning account in the joint names of counsel on record herein within 45 days from the date hereof.
- (c) The costs of the application to abide the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 10TH DAY OF MARCH 2023



OLGA SEWE
JUDGE

