



**Britam General Insurance Kenya Limited v Odinga (Civil Appeal  
E305 of 2022) [2023] KEHC 3858 (KLR) (Civ) (2 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3858 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E305 OF 2022**

**JN MULWA, J**

**MAY 2, 2023**

**BETWEEN**

**BRITAM GENERAL INSURANCE KENYA LIMITED ..... APPLICANT**

**AND**

**GEORGE OTIENO ODINGA ..... RESPONDENT**

**RULING**

1. Before the court is a Notice of Motion application dated 17<sup>th</sup> May 2022 brought under Section 1A, 1B, 3A, 79G and 95 of the *Civil Procedure Act*, Order 42 Rule 6 of the *Civil Procedure Rules*, and the Inherent Power of the Court. The Appellant/ Applicant seeks the following Orders:
  1. Spent.
  2. Spent.
  3. Spent.
  4. That pending the hearing and final determination of the Appeal herein, this Honourable Court be pleased to issue an order for stay of execution of the Judgment and final orders of Insurance Appeals Tribunal in Insurance Appeal Tribunal Case No. 4 of 2022 delivered on 4<sup>th</sup> May 2022.
  5. That the Appellant be at liberty to apply for further Orders and/or Directions as this Honourable Court may deem fit and just to grant.
  6. That the costs of this application do abide the outcome of the appeal.
2. The application is premised on the grounds set out on the face of the motion as well as the supporting and further affidavits of its legal specialists, Linda Mukami - Koigi and Hope Wangechi Wambugu.



3. The Respondent opposed the application through a Replying Affidavit sworn on 30<sup>th</sup> June 2022.
4. The court has considered the parties respective affidavits in support of and in opposition of the application as well as their respective written submissions. The only issue is whether the Applicant has satisfied the conditions for the grant of stay of execution orders pending appeal.
5. The conditions necessary for the grant of stay of execution pending appeal are laid out in Order 42 Rule 6(1) & (2) of the [Civil Procedure Rules](#) which provides that:

“6.

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under sub-rule (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. From the above provisions, it is clear that in order to succeed in an application for stay of execution in this Court, an applicant must demonstrate: that substantial loss may result unless the order of stay is issued; that the application has been brought without undue delay; and, must give security for the due performance of any decree or order that may ultimately be found to be binding on the applicant.
7. As regards substantial loss, the Appellant avers that the Respondent has threatened to levy execution of the impugned Judgment and orders against it. However, it is apprehensive that if the substantial judgment sum of Kshs. 7,150,000/- is paid to the Respondent before the appeal is determined, it will have the effect of crippling the Applicant’s business of providing insurance to its policyholders. Further, it contends that the Respondent may not be able to refund the same in the event that the appeal succeeds thus exposing the Applicant to great hardship and rendering its appeal nugatory.
8. 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; see [James Wangalwa & another v Agnes Naliaka](#) [2012] eKLR. However, it is well settled that once an Applicant expresses a reasonable fear that the Respondent



would have difficulties in refunding the decretal sum, the evidential burden shifts to the Respondent to demonstrate his ability by way of Affidavit evidence as that is a matter which is peculiarly within his or her knowledge; see *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR. The Respondent herein has not discharged this burden and thus the court is satisfied that the Appellant stands to suffer substantial loss if stay is not granted.

9. The court is also satisfied that the application was brought timeously and without undue delay. The impugned judgment was delivered on 4<sup>th</sup> May 2022 and the application was filed a few days later on 17<sup>th</sup> May 2022.
10. The court also finds that the Applicant has satisfied the third condition on security as it has expressed readiness and willingness to abide by any conditions and terms that the Court may deem fit to impose for the grant of the stay orders sought. The Applicant has proposed to provide security in the form of a Bank Guarantee. On the other hand, the Respondent proposes that the Applicant be ordered to deposit the entire decretal sum in an interest earning account in the names of the party's advocates within thirty (30) days of the ruling. In the circumstances of this case, and the no doubt ability of the applicant to pay the decretal sum or satisfy the decretal sum should its appeal not be successful, I am satisfied that a bank guarantee as proposed by the applicant is good security.
11. For the foregoing, the court allows the Applicant's Notice of Motion dated 17<sup>th</sup> May 2022 upon the Applicant complying with the following conditions:
  1. The decretal sum of Kshs. 7,150,000/- shall be secured by a Bank guarantee from a reputable bank drawn in favour of the Respondent within 35 days from date of this ruling.
  2. In default of order (1) above, the stay orders shall lapse automatically.
  3. The Respondent shall have the costs of the application.

Orders accordingly.

**DATED, DELIVERED AND SIGNED IN NAIROBI THIS 2RD DAY OF MAY 2023.**

**JANET MULWA**

**JUDGE**

