



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL APPEAL NO. E034 OF 2020**

**TRIDENT INSURANCE COMPANY.....APPELLANT/APPLICANT**

**VERSUS**

**DENNIS MUTWIRI.....RESPONDENT**

**RULING**

***Introduction***

1. Before the Court is a Notice of Motion dated 16<sup>th</sup> December 2020 seeking the following orders: -

i) *Spent*

ii) *That the Honourable Court do grant leave to the firm of R. M. Mochache & Co. Advocates to come on record for the Appellant/Applicant.*

iii) *That pending the hearing of this application, this Honourable Court be pleased to issue a stay ex parte of the ruling and orders of the Chief Magistrate's Court passed on the 10<sup>th</sup> day of December 2020.*

iv) *That the intended stay of execution by the Respondent's agents M/S Quickline Auctioneers or any other agents of the Respondent be lifted and/or stayed until this Notice of Motion and the Appeal are fully heard and determined. (sic)*

v) *That costs of this application be borne by the Respondent.*

***The applicant's case***

2. The application is premised on the grounds on the application and is further supported by the supporting affidavit sworn by Diamond H. Lalji, the Managing Director of the Applicant on 16<sup>th</sup> December 2020.

3. The Appellant states that the Judgement herein was entered on 23<sup>rd</sup> April 2020 wherein the Court awarded the Respondent a total of Ksh 7,250,205/= plus interests at court rates.

4. The Appellant contends further that it filed an application dated 16<sup>th</sup> June 2020 which culminated in the Ruling delivered on 13<sup>th</sup> August 2020 by which the Court ordered it to settle the decretal amount by way of monthly installments of Ksh 1,000,000/= each. Being dissatisfied with this Ruling, it subsequently filed an application dated 2<sup>nd</sup> September 2020 seeking to review and/or vary and/or set aside the Court's orders of 13<sup>th</sup> August 2020 but the Court, by a Ruling delivered on 10<sup>th</sup> December 2020 dismissed the said application and found that the Court had rendered itself *functus officio* upon delivery of Ruling on 13<sup>th</sup> August 2020.

5. The Appellant avers that despite the financial difficulties it was experiencing in view of the COVID 19 pandemic, the Court went ahead and ordered it to pay monthly installments of Ksh 1,000,000/= until payment in full. He avers that prior to the prevailing economic times, which has been hit hard by the COVID 19 pandemic it had made great effort to liquidating the Respondent's claim to a sum total of Ksh 1,550,000/=. The Appellant further avers that due to the COVID 19 pandemic, it has experienced financial difficulties and has been unable to pay the decretal amount as directed.

6. The Appellant further contends that should the orders sought not be granted, it stands to suffer irreparable harm and damage and yet its

intended Appeal as exhibited through the grounds in tis Memorandum of Appeal is merited. He argues that unless the orders sought are granted, the Appeal will be rendered nugatory.

7. The Appellant filed its submissions dated 28<sup>th</sup> December 2020 wherein he argues that the Magistrate in the impugned Ruling, failed to appreciate the provisions of Section 5 (b) (iv) of the Insurance (Motor Vehicles Third Party Risks) Act Cap 405 Laws of Kenya that caps an insurer's extent of liability in respect of a claim arising from one person at Ksh 3,000,000/=. The Appellant further argues that it's newly appointed Advocates, the firm of R. M. Mochache should be allowed to come on record, flowing from the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010. It argues that its application has been filed without unreasonable delay, only six days after delivery of the Ruling. It further argues that flowing from the aforesaid provisions of law in the Insurance Act with respect to an insurer's liability of individuals being capped at Ksh 3,000,000/=: failure to grant stay of execution would occasion to substantial loss and that unless stay is granted, the appeal will be rendered nugatory.

#### ***The respondent's case***

8. The Respondent opposed the Application by way of two (2) replying affidavits. One was sworn by the Respondent himself on 22<sup>nd</sup> December 2020 and the other by Kirimi Mbogo, the Respondent's Advocate, similarly on 22<sup>nd</sup> December 2020. The contents of these two affidavits are essentially corroborating each other.

9. In the affidavit by the Respondent, it is contended that following refusal by the Applicant to satisfy the award in the original judgment, he was forced to file a declaratory suit in Meru CMCC No. 335 of 2019 which forms the subject of the intended Appeal herein. It is contended that vide the application dated 16<sup>th</sup> June 2020, the Applicant in the Court's ruling of 13<sup>th</sup> August 2020 was allowed to settle the decretal amount by way of monthly installments of Ksh 1,000,000/= starting from 14<sup>th</sup> September 2020 but instead of complying the Applicant filed a similar application dated 2<sup>nd</sup> September 2020 which was dismissed on 10<sup>th</sup> December 2020. It is contended that the Applicant has never paid a single cent and that the copies of cheques annexed to the Applicant's affidavits are dated 2019.

10. In the affidavit by Kirimi Mbogo, it is contended that following delivery of Judgment in Meru CMCC No. 335 of 2019 on 23<sup>rd</sup> April 2020, the Applicant engaged him with a view of agreeing on the modalities of payment for the decretal amount but no single cent was ever paid. He contends that this is what prompted him to levy execution following which the Applicant filed an application dated 16<sup>th</sup> June 2020 wherein the Court ordered that the decretal amount be paid in installments, the first installment being due on 14<sup>th</sup> September 2020. He further contends that instead of complying with those orders, or making the slightest attempts to comply, the Applicant filed another application dated 2<sup>nd</sup> September 2020 which supposedly had similar facts to the one dated 16<sup>th</sup> June 2020. The Court dismissed this subsequent application vide a Ruling delivered on 10<sup>th</sup> December 2020 for being a replica of the previous application.

11. He further contends that an officer of the Applicant namely Joseph reached out to him on payment of the decretal amount and he conceded that should the Applicant immediately settle Ksh 2,500,000/= of the decretal sum, the balance could be paid in weekly installments of Ksh 250,000/=. He contends that despite the aforesaid concession having been made on 6<sup>th</sup> December 2020, he was surprised to have been served with the instant application on the evening of 18<sup>th</sup> December 2020. He contends that the application has been made in bad suit, is lacking in merit and is an abuse of court process.

12. The Respondent filed submissions dated 5<sup>th</sup> January 2021 which majorly is similar to the contents of the replying affidavits. The Respondent argues therein that the Applicant's Application is *res judicata*; that there has been no goodwill displayed by the Applicant in settling the decretal amount; and that mere inability of a judgment debtor to pay the decretal amount in full at once is not sufficient reason to warrant the Court's discretion.

#### ***Whether application is res judicata***

13. The Respondent contends that the Application before the Court is *res judicata* and the issues raised herein have previously been dealt with on two occasions. *Res judicata* is an issue that goes to the jurisdiction of the Court, without which a Court must down its tools. I will therefore start with this issue.

14. **Section 7 of the Civil Procedure Act CAP 21 of the Laws of Kenya** prohibits courts from adjudicating upon matters which are *res judicata*. The said section provides as follows:-

***'No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.'***

5. Essentially, the doctrine of *res judicata* applies by prohibiting Courts from listening to and/or adjudicating upon matters which have previously been determined by courts of competent jurisdiction. For the doctrine to apply, both matters i.e the one previously determined and the subsequent one must conjunctively bear all the three elements outlined in the provisions of Section 7 of the Civil Procedure Act. In this respect:-

- i) Both matters must have been addressing similar issues directly and substantially.
- ii) Both matters must have had similar parties whether such parties claim in their own rights or through others.

iii) The previous matter must have been determined by a Court of competent jurisdiction.

15. The Applicant has not clearly brought out the applications he is referring to. However, from a perusal of pleadings, there are only three applications, 2 from the lower Court and the one filed in this Court.

16. The very first application is the one dated 16<sup>th</sup> June 2020 which sought stay of execution and the Judgement and Decree of 23<sup>rd</sup> April 2020. The second application is the one dated 2<sup>nd</sup> September 2020 which sought for stay of execution pending hearing of the said application as well as a review of the Court's Ruling of 13<sup>th</sup> August 2020 with respect to the payment plan. The very final application which is the instant one is dated 16<sup>th</sup> December 2020 which seeks stay of execution pending Appeal.

17. Although the parties are the same and the other two applications already determined were determined by Courts of competent jurisdiction, I find that the issues for determination in the matter are somewhat different and would involve the application of different legal principles. The application for stay of execution before the court is for stay of execution for which jurisdiction is granted to the court as **the court to which appeal is preferred** notwithstanding that the application has been considered or rejected by the trial court. Order 42 Rule 6(1) of the Civil Procedure Rules.

*Leave to change advocates*

18. Turning to issues raised by the Appellant, the key emerging issues is whether leave should be granted for the firm of R. M. Mochache & Co. Advocates to come on record and whether the Applicant has met the legal threshold for grant of stay of execution pending Appeal.

19. On the first issue, on whether leave should be granted for the firm of R. M. Mochache & Co. Advocates to come on record, seeing that Judgment had already been delivered and yet the Appellant still wishes to proceed with this subsequent application, I find no reason to deny him a right to representation. The firm of R. M. Mochache & Co. Advocates is hereby granted leave to come on record pursuant to order 9 Rule 9 (a) of the Civil Procedure Rules.

20. On the second issue, whether the Applicant has met the threshold for grant of stay of execution, this invites this Court to consider the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 which provides for stay of execution in the following terms:

**“Order 42 Rule 6 Stay in case of Appeal**

1. **No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 **without unreasonable delay** application has been made; 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.”*

21. The High Court, as court to **which appeal preferred** is, therefor, under a duty to examine the application and determine:

- a. Valid appeal;
- b. Substantial loss;
- c. Application for stay of execution made without delay - Rule 6(1) of the CPR; and
- d. Security.

The legal threshold for award of stay of execution is thus well settled.

22. In the present case, before looking at the whether this threshold has been met, the Court observes that what the Applicant seeks to stay is the Ruling of the lower Court of 10<sup>th</sup> December 2020. This Ruling while appealable as for right being a review application (Order 43 rule 1 (x) of the Civil Procedure rules), in essence dismissed the Applicant's application dated 2<sup>nd</sup> September 2020 and is, therefore, a **negative** as opposed to an **executive** order, which require the doing of an act or taking some action. Generally, an application for stay of execution would normally only be entertained when what is intended to be stayed is a positive order, requiring the positive action of another. In the present case, there would be nothing to stay since a dismissal of an application does not impose the doing of any positive act on another.

23. I respectfully agree with the numerous authorities on this point including the cases of **Electro Watts Limited Vs Alios Finance Kenya Limited Civil Appeal No. 96 of 2018 (2018) eKLR** and **Beatrice Kariuko Muriithi Vs Peter Karani Wanjau Kerugoya ELC Appeal**

**No. 8 of 2020 (2020) eKLR**

24. For the above reasons, I find no reason to grant let alone entertain the merits of the Applicant's application for stay. The Court does not have jurisdiction to stay a negative order such as the one issued by the lower Court dismissing the Applicant's application dated 2<sup>nd</sup> September 2020.

25. However even if the Court could rightfully entertain the said application for stay, I doubt that the threshold as espoused under Order 42 Rule 6 has been met by the Applicant. Materially, the 3 conditions in the said provision apply conjunctively and must all be present for there to be a valid reason to grant stay.

26. On whether substantial loss may result to the applicant unless the order is made, this invites us to look at the subject matter of the proceedings at the lower court in order to determine what is at stake for both parties. The subject matter in the application at the lower Court is the payment structure and/or arrangements for the decretal amount. The Applicant sought to have the earlier payment structure reviewed in light of the financial challenges it was facing.

27. Vide the application dated 2<sup>nd</sup> September 2020, the Applicant indicated its willingness to settle the decretal amount and alongside seeking stay of execution, it proposed to settle the decretal amount in installments of Ksh 200,000/= for the first month, Ksh 50,000/= per month for the next 5 months and Ksh 400,000/= per month subsequently.

28. In dismissing the Applicant's application dated 2<sup>nd</sup> September 2020, the Court found as follows at page 3 thereof: -

*'I note that indeed this Honourable Court had made a ruling on 13<sup>th</sup> August 2020 allowing the applicant to settle the decretal amount in installments. I note further that the same arguments advanced by the Applicant in this application on financial challenges are the same ones being advanced in this application. As such, I agree with the Respondent that upon delivering the ruling on 13<sup>th</sup> August 2020, this Court became functus officio and reviewing the orders granted on 13<sup>th</sup> August 2020 on the same grounds will be tantamount to this Court sitting on it's own appeal.*

*I also note that the Applicant, despite making promises on it's willingness to settle the decretal amount has not attached any evidence to show that it has at least tried to settle the decretal amount herein. The applicant has therefore not demonstrated bona fides (good faith and sincerity) in this matter.*

*The upshot is that the application lacks merit and I hereby dismiss it with costs.'*

29. The question that arises is that following an admission of the amount owed to the Respondent, and following an indication of willingness to settle the decretal amount, what substantial loss is likely to be suffered by the Applicant should stay not be granted, especially when it has time and again failed to honour its payment obligations.

30. It is a well established principle of equity that whomsoever comes to equity must come with clean hands. In the present case, there is doubt as to the real intentions of the Applicant in approaching this Court since despite indicating willingness to pay, it has not shown the slightest efforts to comply.

31. All these while, the Respondent has not been able to enjoy the fruits of his judgement. Notably, the Judgement of 23<sup>rd</sup> April 2020 was rendered from the findings of the Court in a declaratory suit, which suit was only necessitated following the Appellant's refusal to pay what had initially been awarded in a different suit.

32. In the case of *Bonface Kariuki Wahome Vs Peter Nziki Nyamai & Another* Kajiado Civil Appeal No. 43 of 2018 (2019) eKLR, Nyakundi J. held as follows: -

*'It is trite law that a litigant must enjoy the fruits of his/her judgement. In Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63 it was held that:*

*"...to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court".*

*In view of the above decision, it is noteworthy that a litigant that has lost his case has a right to appeal against the findings of the court. It follows therefore that a matter is deemed concluded after going through its due course all the way to the apex court if need be. But also it must be understood that until and unless the Judgement/Decree has been set aside by the superior court, remains in force capable of being executed. The Courts therefore must balance the two competing interest of the decree holder and that of the appellant. (See the case of *Kiplagat Kotut v Rose Jebor Kipngok [2015] eKLR*)'*

33. Although in the above case stay of execution was granted, the same was sought with respect to a **positive** order and further, the issue of inability to pay had been raised and the Applicant therein without any protests by the Respondent therein and further, the Applicant had

offered and was ready to deposit security. In the present case, none of these has been shown to exist and there is no reason to grant the stay of execution, even if there had been a competent application for stay of execution.

34. Although the Memorandum of Appeal and the Applicant's submissions introduces the issue of Section 5 (b) of the Insurance Act, Cap which purportedly Caps the amount recoverable by an insured on a single claim at Ksh 3,000,000/= A perusal of the pleadings show that this issue was not, to the slightest extent the subject in the application dated 2<sup>nd</sup> December 2020 which culminated in the Ruling of 10<sup>th</sup> December 2020.

35. If anything, this issue contradicts the very essence of the very same Applicant's application dated 2<sup>nd</sup> September 2020 which was giving a payment plan after having admitted the sum owed to the Respondent.

36. Although the Appeal involves a money decree, the Applicant has not raised any issue with the ability and/or inability of the Respondent to pay should the appeal be determined in the Appellant's favour. Had this issue been raised, the burden would then have shifted to the Respondent to prove that he has the means to pay. As such, no substantial loss to be suffered by the Appellant has been demonstrated.

37. Furthermore, the Applicant has not offered any security as envisaged in Order 42 Rule 6 of the Civil Procedure Rules, 2010. Although the application was made in good time, being only 6 six days post delivery of the impugned Ruling, the other two conditions have not been met.

## **CONCLUSION**

38. In *Hunker Trading Company Limited v Elf Oil Kenya Limited* [2010] eKLR, the Court of Appeal held an abuse of the process of the court to file a repeated application for stay of execution after failing to comply with orders made in an earlier similar application as follows:

*"The applicant is seeking the same orders it declined to obey. We think that we have the jurisdiction to stop it in its tracks in order to attain or further the "O2" principle. We would act unjustly if we were to allow it another chance in this Court to defeat the cause of justice by failing to obey an important order of the superior court...."*

*Disobedience of a court order that was intended for the same purposes being pursued by the applicant in this Court is a clear violation of the "O2 principle" as demonstrated above and we hereby invoke the power vested in us under section 3A to dismiss the application."*

39. The *Hunker* bells ring true of this application which seeks to alter the terms of stay granted in an application which the applicant failed to obey and is therefore disentitled of relief, as a consequence of breach of the overriding objective principle of the civil process of the court.

40. Without finally deciding, it is noted that the decision of a trial court of 10<sup>th</sup> December 2020 from which the present appeal is preferred is the exercise of discretion of the trial court to review or refuse to review its earlier order, the interference of which discretion is circumscribed by the practice of the court as held in *Mbogo v. Shah* (1968) EA 93 (per Newbold P.) as follows:

*"A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice."*

41. There would appear to be no arguable case to present to the appeal court and this court, therefore, refuses the application for stay of execution pending appeal from the decision of the trial court refusing an application for review.

42. Ultimately, there is in legal acceptance of the term nothing to *stay* in a *negative* order which does not compel or require the doing or the taking of any action. The application for stay of execution of the trial court's order of 10<sup>th</sup> December 2020 refusing to review its earlier ruling of 13<sup>th</sup> August 2020 is declined.

## **ORDERS**

43. Accordingly, for the reasons set out above, the court makes the following orders:

1. Leave for change of advocates post judgment is granted and the firm of R. M. Mochache & Co. Advocates is allowed to appear for the appellant.
2. The application dated 16<sup>th</sup> December 2020 is dismissed.
3. Costs will abide the outcome of the appeal.

*Order accordingly.*

**DATED AND DELIVERED THIS 4<sup>TH</sup> DAY OF FEBRUARY, 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

M/S R. M. Mochache & Co. Advocates, the appellant.

M/S Mbogo & Muriuki Advocates for the Respondent.