



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E266 OF 2020

DAVID GICHIRI.....1ST APPLICANT

GATHOMI MUTUKU..... 2ND APPLICANT

SHABAN KINUNGU.....3RD APPLICANT

JOSEPH NGUGI4TH APPLICANT

-VERSUS-

EMMAH KERUBO SESE..... RESPONDENT

RULING

1. Before the court for determination is a motion dated 26th November, 2020 seeking inter alia an order to stay execution of the judgment and decree in **Milimani CMCC 1593 of 2017** pending the hearing and determination of the appeal filed herein. The motion is expressed to be brought under Order 42 Rule 4 & 6, Order 50 Rule 4, and Order 51 Rule 1 of the Civil Procedure Rules, inter alia. On grounds, among others, that being dissatisfied by the decision in **Milimani CMCC 1593 of 2017** delivered on 2nd October, 2020 the Applicants have preferred an appeal which overwhelming chances of success and that the Applicants will suffer substantial loss if stay is denied and their appeal rendered nugatory.

2. The affidavit in support of the motion is sworn by Pauline Waruhiu who describes herself as the Head of Claims and Legal at Directline Assurance Co. Ltd the insurers of the suit motor vehicle registration no. **KAS 456W**. The deponent states that she was therefore competent, conversant with the matter and duly authorized to swear the affidavit by *“dint of M/S Directline Assurance Company Limited’s rights of subrogation under the relevant policy of insurance and at Common law and its right to defend, settle and/or prosecute any claims in the insured’s name”*.

3. The deponent asserts that the Applicant is aggrieved by the judgment of the lower court and has preferred an appeal; the Applicant is apprehensive the Respondent may proceed with execution at any time which execution will render the appeal nugatory, and occasion irreparable loss and damage as the Respondent’s financial means are unknown, and if the decretal sums are paid, the Respondent will not be in a position to make a refund out were the appeal to succeed. Finally, the deponent expresses readiness to deposit the entire decretal amount in court as security for performance of the decree.

4. The motion was opposed by way of a replying affidavit dated 15th December, 2020 by **Emmah Kerubo Sese**, the Respondent. The affidavit takes issue with the affidavit in support of the motion which she states is sworn by a stranger and hence the motion was fatally defective. In her view the motion has no merit and is brought in bad faith with the intention of denying her the fruits of her judgment.

5. On 20th January 2021 parties took directions on the matter and agreed to dispose of the motions by way of written submissions. The parties duly complied.

6. For the Applicants, it was submitted that the Applicants had satisfied the threshold as set out in Order 42 Rule 6 of the Civil Procedure Rules to warrant the grant of the orders sought. The assert that the motion before the court was filed in a timely manner as judgment was delivered on 2nd October, 2020 and the present motion filed on 27th November, 2020. Secondly, the Applicants reiterate that the Respondents’ financial means are unknown and, in the event, the decretal sum is paid out to the Respondent, and she may not be able to refund monies paid to her in the event that the appeal is successful. Citing the case of **Edward Kamau & Another v Hannah Mukui Gichuki & Another [2015] ekLR** wherein the court cited the Court of Appeal decision in **National Industrial Credit Bank Ltd. v Aquinas Francis Wasike Civ. Appln. No. 238/2005**, the Applicants asserted that once they allege the Respondent’s financial incapacity to refund, the burden automatically shifts to the Respondent to demonstrate that she possesses the financial capability to refund the decretal sum in the event of the appeal succeeding. Finally, the Applicants pledged to furnish reasonable security as condition for the order of stay of execution.

7. On the part of the Respondents, it was argued that the motion before the court lacks merit and ought to be dismissed. As a preliminary issue the Respondent submitted the affidavit in support of the motion is fatally defective and incompetent having been sworn by a stranger to these proceedings. It was the Respondents' submission the deponent of the affidavit in support of the motion who claims to be the Head of Claims and Legal at Directline Assurance Co. Ltd is not a party to the instant proceedings. That the said insurer and/or its employees are strangers to the proceedings and that, the deponent in the said affidavit had failed to produce any authorization allowing her to plead on behalf of the Applicants. Consequently, the motion was defective on account of the aforementioned.

8. Further, the Respondent submitted the rights of the insurer under the principle of subrogation had not accrued as the insurer had not paid out any monies on behalf of the insured, and hence the deponent in the affidavit in support of the motion is barred from pleading herein; that her *locus* to so depose is derived from rights under the principle of subrogation which in this case had not crystallized. Counsel relied on several authorities including **Kenya Power & Lighting Co. Limited v Julius Wambale & Another [2019] eKLR** and the Court of Appeal decision in **Mojo Matanya ole Keiwa v Chief Justice of Kenya & 6 Others [2008] eKLR**.

9. On the merits of the motion, the Respondent submitted that the motion was an afterthought having been filed after the lapse of the 30-day stay of execution granted by the lower court upon delivery of the judgment. Further, the applicant did not explain the delay in filing the instant application. On That the Applicants had failed to clearly demonstrate what prejudice will be visited upon them if stay of execution pending appeal is not granted. Counsel relied on **the case of James Wangalwa & Another v Agnes Naliaka Cheseto (2012)e KLR** and urged that in balancing the rights of both parties to the appeal the court be inclined to order the Applicants to deposit security.

10. The court has considered the material canvassed in respect of the motion. As a preliminary point the Court must determine whether the motion before it is fatally defective as argued by the Respondent. By her replying affidavit the Respondent raised objection to the fact that the motion was supported by an affidavit sworn by a stranger to the proceedings. The matter was further raised in her written submissions. On their part, the Applicants did not address themselves to the objection. The Court has considered the Respondent's submissions and the affidavit supporting the motion. No authority to plead on behalf of the Applicants has been filed by the deponent to the supporting affidavit. However, at paragraph 1 of the affidavit it is deposed that the deponent is:

"...the Head of Claims and Legal in Directline Assurance Company Limited who are the insurers of the motor vehicle registration number KAS 456 W and at whose instance this claim is claimed from and which is being Appealed from and I am conversant with the issues relating to this suit and I am duly authorized and competent to make this affidavit by dint of M/S Directline Assurance Company Limited's rights of subrogation under the relevant policy of insurance and at Common law and its right to defend, settle and/or prosecute any claims in the insured's name". (emphasis added).

11. Therefore, it is evident that the insurance company approached the Court in their insured's name under the principle of subrogation. Is the doctrine of subrogation properly invoked in this case where, undeniably, the insurance company has not settled the Respondent's claim on behalf of the Applicants? In **Africa Merchant Assurance Company v Kenya Power & Lighting Company Limited (2018) eKLR** the Court of Appeal had this to say:

"26. The essence of the doctrine of subrogation is not in contention. It allows an insurer after compensating an insured for any loss under the insurance contract to step into the shoes of the insured. In that, the insurer is entitled to all the rights and remedies the insured might have against a third party in respect of the loss compensated...."

28. As it stands, the law in that respect is settled, that is, that an insurer cannot under the doctrine of subrogation institute a suit in its own name against a third party. See this Court's decisions in *Octagon Private investigation Security Services vs. Lion of Kenya Insurance Co.* [1994] eKLR and *Michael Hubert Kloss & another vs. David Seroney & 5 others* [2009] eKLR."

12. In the case of **Egypt Air Corporation vs. Suffish International Food Processors (U) Ltd and Another [1999] 1 EA 69** the Court defined the basis of the doctrine of subrogation as follows:

"The whole basis of subrogation doctrine is founded on a binding and operative contract of indemnity and it derives its life from the original contract of indemnity and gains its operative force from payment under that contract; the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity. If there is no contract of indemnity, then there is no juristic scope for the operation of the principle of subrogation." (emphasis added)

13. The Court stated in **Opiss vs. Lion of Kenya Insurance Company Civil Appeal No. 185 of 1991**:

"The right to subrogate does not create a privity of contract between the insurance company and the third party; it only gives the insurance company the right to take over the rights and privileges of the insured and therefore must be brought in the name of the insured." (emphasis added)

14. Undeniably in this case, the insurance company is yet to make good the Respondent's claim but has seemingly assumed to step into the shoes of their insured. The invocation of the doctrine of subrogation by the insurance company is therefore premature, their rights thereunder not having crystallized. This Court is in agreement therefore with the sentiments expressed by **Githua J** while dealing with a similar situation in **Kenya Power & Lighting Company Limited v Julius Wambale & Another (2019) eKLR**, to the effect that:

"The parameters within which the principle of subrogation applies are now well settled. The doctrine applies where there is a contract of insurance and following crystallization of the risk insured, the insurer had compensated its insured for financial loss occasioned thereby usually by a third party. Under this doctrine, the insurer is in law entitled to step into the shoes of the insured and enjoy all the rights, privileges and remedies accruing to the insured including the right to seek indemnity from a

third party. The action must however be instituted in the name of the insured with his consent and must relate to the subject of the contract of insurance.”

It is not disputed that the insurance company has not yet settled the decretal amount on behalf of the applicant who is its insured. It therefore follows that its right under the doctrine of subrogation has not yet crystallized and even if it had, its recourse would only lie in the filing of a suit against the third party blamed for the occurrence of the risk in question for recovery of the sums expended on its insured”

15. The motion before the Court is founded upon a premature invocation of the principle of subrogation by the insurance company. Hence the deponent to the affidavit supporting the motion is a stranger to these proceedings. The motion and affidavit are therefore incompetent. The court hereby strikes out the entire motion with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 13TH DAY OF MAY 2021.

C.MEOLI

JUDGE

In the Presence of:

For the Applicants: Ms. Sagini h/b for Ms Kanini.

For the Respondent: N/A.

Court Assistant: Carole