



**Kenya Orient Insurance Company Limited v Hemed (Civil Appeal
E124 of 2021) [2024] KEHC 13996 (KLR) (12 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13996 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E124 OF 2021
JK NG'ARNG'AR, J
NOVEMBER 12, 2024**

BETWEEN

KENYA ORIENT INSURANCE COMPANY LIMITED APPELLANT

AND

FARIDA HEMED RESPONDENT

RULING

1. The Appellant filed a Notice of Motion application dated 2nd March 2024 under Certificate of Urgency pursuant to Order 42 Rule 6 of the [Civil Procedure Rules](#) and under Section 1A, 1B and 3A of the [Civil Procedure Rules Act](#) seeking that this court be pleased to issue an order of stay of execution of the judgment delivered on 20th August 2021 by the Chief Magistrate in *Farida Hemed v Kenya Orient Insurance Limited*, CMCC No. 2868 of 2010 – Mombasa which was the subject of this appeal leading to the judgment decided on 6th November 2023 dismissing the appeal pending the hearing and determination of the application herein interparties and subsequently pending the hearing and determination of the appeal in the Court of Appeal.
2. The application is premised on grounds on the face of the application and the Supporting Affidavit of Amin Said Amin sworn on 2nd March 2024 that the Applicant has lodged an appeal against this court's judgment delivered on 6th November 2023 by the learned Justice Magare Dennis Kizito in [Kenya Orient Insurance Limited v Farida Hemed](#), Civil Appeal No. E124 of 2021 – Mombasa. That the Applicant herein vide *Kenya Orient Insurance Limited v Farida Hemed*, Court of Appeal Civil Appeal No. E020 of 2024 – Mombasa has an arguable appeal against this court's judgment. That the second appeal to the Court of Appeal emanates from the trial court's judgment entered on 20th August 2021. That the trial court on 10th November 2022 gave a stay of execution order against its own judgment delivered on 20th August 2021 pending the outcome of this appeal. That the order for stay of execution by the trial court was premised on the ground that the applicant herein deposits the decretal sum in court which the applicant duly did.



3. The Applicant further averred that stay of execution that was given after trial court's judgment has lapsed since the appeal herein was concluded and the Respondent is bound to execute. That the Respondent seeks to execute this court's judgment entered on 6th November 2023 while the matter is pending at the Court of Appeal. That the lodged appeal at the Court of Appeal will be rendered nugatory and an academic exercise if stay of execution is not granted thus prejudicing the Applicant herein. That execution by the Respondent is eminent and will occasion irreparable loss and damage on the part of the Applicant herein. That there is a security offered by the Applicant herein that stays execution of the trial court's judgment pending outcome of this appeal which court delivered its judgment on 6th November 2023. That this court has the power to grant the orders sought under the Civil Procedure Rules, and that the Applicant has constitutional rights which need protection.
4. The Respondent in her Replying Affidavit sworn on 9th April 2024 stated that from the plaint filed in the lower court, the claim was for Kshs. 202,345.00, interest at 12% p.a. from 29th September 2010 and costs of the suit. That judgment was entered in favour of the Respondent on 20th August 2021 as prayed for in the plaint and on 21st November 2023 the Respondent was awarded costs in the appeal of Kshs. 90,000.00. That the amount due as at 17th January 2024 was Kshs. 651,097.00 after discounting costs awarded to the Appellant in HCCA No. E009 of 2023 of Kshs. 45,000.00. That if the Applicant's application is allowed, then it should be ordered that they furnish security equivalent or close to the amount that it will be liable to pay from the decree should its appeal be unsuccessful. That any security deposited previously or at all is insufficient to secure the due performance of the decree.
5. The Respondent further stated that she believes the Appellant does not have an arguable appeal, that the Appellant has not demonstrated difficulties in paying the decretal sum, it being a successful insurance company, and that the Respondent owns a school and is capable of refunding the decretal sum should the appeal succeed. That justice would be best served if the Appellant's Notice of Motion dated 2nd March 2024 is dismissed.
6. The application was canvassed by way of written submissions. The Appellant/Applicant filed submissions dated 27th July 2024 while the Respondent filed submissions dated 2nd July 2024.
7. I have considered the Notice of Motion application dated 2nd March 2024, Replying Affidavit sworn on 9th April 2024 and submissions by the parties. The issue for determination is whether the application is merited for grant of the orders sought.
8. The Appellant/Applicant stated in the application that they have lodged an appeal against this court's judgment delivered on 6th November 2023 by Justice Magare Dennis Kizito in *Kenya Orient Insurance Limited v Farida Hemed*, Civil Appeal No. E124 of 2021 at the Court of Appeal vide *Kenya Orient Insurance Limited v Farida Hemed*, Court of Appeal Civil Appeal No. E020 of 2024 – Mombasa.
9. This court relies on the holding in *Dickson Muricho Muriuki v Timothy Kagundu Muriuki & 6 others* (2013) eKLR as follows: -

“We take cognizance that when this Court has delivered judgment; all pertinent issues and points of law have been fully canvassed and considered. Upon delivery of judgment, the rights of the parties have been determined and it is a legal requirement that the decree emanating from the judgment should be executed. The submissions by counsel, evidence on record, points of law and relevant authorities all have been raised, re-examined, weighted, deliberated upon and judgment made. What new point of law can subsequently be raised in an interlocutory application for stay of execution that will make this Court change its mind after delivery of judgment and order stay of execution? If there are new points of law



or circumstances that arise after judgment, this Court is functus officio and the justiciable forum to consider the merits or otherwise of these new circumstances must shift from this Court ...”

10. In consideration of the above, this court finds that it cannot sit on appeal of its own decision. It therefore lacks jurisdiction to entertain the Appellant/Applicant Notice of Motion application dated 2nd March 2024. The application for stay of execution ought to be pursued at the Court of Appeal. The Appellant/Applicant’s application therefore lacks merit and is dismissed.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 12TH DAY OF NOVEMBER, 2024.

J.K. NG’ARNG’AR, HSC

JUDGE

In the presence of: -

Kioko Advocate for the Appellant

Maundu Advocate for the Respondent

Court Assistant – Mr. Samuel Shitemi

