



Nyabando & another (Administrators of the Estate of Brian Nyabando Makori (Deceased)) v CIC Insurance Company Limited & another (Civil Appeal E011 of 2024) [2024] KEHC 14008 (KLR) (5 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14008 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E011 OF 2024
SM MOHOCHI, J
NOVEMBER 5, 2024**

BETWEEN

**ERICK MAINA NYABANDO 1ST APPELLANT
ANTHONY MAKORI NYAOCHENGA 2ND APPELLANT
ADMINISTRATORS OF THE ESTATE OF BRIAN NYABANDO MAKORI
(DECEASED)**

AND

**CIC INSURANCE COMPANY LIMITED 1ST RESPONDENT
NEW MEGA (AFRICA) LIMITED 2ND RESPONDENT**

RULING

1. The Applicants moved this Court by way of Notice of Motion Application dated 11th March, 2024 brought under Sections 1A, 1B, 3A, 75 and 79G of the *Civil Procedure Act* and Order 42 Rule 6 Order 43 Rule 4(2) and Order 51 of the *Civil Procedure Rules*, seeking the following orders: -
 - a. Spent
 - b. Spent
 - c. That there be a stay of proceedings, further pronouncements/orders or action in Nakuru CMCC No. E242 of 2023 *CIC Insurance Ltd Vs New Mega (Africa) Limited* pending the hearing and determination of this Appeal.
 - d. That the Honourable Court be pleased to issue any other such orders/directions as it may deem fit
 - e. That the costs of this Application be in the course.



Applicant's Case

2. The Application is on the basis on the grounds on its face and on the Supporting Affidavit of John Ndung'u Njuguna, Advocate sworn on the same date.
3. He stated that, he is on record for the Applicants in Nakuru CMCC No. E914 of 2022 arises from a road traffic accident that occurred on 27th April, 2022. The 1st Respondent applied for leave to file the avoidance suit Nakuru CMCC No. E242 of 2022 out of time seeking to avoid settling claims arising out of the said accident of which leave was granted together with stay of all suits in relation to the said accident.
4. That the Applicants applied to be enjoined in the said avoidance suit as Interested Parties which application was dismissed which is now subject of the Appeal herein which he argues is arguable and has high chances of succeeding for the reasons that:
 - a. the Appellant are necessary parties in the avoidance suits by dint of Sections 9, 10 and 11 of Cap 405 and was pleaded and acknowledged by the 1st Respondent;
 - b. there are cross-cutting issues necessitating the Appellants participation to safeguard their rights with Nakuru CMCC No. E914 of 2022 being stayed at the behest of the 1st Respondent;
 - c. that, the learned magistrate erred, in making the decision and that, there is no provision which allows extension of time to file avoidance suits.
 - d. That, failure to allow the Appellants to be enjoined in the lower Court suit denied them a chance to present their case and raise pertinent issues one of them being that the avoidance suit is statute-barred.
5. He deposed further that, it would be in the interest of justice that the Lower Court suit is stayed since if stay is not granted and the appeal is found with merit, the Applicants will have been denied an opportunity to present their case which will occasion the irreparable harm. Further that, if the appeal is allowed, the Lower Court proceedings will be rendered nugatory and a waste of judicial time.
6. He contended that, no prejudice will be occasioned to any party if the Application is allowed that cannot be compensated by way of costs.

1st Respondents Case

7. The Application was opposed by way of Replying Affidavit sworn on 23rd April, 2024 by Phylis Mutua, Legal Officer of the 1st Respondent Company. She stated that the Applicants lack the necessary standing to file the instant application as they are not parties to Nakuru CMCC No. E242 of 2022.
8. She further stated that, the Court disallowed the Applicant's Application to be enjoined as Interested-Parties in Nakuru CMCC No. E242 of 2022 on account that the declaratory suit was between the insurance and the insured and the Applicants added no probative value to the issues.
9. It was her contention that, the dismissal was grounded in law, the Ruling was sound and impeachable, there is no justifiable reason to set-it aside and therefore the application lacks merit. Further that, the Applicants do not have any interests in the cause and their inclusion is bereft of any legal basis. They have no locus standi.
10. She stated that, the Applicants have failed to demonstrate with evidence that, they possess any identifiable stake or legal interests in the proceedings and further, they have failed to lead evidence that,



they stand to suffer any prejudice that cannot be compensated by costs should stay orders not issue. Therefore, they have not met the threshold for grant of orders of stay of execution.

11. She argued that, the allegation that, they will be prejudiced is misleading as the Applicants will be compensated no matter the outcome. That the Appeal has no chances of success as its substance lacks foundational basis in law and seeks prayers that cannot be granted by any competent Court of law.
12. That, the Applicants also failed to meet the threshold required to be enjoined as Interested Parties. That the inclusion of the Applicants as Interested Parties to the suit only adds unnecessary costs.
13. The application was argued by way of written submissions. The Applicants filed their submissions on 18th June, 2024 while the 1st Respondent filed its submissions on 24th June, 2024

Applicants' Submissions

14. It was submitted that, the discretion of the Court to grant stay of proceedings pending appeal is derived from Order 42 Rule 6(1) of the *Civil Procedure Rules* and the Courts decision in *Edward Muchiri Ituma vs Beatrice Wangige & 9 Others* [2019] eKLR. Reliance was also placed in The *Board of Management Kapletundo Secondary School vs Lakeside Products Agencies* [2022] eKLR to submit that the purpose of granting stay of execution is to ensure the appeal is not rendered nugatory.
15. It was argued that, the Applicants' Appeal raised arguable issues to wit; being Plaintiff is the primary suit, they should be enjoined in the avoidance suit. That Sections 9, 10 and 11 of the *Insurance (Motor Vehicle Third Party Risks) Act* gives them a statutory right to be enjoined, participate and be heard in such a suit
16. The Applicants relied on the pronouncement in *Kassam Hauliers Ltd vs Takaful Insurance of Africa Limited; Julis Esmbui Ngaruiy (Interested Party)* [2022] eKLR wherein the Court held *inter alia* that, an Interested Party is one who has a stake in the proceedings though not a party to the cause ab initio and a party must demonstrate it is necessary for him to be joined as a party.
17. It was submitted further that the appeal is arguable for the reason that they only want to track the process and bring to the attention of the Court that the avoidance suit is statute-barred and the leave granted to institute the suit out of time was bad in law. Reliance was placed in the case of *Corporate Insurance Co. Ltd v Reuben Murigi Mwangi* [2018] eKLR where the Court was of a similar opinion.
18. The Applicants also brought to the Court's attention the case of *Jubilee Insurance Company Limited v Francis Muriithi Githinji; Ann Mumbi Kabia & Another Suing as the Administrators of the Estate of Benson Ngugi -Deceased* [2021] eKLR to submit that the appeal is arguable and whether or not they are beneficiaries of the insurance policy, it gives them a legitimate right to participate in the avoidance suit.

Respondent's Submissions

19. On whether the Application is merited, the 1st Respondent submitted that, the Applicants represent the estate of the deceased an employee of the 2nd Respondent and are not supposed to file suit for compensation against the 1st Respondent or the insured from the onset. That, the deceased presence in the vehicle was unclear and as an employee should be compensated under the *Work Injury Benefits Act*.
20. It was submitted further that, no valid reason has been granted why the suit should be stayed and that the Appellant has not disclosed the loss they will suffer. It was argued that the Applicants will be at liberty to pursue the liable party between the 1st or 2nd Respondent upon conclusion of the suit.



21. As to whether the Appeal is arguable, it was submitted that, the Ruling of the Court was proper as none of the suits had been concluded yet. That the genesis of the suit cannot be said to be purely contractual and as injuries that were sustained and lives lost were regarding to individuals on board the 2nd Respondent's vehicle and therefor the Court should not be limited to the Applicants suggested provisions.
22. Reliance was placed in [Xplico Insurance Company v Simon Mkalla Ndegwa & 2 Others](#) [2014] eKLR where the Court allowed an insurer to file a declaratory suit out of time and in [Muchai vs Xplico Insurance Company Ltd](#) [2023] KEHC 21614 [KLR] the Court dismissed an appeal that challenged leave granted to an insurer to file a declaratory suit.

Analysis and Determination

23. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the [Civil Procedure Rules, 2010](#) which provides as follows:
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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.
 - (3) Notwithstanding anything contained in subrule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
24. The power of a Court to grant stay of execution is discretionary which power must not be exercised capriciously or whimsically but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial Court's decision. (see [Butt vs. Rent Restriction Tribunal](#) [1979]).
25. The purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case. The Court of Appeal in [RWW vs. EKW](#) (2019) eKLR addressed itself on this as hereunder: -

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted



right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

26. The Court of Appeal in *Visbram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nairobi 15 of 1990 [1990] KLR 365, outlined the requirements for granting stay of execution pending appeal. It held that, whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 Rule 6 (as it then was) of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.
27. The first requirement is that; the intended appeal must be arguable. A cursory look at the Memorandum of Appeal shows that, the grounds raised therein are triable and the fact that the 1st Respondent in its quest to safeguard its interests moved Court in Nakuru CMCC No. E242 of 2022 whereby it successfully stayed the Applicants ongoing suit in Nakuru CMCC No. E914 of 2022. The fact that the 1st Respondent initiated an action affecting the Applicants constraining them to seek to be enjoined in Nakuru CMCC No. E914 of 2022 which Application’s dismissal gave rise to the Appeal is indicative of the Arguable nature of the Appeal. This first ground is therefore met. The essence of considering whether the appeal raises triable issues is to avoid the same being rendered nugatory should the decision of the Appellate Court overturn that of the trial Court.
28. The second aspect is to consider whether the Application before Court had been filed without undue delay. I noted that the Interlocutory Ruling subject to Appeal was rendered on 25th January 2024, while the present application is dated 11th March 2024. Thus, there is no undue delay.
29. Thirdly, this Court must determine whether not granting the order will occasion substantial loss to the Applicant. Substantial loss was explained in the case of *James Wangalwa & Another vs. 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.”
30. This Court finds that, the continued hearing and determination of the Nakuru CMCC No. E914 of 2022 may render this instant Appeal an academic exercise as the interlocutory Appeal sought to enable the Applicants participate as interested parties.
31. The Court is persuaded on the substantial loss test, as the Applicants have had their primary suit in Nakuru CMCC No. E914 of 2022 stayed in the 1st Respondent’s ongoing avoidance suite against the 2nd Respondent in Nakuru CMCC No. E914 of 2022 with an outcome that might adversely affect the



interests of Applicants. A positive outcome to the 1st Respondent may in the converse imply an adverse outcome to the Applicant's primary suit which would occasion or lead to occasioning of substantial loss.

32. This principle was enunciated in the decision of the Court of Appeal in *Absalom Dova vs. Tarbo Transporters* [2013] eKLR, where it stated: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the Court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation...”

33. Lastly, the Applicants are required to furnish security to the Court as security for the performance of the judgment debt should the appeal fail and where a party seeks stay, such an application must still be weighed against the parameters under Order 46 Rule (2). In this instance we have no judgment debt and the Applicants have not offered any security for costs leaving the issue to the Court.

34. The purpose of security was clearly enunciated in *Arun C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, where the Court stated: -

“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.”

35. It is my finding that the Applicants herein, though they brought this Application with undue delay and adequately demonstrated the substantial loss that they would suffer and they failed to offer furnish security as stipulated by Sub-Rule (b).

36. In the result, I exercise this Courts discretion and allow the Notice of Motion dated 11th March 2024 on the following conditional term(s):

- i. A Conditional Order of stay of proceedings is hereby issued in Nakuru CMCC No. E242 of 2023 CIC Insurance Ltd Vs New Mega (Africa) Limited pending the hearing and determination of this Appeal.
- ii. The Applicants shall furnish security for costs being Kshs. 150,000/=.
- iii. The Applicants shall deposit in Court Kshs. 150,000/= being security for costs within Thirty (30) days of today.
- iv. The Applicants shall take all necessary steps to ensure that the Record of Appeal is properly filed, presented for admission and within 45 days of today.
- v. The Stay Order granted in (i) above shall automatically lapse upon default of any condition set by this Court.



It is so ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 5TH DAY OF NOVEMBER, 2024.

MOHOCHI S.M

JUDGE

