REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. E19 OF 2021.

ENTERTAINER TRUCKS CO. LTD.....APPLICANT

VERSUS

PAUL MACHARIA NDUATI.....RESPONDENT

RULING.

1. The applicant has filed a notice of motion application dated **2nd March 2021** seeking for orders inter alia;

   i. THAT there be an order for stay of execution of the judgment delivered on 23rd of December 2020 pending the hearing and determination of this application inter parties.

   ii. THAT the court be pleased to grant stay of execution of the judgment delivered on 23rd of December 2020 pending the hearing and determination of an appeal against the said Judgment.

   iii. THAT the Appellant be granted leave to appeal out of time against the judgment delivered on 23rd of December 2020 and the Memorandum of Appeal annexed hereto be deemed as duly filed on payment of the requisite fees.

   iv. THAT the costs of this application be provided for.

2. The application is premised on the grounds on the face of the record and the supporting affidavit of **Paul Kibichiy Biego** the appellant's director in which he averred that he became aware of the judgement delivered on 23rd December, 2020 on 25th February 2021 when M/s Maskys Auctioneers proclaimed its motor-vehicles in the purported execution of a decree.

3. The appellant averred that as a sign of good faith a sum of Kshs. 3,000,000 has already been paid to the respondent and that unless the application is allowed the applicant's appeal shall be rendered nugatory and the appellant will suffer irreparable damage as it will be condemned to pay the respondent the sum in excess of Kshs. 6,400,000 or risk it's motor vehicle being proclaimed. The motor vehicles sought to be proclaimed are used for commercial purposes by the appellant, hence it's attachment shall have acrippling effect on its operations.

4. The appellant averred that the respondent is unlikely to be subjected to any prejudice should the application be allowed and hence it is in the interest of justice that this application be heard to allow the appellant to lodge the appeal out of time. The appellant averred that he has met the threshold since he has an arguable appeal with high chances of success as the award is manifestly excessive, he stands to suffer substantial loss if condemned to settle a decree which is manifestly excessive, the application has been made without unreasonable delay, and the appellant is willing to abide by the terms of security for costs as may be imposed by the court.

5. The respondent filed a replying affidavit and averred that the application is misconceived, bad in law and the applicant is guilty of non-disclosure of material facts and thus not entitled to court's discretion and/or the orders sought. The respondent averred that it would defeat the purpose of the Insurance Act if the Applicant was to be accorded a right of Appeal whereas the insurance Company has already settled its liability towards the judgement up to the maximum limit of Kshs. 3 million. The appellant has an obligation of settling the excess amount thus the payment of the excess amount of Kshs. 3.7 million should not be the determining factor that accords the insured a right of appeal.

6. The respondent averred that the doctrine of subrogation would be put into jeopardy if the appellant was to be allowed to re-open the proceedings of the trial court. In any event, the applicant's appeal was filed 21 days out of time without any valid reasons contrary to the provisions of **Section 79 G of the Civil Procedure Act** thus making the said appeal incompetent. Hence, no orders of stay should be granted premised on an incompetent appeal. The respondent contended that the application should be dismissed with costs and the stay of execution orders ought to be vacated forthwith.

7. It was on the strength of the foregoing that the respondent raised a preliminary objection against the appellant's application and sought

that it be struck out and/or be dismissed with costs to the respondent for being incompetent, untenable in law and for being filed in abuse of the court process.

8. The application and the preliminary objection were canvassed by way of written submissions as directed by the court and both parties filed their submissions as summarized herein under.

Applicant's written submissions

9. The applicant submitted that it has a right of appeal as envisaged under **S. 95 and 79 (G) of the Civil Procedure Act** since all that the appellant has to do under the proviso of **section 79 (G)** is to satisfy the court that he had sufficient cause for not filing the appeal in time. The Insurance Act does not expressly forbid an appeal being preferred in instances where the insurer took over the defence of the case and opts to pay part of the decree to the statutory limit on behalf of the insured.

10. The applicant submitted that under the doctrine of subrogation, the insurer can only exercise those rights or remedies that accrue to the insured hence it cannot have any greater right than the insured. See the case **of Margaret Kannes Muyanga v Jamal Abdulkarim Musa [2020] eklr.** It is therefore not correct for the respondent to state that the firm of Ms Murimi Ndumia, Mbago & Muchela Advocates had no responsibility to notify the applicant of the decision of the trial court since the said law firm was working for the insurance having taken over the rights of the applicant.

11. The applicant submitted that part payment by the insurer should not be used against the applicant as acceptance of liability to complete payment of the balance. The applicant submitted that **Section 79G of the CPA** gives an aggrieved person liberty to apply for leave to appeal out of time and the court has discretion to grant such leave upon being satisfied that the applicant has established a good and sufficient cause for not filing the appeal out of time. **Section 95 of the CPA** also gives this court discretion to enlarge time to allow a claimant appeal out of time.

12. The applicant relied in the case of **Tahir Sheikh Said Transporters (K) ltd v Charles Ungalo Civil Application Number 119 of 1997** that was highlighted by Justice Odunga's in his book, Odunga's Digest on **Civil Case Law and Procedure Volume 6 page 4038** ***"where it was held that the failure of the insurance company to inform the insured of the outcome of the suit is a good ground for extension of time to appeal."*** The applicant submitted that it has demonstrated good and sufficient cause to warrant extension of time to appeal as it is clear that the insurer's advocate failed to notify it of the delivery of the judgment.

13. The applicant submitted that it had met all the conditions of stay as envisaged under **Order 42 Rule 6 of the Civil Procedure Rules**. He stated that he has demonstrated that he would suffer substantial loss within the meaning of the **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** case. Should the appeal be admitted out of time and the assets of the applicant sold before determination of the appeal, and should the appeal succeed, the applicant will not only be subjected to substantial loss as the attached assets are used for commercial transport but also the appeal will be rendered nugatory.

14. The applicant submitted that there was no inordinate delay in filing this application as it filed as soon as it became aware of the decision after being served with the proclamation notice on 25/2/2021. On the issue of security, the applicant submitted that the respondent is in receipt of the decretal sum of Kshs. 3 million and requested that the same be deemed as security for costs pending hearing and the determination if admitted out of time. The applicant also deposed that he is willing and ready to furnish security as may be ordered by this Court.

15. The applicant submitted on costs and requested this court to exercise its discretion under **section 27 of the Civil Procedure Act** and dismiss the claim in its entirety with costs to the defendant.

Respondent's submissions

16. The respondent relied on **Section 10 (1) and section 5 (b) (iv) of the Insurance (Motor Vehicles Third Party Risks) Act** and submitted that there must have been express authority given to the Insurer by the insured/Applicant and which authority allowed the insurer to prosecute the case, enter into consents and/or settle the award on liability against the insured/applicant. Once the insurer has settled a third party judgment on behalf of the insured as per provisions of the **Act (CAP 405)** then the insured who had given authority to the insurer to prosecute the defence cannot turn around to start challenging the acts and/or omissions of the insurer without the mandate of the insurer.

17. It is trite law that an appeal is a continuation of a suit and therefore it is only the insurer who would have the right or entitlement to Appeal by using the name of the Insured but not the Insured to mount an appeal after liability has been acknowledged and settlement made by the insurer.

18. The respondent submitted that pursuant to the provisions of **Section 10 (1),** the insurer has the mandate to take over defence proceedings on behalf of the insured and thereon settle liability for the insured as long as the policy of the insurance is in force. When liability has been settled by the insurance so as to indemnify the insured in a third party claim, then there is no authority and specifically without approval by the insurer for the insured to commence an action to re-open proceedings which were conducted on his behalf by the insurer.

19. The respondent submitted that where the insurer has settled the third party claim up to the maximum limit of Kshs.3 million as provided by law, then the insured has no obligation than to settle the amount in excess of the maximum. In the event that the insured is aggrieved by the conduct of defence proceedings on his behalf, then his only option is to pursue the insurer for damages on the negligent conduct of proceedings.

20. Basically, if insured parties were to be allowed to reopen proceedings where settlement has already been made by their insurers then the provisions of **CAP 405** would be mutilated and thereon obviate the whole purpose for which the **Act (CAP 405)** was formulated. The

said Act was primarily promulgated for the purpose of providing protection to third parties who receive injury and so as to share responsibility between the insurer and insured in settling third party claims even when the liability exceeds the maximum limit of Kshs. 3 Million.

21. The respondent submitted that had the judgement been for an amount not exceeding 3 Million, the insurer would have settled the whole amount without any right of appeal accruing to the insured, in the same breath there should be no such right just because the insured has been compelled to shoulder the amount in excess of Kshs. 3 million. Therefore, the only party with the right to question the lower court's judgement is the insurer while using the insured's name.

22. The respondent relied on the Court of Appeal case of Kenya **Airfreight Handling Limited v Indemnity Insurance Company of North A, Erica & 3 others [2001] eklr** and the case of **Leslie John Wilkins v Buseki Enterprises Ltd [2015] eklr** and submitted that when the insurer made payment of Kshs. 3 million on behalf of the respondent, the insurer was actually subrogated to the rights of the insured and therefore any rights of claim, remedies or privileges owing to the insured now belong to the insurer. The application is thus in flagrant disregard of the doctrine of subrogation.

23. The respondent submitted that the previous advocates on record were not under obligation to inform the applicant about the judgement since the advocates were conducting proceedings on behalf of the Applicant's insurer. It was the respondent's contention that the insurer must have notified the insured of the judgement and that is why the insured/applicant is aware of the Kshs. 3 million payments. The applicant has not disclosed to the court how it became aware of the payment.

24. The respondent submitted that the applicant is being economical with the truth as it failed to inform the court that the Kshs. 3 million paid was in conformity to **Section 10(1) of CAP 405** and not payment in good faith for partial fulfillment of the decree pending determination of the appeal.

25. The respondent further submitted that the applicant has not exhibited any chances of success of the appeal if the extension of time is granted. The respondent will suffer prejudice if the application is allowed for he had a legitimate expectation that once the time for lodging of an appeal had elapsed, then the applicant would abandon his right of appeal. Furthermore, the insurer had already acknowledged liability and paid the respondent's claim up to the maximum limit hence the applicant's application has no merit.

26. The respondent submitted that in accordance to **Order 42 Rule 6 (1) of the Civil Procedure Rules** an application or order for stay of execution of appeal, can only be granted once an appeal has been filed in respect of the decree/order to be stayed. The court has no mandate to consider an application when there is no pending appeal against the decree/order to be stayed. The respondent relied on the case of **Mary Rono v Ben Gathogo & Another Nakuru H.C Civil Appeal No.92 of 2015** and submitted that the applicant is seeking for leave to file an appeal out of time and yet the appeal has not been lodged or is not pending for hearing and determination. Hence, the court has no powers to entertain an application for stay of execution without any pending appeal.

27. The respondent further relied in the case of **I.T Inamdar, Subodh Inamdar & Samir Inamdar v Postal Corporation of Kenya [2001] eklr** and submitted that the cornerstone in all applications for stay pending appeal is the demonstration of substantial loss to be suffered if stay is not granted, the enforcement of a decree by payment does not of itself render the decree nugatory. It is incumbent upon the applicant to demonstrate that it might not be able to recover the sum paid to the plaintiff/ decree holder if at all the appeal turns successful after execution of the decree.

28. The respondent submitted that the application fails on all fronts and hence it should be dismissed and/ or struck out with costs to the respondent.

ANALYSIS AND DETERMINATION

Issues for determination

i. Whether the applicant has a right to appeal after the insurer has already paid up to the maximum contribution of 3million.

29. It is not in dispute that the amount the insurer can pay is capped at Kshs. 3 million. In the case of **Justus Mutiga & 2 others v Law Society of Kenya & another [2018] Eklr** the Court of Appeal held *that* ***"Unfortunately, under the current system, the third party has been left at the mercy of not just the percentages imposed under the schedule, but should there be any excess recoverable, he must contend with pursuing the insured personally. For example, in the case of Georgina Wangari Mwangi v. David Mwangi Muteti, High Court of Kenya Civil Case No 40 of 2013; it was held that the insurance company is to pay a maximum of Ksh.3, 000, 000 with any excess being payable by the insured party. The plaintiff in that case was awarded damages of Kshs. 14,612,540.20 out of which only Kshs. 3,000,000 was payable by the insurer, with the rest being recoverable from the insured."***

30. In the **Law Society of Kenya versus Attorney General & 3 Others 2016 eKLR** the court held that, the Insurance Act only limits how much an insurer should pay by apportioning a maximum of Kshs. 3 million to be paid by the insurer. Similarly, in **Africa Merchant Assurance Co. Limited versus William Muriithi Kamaru 2016 eKLR**, the court also held that the insurer cannot pay any amount above 3 million and a decree holder could not recover more than the Kshs. 3 million limit.

31. ***Section 5 (b) (iv) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405***, provides that, an insurer in Public Service Vehicles in respect to third parties is only liable to pay a maximum of Kshs. 3 million per claim.

32. The insurer has paid Kshs. 3 million, any amount over and above the amount paid is to be paid by the insured as the insurance Company is not liable to any amount in excess of Kshs. 3 million. What comes to my mind after looking at the above authorities is that the buck stops at payment of the maximum amount of 3 million by the insurer. Meaning that liability in relation to the insurer comes to an end once the

insurance company honors its part and the insured remains liable to the extent of the balance in excess of 3 million. It is therefore correct to state that the insured has a right to appeal against the judgement of the trial court if it feels aggrieved by the same. Neither the **Insurance Act** nor the **Civil Procedure Act** specifies persons who can appeal.

33. The applicant submitted that it has a right of appeal as envisaged under **S. 95 and 79 (G) of the Civil Procedure Act. Section 79G** provides as follows:

> **79G.** ***"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.***
>
> ***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.***

Section 95 provides thus: -

> **95.** ***Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.***

34. Therefore, an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so. The applicant submitted that the reason why it didn't file the appeal in time is because it was not aware of the lower court's judgement delivered on 23rd December, 2020 until on 25th February 2021 when M/s Maskys Auctioneers proclaimed its motor-vehicles in the purported execution of a decree. The matter was being handled by the advocates appointed by the insurer who according to the defendant/insured never informed him of the judgement.

35. This court would give the insured a benefit of doubt and consider its reason of not filing an appeal on time as sufficient reason. Further, the delay is only for 21 days which is not inordinate in the circumstances as to deny the applicant an opportunity to ventilate its grievances by way of an appeal to this Court.

35. In the case of **Charlene Nyeri Kuria v Simon Gitu Mbirua & another [2018] eKLR** which has similar facts as in the instant case the court held that;

> ***"The defendants have the right of appeal which they are entitled to pursue. In that regard, I grant the order that the time for them to lodge an appeal be extended by a period of 30 days from the date of this ruling."***

ii. <u>Whether the order of stay of execution should be granted.</u>

36. On the prayer for stay of execution of judgment or decree of the trial court pending the hearing and determination of the intended appeal, **Order 42 Rule 6(2) of the Civil Procedure Rules** provides that:

> ***"No order for stay of execution shall be made under sub rule (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."***

37. **In JMM v PM [2018] e KLR** it was stated:

> ***"As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."***

39. In **Butt vs. Rent Restriction Tribunal** ***[1979],*** the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle 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 the appeal court reverse the judge's discretion. Thirdly, 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. Finally, 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 requirements.

40. On the issue of substantial loss, the court observed in **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."

41. In the instant suit, it is the applicant's contention that the motor-vehicles sought to be proclaimed are used for commercial purposes by the appellant, hence it's attachment shall have a crippling effect on it's operations. It therefore follows that if the Respondent executes the judgement and the Applicant's appeal succeeds, then not only will the Applicant suffer substantial loss but the appeal will also be rendered nugatory. The respondent has not disclosed any source of income that he would use to refund the Applicant the decretal amount should the appeal succeed. The Applicant has thus established that it will suffer substantial loss if the intended execution is not stayed.

42. Was the application filed without unreasonable delay? The application has been filed 21 days after the delivery of the judgement. It is noted that the appeal was filed on 3rd March, 2021 soon after the applicant became aware of the judgement thus signaling the Applicant's interest in pursuing the appeal. There is thus no inordinate delay on the part of the Applicant.

43. With regard to security for costs, the court in ***Absalom Dova vs. Tarbo Transporters [2013] eKLR, 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…"

45. The Applicant indicated its readiness to furnish security for the due performance of the decree. It is also the applicant's contention that the respondent is in receipt of the decretal sum of Kshs. 3 million and requested that the same be deemed as security for costs pending hearing and determination of the appeal.

46. Taking the interest of both parties equally this court in the premises shall allow the application as hereunder;

(a) The applicant is hereby granted leave to file and serve its memorandum of appeal within 14 days from the date herein.

(b) The applicant shall deposit the sum of kshs. 3.5 million or a bank guarantee for the said amount or an equivalent security for the same amount within 30 days from the date herein.

(c) The respondent shall have the costs of this application.

Dated signed and delivered via video link at Nakuru this 22nd day of July 2021.

H.K. CHEMITEI.

JUDGE