



**Kenya Orient Insurance Co Ltd v Mwangi (Civil Appeal E142 of 2023)
[2023] KEHC 23684 (KLR) (16 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23684 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E142 OF 2023
FR OLEL, J
OCTOBER 16, 2023**

BETWEEN

KENYA ORIENT INSURANCE CO LTD APPELLANT

AND

CHRIS KINUTHIA MWANGI RESPONDENT

RULING

A. Introduction

1. The application before this court is the Notice of Motion application dated 20th June 2023 brought pursuant to provisions of Section 1A, 3A & 79G of the *Civil Procedure Act*, Order 42 Rule 6(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 that there be stay of execution pending hearing and determination of the appeal filed. The application is supported by a supporting affidavit of Catherine Kendi dated 20th June 2023.
2. This application is opposed by the Respondent who filed a Replying Affidavit's dated 23rd September 2023 .The facts in this application are not in contention as the respondent has a decree of Kshs 466,448.18/= awarded to him on 5th June 2023, which the appellant seeks to set aside

B. Analysis & Determination

3. I have carefully considered the Application, 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.
4. 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)

5. In 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.
6. The appellant is obviously aggrieved, by the judgment delivered and did file this appeal promptly and the grounds of appeal do disclose arguable grounds. The decretal amount is a tidy sum and no affidavit of means has been filed by the respondent to show that indeed if the said sum is released to him, he will be in a position to refund the same should the appeal succeed.
7. In determining this application, 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 Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of her judgment. See *Attorney General Vs Halal Meat Produces Limited Civil Application No. Nairobi 270 of 2008*; *Kenya Shell Ltd Vs Kibiru & another* (Supreme); *Mukuma Vs Abuoga* (1988) KLR 645.
8. The law is that where the Applicant succeeds, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the Respondent who has a decree in his favour should not, if the applicant is eventually unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.
9. This issue of adequacy of security was dealt with in the Court of Appeal in *Nduhiu Gitahi Vs Warugongo* (1988) KLR 621; IKAR 100;(1988-92) 2 KAR 100 where the Court of Appeal expressed itself as follows;

“The process of giving security is one which arises constantly so long as the opposite party can be adequately protected. It is right and proper that security should be given in a way which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantees and payment into court are but two of them. So long as it is adequate, then the form of it is a matter which is immaterial. In an application for stay pending appeal, the court is faced with a situation where judgment has been given. It is subject to appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even handedly without prejudicing



the issues pending in the appeal. For that purpose, it matters not whether the plaintiff are secured in one way rather than the other, it would be easier for the defendants or if for any reasons they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no principles why they should not do so... The aim of the court in this case was to make sure, in an even handed manner, that there would not be prejudiced and that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant so as to tempt him into settling the appeal nor will any party lose if the sum is actually paid with interest at court rates. Indeed in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it.”

Disposition

- 10. Taking all relevant factors into consideration, I do grant stay of execution of the decree herein on condition that;
 - a. The appellant do deposit the entire decretal sum of Ksh.466,448.18/- in a joint interest earning account held at a reputable commercial bank, to be held in the joint names of both advocates herein pending hearing and determination of this Appeal.
 - b. This condition is to be met within 45 days from the date of this ruling and in default to meet the terms of stay as directed above, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
- 11. The costs of this Application are awarded to the Respondent.
- 12. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF OCTOBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 16th day of October, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant

