



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CIVIL APPEAL NO. E 003 OF 2021

MADISON INSURANCE COMPANY LTD (*Now known as* .

MADISON GENERAL INSURANCE KENYA LTD).....**APPELLANT**

VERSUS

JOHN MWAURA IRUNGU).....**RESPONDENT**

RULING

1. The appellant craves two reliefs: Firstly, for a *stay of execution* of two separate decrees pending the determination of the appeal; and, that the motion be consolidated with another appeal being Murang'a High Court Civil Appeal Number E002 of 2021, Madison General Assurance Company Limited v Stanley Mwangi Mutura
2. The notice of motion is dated 8th February 2021. The two appeals emanate from separate decrees issued in Kangema Senior Principal Magistrates Civil Suit Nos. 83 & 84 of 2020 respectively. The decrees were against defendants who were insured by the appellant. Subsequently, the lower court made declarations dated 6th January 2021 and 13th January 2021 that the appellant was obligated to settle the claims by dint of section 10 of the **Insurance (Motor Vehicle Third Party Risks) Act** (hereafter *the Act*)
3. Those declarations precipitated the appeals and the motions. The motion is opposed by the respondent vide a replying affidavit sworn by the respondent on 18th February 2021.
4. Both learned counsel for the disputants filed written submissions on 17th March 2021 and 8th April 2021 respectively. On 12th May 2021 I heard brief arguments from both learned counsel.
5. I will commence with the prayer for *consolidation*. There is no meaningful opposition to it. I am satisfied that the two appeals originate from related suits in which the parties were represented by *similar* advocates. The primary issue for determination in the appeals revolve around the *statutory liability* of the appellant under the Act. I find that the appeals can conveniently be tried together. Furthermore, and in line with the *overriding objective* of the court, it will save valuable judicial time and costs.
6. For all those reasons, I order that this appeal be and is hereby consolidated with Murang'a High Court Civil Appeal No. E002 of 2021, Madison General Assurance Company Limited v Stanley Mwangi Mutura. Further *directions* will be given by the court at the *admission or hearing* of the consolidated appeals.
7. I will now turn to the prayer for *stay*. The essence of the motion is that unless leave is granted, the appeal will be rendered nugatory. The applicant's legal officer has deposed that execution of the decree will inflict substantial loss because the decree holders are men of straw. The applicant has also offered to provide security for due performance of the decree.
8. As I have stated, the motion is opposed. The gravamen of the reply is that there are no sufficient grounds for stay and that the entire motion is a delaying tactic. In the penultimate paragraph, the respondent prays that if stay be granted, it be pegged upon a deposit of the entire decretal sum in a joint interest earning account of both counsel.
9. The present motion is largely predicated upon Order 42 rules 6 of the **Civil Procedure Rules**. The court *may* grant a stay if *substantial loss* may occur; that the application has been made *without delay*; and, that the applicant furnishes *security* for the due performance of the decree that may ultimately be binding on him.
10. I find that the present motion was presented *without delay*.

11. I also find that there is an *arguable* appeal as to whether the appellant is obligated to settle the decree on behalf of its insured. I must emphasize that this does *not* mean that the two appeals will succeed. However, the court ought to see that the appeals, if successful are not rendered nugatory. *Wilson v Church* (No 2) 12 Ch. D [1879] 454 at 459, *Butt v Rent Restriction Tribunal* [1982] KLR 417.

12. But justice is a two-way street. The respondents are entitled to the fruits of their respective decrees. That is why the applicant must demonstrate that it will suffer *substantial loss* if the decree is executed. See *James Wangalwa & Another v Agnes Naliaka Cheseto*, High Court, Bungoma, Misc. Appl. 42 of 2011 [2012] eKLR. I am also alive to the general proposition that the mere execution of a *money decree* does *not* constitute substantial loss. *Kenya Shell v Benjamin Karuga* [1982-88] 1 KLR 1018.

13. However, the respondent has *not* deposed about his *means* to counter the argument that he would be *unable* to refund the decretal sums. See generally, *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another*, Court of Appeal, Nairobi, Civil Appeal No. 238 of 2005 [2006] eKLR. To that extent, I am satisfied that the appellant *may* never recover the decretal sums if its appeals succeed.

14. Lastly, I note that the applicant has *offered* to furnish security. But to ensure that the respondents are not left holding the short end of the stick; and, to guarantee that the appellant stays wide awake I will grant orders in the following terms-

- a) That there shall be a stay of execution of the decree pending the hearing and determination of the two consolidated appeals.
- b) That the stay is granted upon the *condition* that the appellant deposits the decretal sums into a joint interest earning account of both counsel within *30 days* of today's date.
- c) That in default of condition (b) above, execution shall issue.
- d) That this appeal be and is hereby consolidated with *Murang'a High Court Civil Appeal No. E002 of 2021, Madison General Assurance Company Limited v Stanley Mwangi Mutura*. Further *directions* will be given by the court at the *admission* or *hearing* of the consolidated appeals.
- e) That in the interests of justice, the appellant shall cause the records of appeal in the consolidated appeals to be lodged not more than *ninety days* from today's date; and, shall also ensure that the appeals are presented to the judge in chambers for admission or directions within a *further thirty days*.
- f) That costs shall be in the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 21ST DAY OF JULY 2021.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

No appearance by counsel for the appellant.

No appearance by counsel for the respondent.

Ms. Dorcas Waichuhi & Susan Waiganjo, Court Assistants.