

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CIVIL APPEAL NO. 11 OF 2021

MWENGI MWANZIA & KIPANDINI ENTERPRISES LTD.....1ST & 2ND APPLICANT

VERSUS

KIMANTHI MUVEA.....RESPONDENT

(Being an appeal from the judgement of the Honorable court delivered on 9th February, 2021

by Hon. Magistrate Kasera in Kitui Magistrates Court Civil Suit No. 279 of 2019)

R U L I N G

1. The Appellants/Applicants herein, have lodged this **Notice of Motion** dated **22nd February, 2021** praying for the following orders: -

i. Spent

ii. Spent

iii. That this Hon. Court be pleased to order stay of execution in **Kitui Chief Magistrate's Court Civil Suit No. 279 of 2019** pending the hearing and determination of the appeal herein.

iv. Spent

v. That this Hon. Court does make such orders as it may deem just and expedient.

vi. Costs of this application.

2. This application has been brought by the Applicant on the following grounds namely: -

i. The Applicant is aggrieved by the judgement on quantum delivered on 9th February 2021 by Honorable Kasera Magistrate at Kitui in which as appeal has been lodged at the Kitui High Court.

ii. The Application is timely made and without any undue delay.

iii. The Applicant/Appellants stands to suffer substantial and irreparable loss and damage as there is a likelihood that the Applicant's/Appellants will be unable to recover the decretal sum awarded herein from the Respondents.

iv. That unless the application is allowed, the Applicant's appeal will be rendered nugatory.

v. That delay in filing the application was occasioned in the process of obtaining instructions to appeal the judgement delivered on 9th February, 2021.

vi. The Applicants are ready and willing to issue security in the form of a bank guarantee for the judgement amount to held by the court pending the determination of the intended appeal to enable the Applicants pursue their appeal.

vii. That the delay to file the application was inadvertent on the part of the advocates for the Applicants and the same was not deliberate as they were not in a position to advise their clients accordingly without a copy of the judgement.

viii. The applicants have a strong arguable appeal which has high chances of success.

ix. That application is made in good faith and the Respondents will not suffer any prejudice or any damage that cannot be compensated by way of costs if this application is allowed.

x. The Applicants are apprehensive that the Respondent may levy execution against the Applicants.

xi. The Applicants/Appellants are ready and willing to comply with such reasonable conditions that this court may grant to enable the Applicants pursue their Appeal.

3. The Applicants have supported the above with an affidavit sworn by Kelvin Njure, a claims Deputy Manager with Direct Line Assurance Co. Ltd, who are insurers of motor vehicle *Registration No. KAD 614D*, which was the subject of the claims at the trial court.

4. He claims that, the trial court delivered judgement without giving their advocates judgement notices. He however, avers that the delay in making this application was due to inadvertence on the part of the Applicants' advocates who could not advise them or give an opinion on the judgement without a copy of the judgement.

5. The Applicants claims that they are aggrieved by the judgement and that is why they preferred this appeal, but are now facing threats of execution from the decree holder.

6. The insurer avers that, it is ready and willing to provide a bank guarantee as security for stay of execution pending appeal.

7. In their written submissions, through learned Counsels Kimondo Gachoka & Co. Advocates, the Applicants insist they have an arguable appeal. They have drawn the attention of this court to the memorandum of appeal filed herein, submitting that the same raises serious points of law and fact.

The rely on the decision of *Bake 'N' Bite (Nairobi) Ltd. Versus Daniel Mutisya Mwalonzi [2015] eKLR*, where the court held that, an Applicant in the High Court appealing from a subordinate court is not required to demonstrate that they have an arguable appeal in an application for stay unlike the position in the Court of Appeal where they have to show that they have an arguable appeal.

8. The Appellants further submits that, the rules they have cited grants discretion to this court to grant the orders sought in this application and contend that, the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but they concede that the same is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

They have relied on the decision in *Esther Wamaita Njihia & 2 Others Versus Safaricom Ltd [2014] eKLR*, where the court emphasized the circumstances under which a court should exercise its discretion and that there are no limits or restrictions on when and why the discretion should be exercised and that the main concern is to do justice to all the parties.

9. The Appellants in this application have invoked **Order 42 Rule 6 of Civil Procedure Rule and Order 22(1) Civil Procedure Rule**. The Applicant argue that, sufficient cause in their view, is established if it can be demonstrated that a substantial loss will occur unless stay is granted. On this score, they rely on the case of *Tabro Transporters Ltd Versus Absalom Dova Lumbasi [2012] eKLR*.

10. They contend that, they are ready to deposit security and that the Respondent has not demonstrated that he will be in a position to refund the amount, if they are successful on appeal. They further rely on the case of *Edward Kamau & Another Versus Hanna Mukui Gichuki & Another [2015]eKLR*, where the court held that, while the evidential burden is on the Appellant seeking a stay to prove that the appeal would be rendered nugatory, that burden is shifted to the Respondent if the Appellant shows reasonable fear, that the Respondent is impecunious and unlikely to refund the amount paid, if the appeal succeeds.

11. The Appellants contend that, the sum awarded to the Respondent that is Kshs. 186,150, is substantial in its view and that the Respondent may not be in a position to refund it if their appeal succeeds.

12. The Respondent has opposed this application through a replying affidavit sworn by S.M. Makau on 3rd May, 2021. The Respondent's Counsel avers that, the judgement appealed against, is only on quantum because the parties agreed on liability at 90% to 10% in favour of the Respondent.

13. The Respondent avers that, it should be allowed to enjoy fruits of judgement as the Applicant has not fulfilled the mandatory conditions spelt out under **Order 42 Rule 6(1) of the Civil Procedure Rule**.

14. The Respondents contend that; the Appellant should pay 75% of the decretal amount. He submits that, the stay if granted, should be conditional, adding that financial ability of a decree holder is not a sole reason for allowing a stay of execution. He relies on the decision in *Stephen Wanjohi Versus Central Glass Industries Ltd (Nairobi HCC No. 6726 of 1991)*, where the court inter alia held that, it is not just to deny a successful litigant, the benefits of judgement simply because he is poor.

15. The issue for determination in this application, is whether the Applicants have met the conditions for grant of orders of stay of execution. The Appellants were aggrieved by the Lower Courts decision on quantum, only because the question of liability as seen from the record of proceedings was agreed between the parties in this appeal.

16. It is perhaps important to look at the amount awarded in this matter, as well as other related matters because determination of this application as observed above, affects the 3 other similar applications consolidated with this instant application.

The judgement by the trial court entered on 9th February, 2021, shows that, the Applicants were held 90% liable, while the Respondent shouldered 10% liability. The awards were as per the table below: -

	<u>LOWER COURT CASE</u>	<u>CIVIL APPEAL</u>	<u>AMOUNT AWARDED</u>
1	Kitui CMCC No. 279 of 2019	11/21	Kshs.186,150
2	Kitui CMCC No. 285/19	12/21	Kshs. 456,100
3	Kitui CMCC 281/2019	13/21	Kshs. 184,650
4	Kitui CMCC 284/2019	14/21	Kshs. 186,050

17. The guiding principles for grant of stay of execution pending appeal is provided under **Order 42 Rule 6 of the Civil Procedure Rule** which provide as follows: -

“.....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 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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.....”

18. An Applicant for stay of execution must therefore, show sufficient cause to justify why a decree holder should be denied fruits of judgements to await the outcome of an appeal filed. That is why under **Order 42 sub-rule (2) of Rule 6** as seen above a grant of stay of execution can only be granted on 2 conditions which are;

i. If the court is satisfied that a substantial loss may result.

ii. Application is filed timely.

19. Having set out what the law provides in respect to the substantive relief sought in this application which is stay of execution pending appeal, the facts presented before this court have to be tested to determine if the conditions for stay have been met. The Respondent has raised an important objection in regard to the affidavit in support of this application stating that one Kelvin Nguni, swore the said affidavit yet he is not a party to the proceedings herein.

20. The provisions of **Order 19 Rule 3 of the Civil Procedure Rule** provides as follows: -

“.... Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, provided that in interlocutory proceedings or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof...”

21. A cursory look at the averments made by the deponent of the affidavit in support of this application, one easily point out some averments which we should have avoided because they are either misleading or unclear on where he got the information. This court notes the following:

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i. Mr. Kelvin Ngure avers that he was informed that judgement was delivered without notice and were unrepresented but a perusal of the Lower Court's proceedings indicator that the Appellants were represented on 9th February, 2021 by Miss Wambui Holding Brief for Mwaura for the Appellants when the judgements were delivered. The Applicants were well represented and cannot make contrary claims.

ii. The same Kevin Ngure avers that, as follows under paragraph 6 of the said affidavit.

“.....the delay was inadvertent on the part of the advocate for the Applicant and the same was not deliberate as they were not in a position to advise their clients accordingly without a copy of the judgement...”

This raises the question how does the deponent know that the delay was inadvertent and how does he couch the competence of their advocate to be acquainted with the judgement delivered in her presence.

iii. Thirdly, the same Kelvin Ngure states that;-

“.....I am advised by my insurer that he is ready and willing to provide bank guarantee as a security for stay of execution....”

This pegs the question is he talking of an insurer of Kelvin Ngure or the insurer of the Appellants and are they the same insurers?

22. This court finds that the averments contained under paragraphs 4,5,6 and 7 of the affidavit of Kelvin Ngure offends the provisions of Order 19 Rule 3 of the Civil Procedure Rule as stipulated above and are to that extent struck out as provided under Order 19 Rule 6 of the Civil Procedure Rule. But it does appear that, that is not the only shortcoming in this application.

23. Besides the above anomalies, this application was filed after some delay which I do not find reasonable. There is the unexplained delay of 46 days from the time the judgement was delivered, to the time this application was filed. As seen from the above rules, an application for stay of execution should be made without unreasonable delay. The appeal herein, was filed on 8th March, 2021, which was within time but the delay in presenting this application has not been explained at all.

24. Apart from the above, the supporting affidavit in this application is impugned because, under the doctrine of subrogation, an insurer can only step in for an insured once the insurer has paid the claim. The question of whether an insurer can swear pleadings on behalf of the insured is answered in the decision of **Securicor Guards (K) Limited Versus Mohamed Saleem & Anor. [2019] eKLR**, where the court stated as follows;

“.....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 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....”

25. Similarly, in the case of **Kenya Power & Lighting Limited Versus Julius Wambale & Another (supra)** the court opined as follows;

“..... This case, 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 but it is not a right which can be exercised on appeal in the first instance....”

Mutungu J in **P.M. M. Private Safaris versus Kevin Ijatia [2006] eKLR** held as follows in a similar application;

“..... The insurer is not a party to the proceedings...hence the Affidavit is sworn by a stranger to the proceedings....The insurance sector clearly misleads the insured to believe that he/it, the insured is represented by a Counsel which Counsel is not answerable to the insured...”

26. There is no doubt that the insurer has not settled the decretal amount on behalf of the Applicants. The insurer therefore, under the above doctrine, cannot purport to swear affidavits on behalf of the Applicants. This renders the remaining part of the affidavit sworn by Kelvin Ngure incompetent. The entire affidavit is incompetent for violating Rules under **Order 19 Rule 3 of Civil Procedure Rule** as stated above, and offending the doctrine of subrogation.

The provisions of **Order 51 Rule 4** provides that, every notice of motion shall state in general terms, the grounds upon which it is presented and where it is based on affidavit, the same be served. This means that the motion before me, in view of my above findings, is unsupported and to that extent incompetent.

In the premises, the application dated 22nd February, 2021 is unsustainable and the same is struck out with costs. This order for avoidance of doubt shall also apply in **Civil Appeals numbers 12 of 2021, 13 of 2021 and 14 of 2021**.

DATED, SIGNED AND DELIVERED AT KITUI THIS 22ND DAY OF JULY, 2021.

HON. JUSTICE R.K. LIMO

JUDGE