



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NANYUKI**

**CIVIL APPEAL NO E001 OF 2021**

**APA INSURANCE LIMITED.....APPELLANT**

**VERSUS**

**1. IRENE WANJIKU THUO**

**2. NANCY WANGUI WAITIKI (*Suing as Administrators of the Estate of***

**MICHAEL THUO WAITIKI, *Deceased*).....RESPONDENTS**

***(Being an Appeal against the Judgment/Decree of the Nanyuki CM***

***Civil Case No.22 of 2019 – B M Mararo, PM)***

**RULING**

1. The Respondents in this appeal, **IRENE WANJIKU THUO** and **NANCY WANGUI WAITIKI**, have a declaratory decree against the Appellant, **APA INSURANCE LIMITED**. That decree is that the Appellant, an insurance company, is liable to satisfy the money decree in Nanyuki CMCC No 30 of 2017 (the primary suit) in favour of the Respondents. The declaratory decree was issued in Nanyuki CMCC No 22 of 2019 (the declaratory suit).
2. The Appellant has challenged the declaratory decree in this appeal. Its stand is that it is liable to the extent only of KShs 3 million, which is already paid and acknowledged. It therefore applied by **notice of motion dated 18/01/2021** for stay of execution of the declaratory decree pending disposal of the appeal. The Respondents filed affidavits in opposition to the application.
3. When the application came up for mention *inter partes* on 26/01/2021 learned counsel for the Respondents informed the court that stay of execution is not opposed, subject to an order for provision of security by the Appellant. He left that issue of appropriate security to court.
4. The Appellant has offered security in the form of an insurance bond or bank guarantee. The Respondent would much prefer a deposit of the balance of the decretal sum in a joint interest-earning account in the joint names of the advocates on record.
5. The purpose of security is to secure the balance of the decretal sum so that the money will be readily available to the Respondents in the event that the appeal is ultimately dismissed. The decretal sum in the declaratory decree is the specific sum named therein – KShs 9,431,949/00. No costs or interest were awarded in the declaratory decree.
6. Where possible, a deposit in a joint interest-earning account is a desirable security because the money would continue to grow.
7. In the present case it must be remembered that the Appellant is not the primary judgment-debtor. Its liability to satisfy the primary decree is statutory. It does not deny that liability; the issue to be determined in the appeal is the financial extent of that liability. The Appellant's case is that the liability is to the extent of only KShs 3 million, and that it has shown good faith by paying up that sum.
8. In the circumstances of this case the balance of KShs 9,431,949/00 is not a small sum of money. I am satisfied that the same will be properly and adequately secured by the Appellant providing an appropriate insurance bond or bank guarantee.
9. Final orders on the notice of motion dated 18/01/2021 will therefore be as follows –

1. There shall be stay of execution of the decree in the declaratory suit pending disposal of the appeal upon the following conditions:

(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 9,431,949/00. 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 Appellant shall process the appeal for expeditious hearing.

2. The Appellant shall pay the Respondents/ thrown-away costs connected to execution (which shall include the auctioneer's charges), such costs to be agreed or assessed and payable within fourteen (14) days of agreement or assessment; in default the Respondents may execute for the same.

3. Costs of the application shall be in the appeal.

**DATED AND SIGNED AT NANYUKI THIS 3<sup>RD</sup> DAY OF FEBRUARY 2021**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 4<sup>TH</sup> DAY OF FEBRUARY 2021**