



**Kangethe v Kiarie (Civil Case E006 of 2024)
[2024] KEHC 15798 (KLR) (16 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15798 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CIVIL CASE E006 OF 2024
SM GITHINJI, J
DECEMBER 16, 2024**

BETWEEN

BONIFACE KAMAU KANGETHE APPELLANT

AND

SUSAN WAITHERA KIARIE RESPONDENT

*(Being an Appeal arising from the Ruling delivered on the 30th July,
2024 by Honourable Hon Edward Too in Hola CMCC No. E034 of 2023)*

JUDGMENT

1. On 30/7/2024, the subordinate court sitting at Hola in CMCC E034 of 2023, dismissed the Appellant's application to set aside a consent judgment entered in that suit. That application was dated 22/3/2024.
2. To understand the issues at hand, I will briefly layout the history of this matter. The suit before the lower court was triggered by an accident involving motor vehicle KDJ 232S which had an insurance policy with Trident Insurance Company Limited (the Insurer), taken out by the Appellant. The accident was said to have occurred on 13/4/2023 and was at the time ferrying a sum of 47 passengers. Resultantly, a series of 47 suits were instituted against the Appellant with Hola CMCC E034 of 2023 being the lead file. The firm of Urbanus Kioko & Associates came on record to represent the Appellant's interests in the suits. A consent judgment was resultantly recorded in favour of the Respondents as against the Appellant for a sum of Kshs. 250,000/- plus costs in each of the 47 matters.
3. Aggrieved by the decision dismissing their application dated 22/3/2024, the Appellant preferred an appeal to this court, and filed a memorandum of appeal dated 31/7/2024. Alongside the memorandum, the Appellant filed an application of an even date seeking orders: -
 1. Spent.



2. That the firm of Wesonga Wamalwa & Kariuki Associates be granted leave to act on behalf of the Appellant herein.
 3. Spent.
 4. Spent.
 5. That there be stay of declaratory proceedings being Hola CMCC No. E052 of 2024 -E056 OF 2024, E062 of 2024- E067 of 2024, E074 of 2024 -E101 of 2024 pending the hearing and determination of this appeal.
 6. That there be a stay of execution of the Consent judgment delivered in Hola CMCC E034 of 2023 together with the resultant orders pending the hearing and determination of the Appeal herein.
 7. That this Honourable Court be pleased to set aside the consent judgment delivered in Hola CMCC E034 of 2023.
 8. That costs of this application be provided for.
4. The application is founded on the grounds listed on the body of the motion and supported by an affidavit sworn by James Onjoro, said to be the Insurer's legal officer. He reiterated the facts set out in the motion and added that when it was discovered that the policy held by the Appellant was only limited to two passengers, the Insurer instructed its then advocate to abandon the negotiations that had been commenced to have the suits settled. That the said advocate however ignored those instructions and proceeded to record a consent, contrary to the wishes of the Insurer.
 5. The legal officer deposed that, the Insurer then withdrew instructions from the said advocate and instructed the present firm Ms. Wesonga Wamalwa & Kariuki Associates to set aside the consent judgment. The latter firm then filed the application dated 22/3/2023 which was dismissed by the lower court, thus prompting the present Appeal. Counsel added that during the pendency of that application, the Respondents in the suits listed under prayer 5 of the present application, instituted declaratory suits and that the various respondents are in the process of executing judgment.
 6. To counsel therefore, if the orders sought are not granted, the Appellant shall suffer great prejudice and the application shall be rendered nugatory.
 7. This court on 1/8/2024, made the following interlocutory orders: -
 1. That there be a stay of execution of the consent judgment delivered in Hola CMCC E034 of 2023 and the resultant orders pending hearing and determination of this application inter partes.
 2. That the Applicant do deposit in Court's Account as security for costs a sum of Kshs. 8,000,000/- within 40 days from the date hereof, failure to which the stay order lapses.
 3. That the application and the orders be served upon the Respondent and the matter be mentioned for further directions on 30/9/2024.
 8. The Respondent filed a Replying affidavit which she swore on 19/8/2024, opposing the application. She stated that the application is devoid of merit, meant to deny her from enjoying the fruits of litigation, brought in bad faith, bad in law, and an abuse of the court process. She added that the appeal had no likelihood of success as the allegation that the policy was only limited to two passengers is



fabricated. She added that the consent judgment was lawfully entered and that no party was coerced or unduly influenced.

9. She admitted that consent judgment was entered on 30/1/2024 in favour of the Respondents in each case for a sum of 250,000, making a total of Kshs. 12, 250,000/-, payable in monthly instalments of Kshs. 500,000/-. That upon adoption of that judgment, the Appellant was granted 30 days stay of execution hence the application is res judicata.
10. The Respondent further deposed that should the appeal succeed, she is capable of refunding the decretal sum and that the Appellant has not met the conditions for granting the orders sought in his application.
11. The Appellant again moved the Court via a Notice of Motion application dated 27/9/2024 seeking the following orders: -
 1. Spent.
 2. That this Honourable Court be pleased to reinstate the orders issued herein on the 1/8/2024, conditionally allowing the stay of execution of the judgment delivered in Hola CMCC E034 of 2023 and the resultant orders.
 3. That this honourable court be pleased to reduce the security to be deposited in court to Kshs. 1,000,000 upon reinstatement of the orders issued herein on 1/8/2024.
 4. That in the alternative, upon reinstatement of the Orders issued on the 1/8/2024 and reviewing the said security, the Applicant herein be allowed to deposit an insurance bond guarantee for the revised sum within the extended period of compliance.
 5. That costs of this application be provided for.
12. Both applications were canvassed by way of written submissions which I have perused.

Determination

13. Four issues are for determination: -
 - i. Whether the firm of Wesonga Wamalwa & Kariuki Associates should be granted leave to come on record for the Appellant.
 - ii. Whether the declaratory proceedings in Hola CMCC No. E052 of 2024 -E056 OF 2024, E062 of 2024- E067 of 2024, E074 of 2024 -E101 of 2024 should be stayed pending the hearing and determination of this appeal.
 - iii. Whether an order for stay of execution of the Consent judgment delivered in Hola CMCC E034 of 2023 together with the resultant orders should be granted pending the hearing and determination of the Appeal herein.
 - iv. Who shall bear the costs.
14. Besides the prayer for stay of execution of the consent judgment and stay of proceedings, the Appellant also seeks orders for the setting aside of the said judgment. I however note that the appeal in question arises from the decision of the lower court dismissing the Applicant's Notice of Motion dated 22/3/2024 wherein he sought to set aside the consent judgment. My take is that since the issue of setting aside of the judgment is the subject of the appeal, it is premature and indeed irregular for the Applicant to seek the setting aside of the judgment through this application. I will therefore confine this ruling to the subject of stay of execution and proceedings pending appeal.



Issue i

15. The preliminary issue in this case is the question of representation. It is undisputed that at the trial court, the firm of Urbanus Kioko & Associates was on record for the Appellant until judgment was entered. Vide the application of 22/3/2023, the firm of Wesonga Wamalwa & Kariuki Associates sought to represent the Appellant, post judgment. The trial court disallowed that prayer stating that-

“ 50. ... The procedure for such change of advocate is clear and I fail to understand why the same has not been followed to the latter by the applicants. The applicants vide an application dated 12/3/2024 had sought similar orders to this but later withdrew the same now seeking leave to come on record. I must say that I have not seen any response from the advocate on record for the defendant in respect to the same and as such I find any directions further to be very irregular considering the application before the court seeking to oust the consent recorded...I therefore decline the same.”

16. Order 9 rule 9 of the Civil Procedure Rules, 2010 provides that: -

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change of intention to act in person shall not be effected without an order of the court-

- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

On the onset (emphasis mine).”

17. The import of the above provision was to cure the mischief of litigants sacking their advocates at the execution stage or at the point of filing their bill of costs thus denying their advocates their hard-earned fees. However, the scenario is different in the instant case as this court is sitting as an appellate court. It is my view that Order 9 Rule 9 and 10 of the Civil Procedure Rules does not apply in instances of an appeal because the advocate’s instructions in a lower court are exhausted at the conclusion of a matter and requiring such leave would be tantamount to denying such an appellant a right to legal representation by an Advocate of his choice at an appellate stage.

18. I am persuaded by the reasoning in Tobias M. Wafubwa v Ben Butali [2017] eKLR where the Court of Appeal held thus;

“Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, ... Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate”.

19. This means that the firm of Wesonga Wamalwa & Kariuki Associates does not require leave of this court to represent the Appellant at this stage. The said firm is properly on record.



Issue ii & iii

20. The principles upon which the court may stay the execution of orders appealed from are settled. Order 42 rule 6 (1) provides that no appeal shall operate as a stay of proceedings or order appealed from except in so far as the court appealed from may order. The applicant must approach the court timeously and demonstrate the likelihood that he will suffer substantial loss if the order is denied. He must also furnish security for the due performance of the decree in the event the appeal does not succeed. These are the requirements stipulated in Order 42 Rule 6(2) of the Civil Procedure Rules.
21. In *Butt v Rent Restriction Tribunal 1979 eKLR (Madan, Miller and Porter JJA)* the court stated as follows when considering an application for stay of execution: -
- i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - ii. The general principal 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 be rendered nugatory should that appeal court reverse the judge's discretion.
 - iii. A judge should not refuse a 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.
 - iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirement.”
22. The impugned ruling was delivered on 30/7/2024 and the present application filed on 31/7/2024. I am thus satisfied that the present application was filed without any delay. Notable however is that although the subject of appeal is the ruling dated 30/7/2024, the Appellant wants a stay of execution of the consent judgment which was adopted on 30/1/2024, approximately 6 months before the application for stay of execution.
23. Be that as it may, it is evident that the subject of the impugned ruling was the consent judgment itself, and it is what the Appellant wants this court to set aside in this appeal. I will therefore exercise my discretion and consider whether the Appellant has satisfied the remainder conditions.
24. An applicant for orders of stay of execution pending appeal is required to demonstrate that he will suffer substantial loss unless the stay is granted.
25. Substantial loss was clearly explained in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR*: -
- “...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.”
26. In the present case, the Appellant is apprehensive that declaratory suits have been instituted against the Insurer, which stands to suffer substantial loss considering the judgment sum is a substantial amount; and in the event that the Respondent is unable to pay the decretal sum the appeal would have been rendered nugatory and Applicants would be exposed to irreparable damage.
27. The Respondent rebutted the assertion and stated that she is capable of refunding the judgment sum. This ability was however not demonstrated. It must also not be lost that the consent judgment in this case pertains to a series of 47 claims with different Respondents. In my view, recovering the said sum



would be an uphill task for the Appellant thus it would render the appeal nugatory, in the event that the same is successful.

28. With this in mind, it is my view that that Appellant has, prima facie, been able to demonstrate they stand to suffer irreparable loss if the stay is not granted.

29. I am guided by the case of *G. N. Muema P/A (sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another* [2018] eKLR, the Court stated as follows: -

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

30. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR, the Court of Appeal held thus:

“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...”

31. On provision of security for the due performance of the decree, this Court directed the Appellant at an interlocutory stage do deposit a sum of Kshs. 8,000,000/- within 40 days as a condition for interim stay pending the determination of the present application. This period has since lapsed. As already noted, the Appellant filed another application seeking a review of that amount stating that the Insurer has since been unable to raise that amount, and suggested that the same be reviewed downwards to Kshs. 1,000,000/-.

32. I must first point out that the second application has become untenable bearing in mind that the orders sought to be reviewed are interim in nature and automatically lapses at the instance of determination the first application of 31/7/2024.

33. In *Chairman Board of Governors Mbaikini High School & another v Simecor Merchants 2002 Limited & 2 others* [2021] eKLR Odunga J. cited the case of *Nduhiu Gitahi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 where the Court of Appeal expressed itself as follows regarding the issue of bank guarantees in applications such as the present one: -

“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 guarantee 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 judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that 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 issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not



do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal 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 either 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.”

34. In this case, I see no obstruction that is likely to be placed on the path of the Respondent in recovering the fruits of her judgement in the event that the appeal does not succeed. On the other hand, substantial loss is likely to occur to the Applicant in the event that execution proceeds and the appeal succeeds. In any event, it is trite that 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. I will thus exercise my discretion in favour of the Appellant in this case.
35. The question of whether or not to grant an order for stay of proceedings is a discretionary one and which must be exercised judiciously. The court has to consider if it will be in the interests of justice to grant the same. The underlying interest ought to be that the appeal is not rendered nugatory.
36. I am guided by the Court of Appeal in the case of UAP Insurance Company Ltd vs Michael John Beckett [2004] eKLR, where it held that all an applicant is required to show is that he has an arguable appeal which is not frivolous and that the appeal will be rendered nugatory if the stay of proceedings is not granted.
37. Further in the case of Niazsons (K) Ltd. vs. China Road & Bridge Corporation (Kenya) [2001] e KLR, the Court held that: -
- “Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted.”
38. It is also trite that the prayer for stay of proceedings is an equitable relief. An applicant must therefore have come to court with clean hands.
39. A perusal of the memorandum of appeal reveals that the issue in contention is a consent judgment, which the trial court declined to set aside. The Appellant raises serious allegations which must be investigated by this court. In my view therefore, the intended appeal is arguable and is not frivolous. It is also evident that the consent judgment provoked the declaratory proceedings. Therefore, having allowed the prayer for stay of execution of the said judgment, it is prudent that the declaratory proceedings are temporarily halted.
40. In the ultimate, I make the following orders: -
1. There be a stay of execution of the consent judgment pending disposal of the appeal upon the conditions that: -
 - a. The Appellant shall provide within fourteen (14) days of delivery of this ruling an appropriate insurance bond or bank guarantee for the sum of Kshs 8,000,000/-. Such insurance bond or bank guarantee shall be deposited in court.
 - b. In default of deposit of the insurance bond or bank guarantee the stay of execution shall forthwith lapse, and the Respondents may execute the decree.



- c. The declaratory proceedings in Hola CMCC No. E052 of 2024 -E056 OF 2024, E062 of 2024- E067 of 2024, E074 of 2024 -E101 of 2024 are hereby stayed pending the hearing and determination of this appeal; but this order shall too lapse in the event that order (a) above lapses.
- d. The Appellant to compile, file and serve a record of appeal upon the Respondent within 45 days from the date hereof.
- e. The costs of both applications shall abide the outcome of the appeal.
- f. Mention on 30th January, 2025.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 16TH DAY OF DECEMBER, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Mr Wamalwa for the Applicant
2. Kilonzo Advocate is for the Respondent (absent)

