



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HIGH COURT CIVIL MISC. APPLICATION NO. E024 OF 2021

TWIGA PANEL BEATERS LIMITED.....APPLICANT

VERSUS

JANET KASESE KATUKU.....RESPONDENT

R U L I N G

1. Before me, is a **Notice of Motion** dated **30th March, 2021**, lodged by Twiga Panel Beaters Limited the applicant herein, seeking the following orders namely;

i. Spent.

ii. That this Hon. Court be pleased to order stay of execution in Kitui Chief Magistrate Civil Case Number 218 of 2018, pending the hearing of the intended appeal.

iii. That the Applicant be granted leave to appeal out of time.

iv. Spent.

v. That the Applicant be allowed to furnish bank security pending hearing and determination of the intended appeal.

2. The Applicant has invoked the provisions of **Section 3A, 79G, and 95 of Civil Procedure Act, Order 22 Rule 22, Order 42 Rule 4,5,6 & 7, Order 51 Rule 6 and Order 51 Rule 1 and 3 of the Civil Procedure Rules**. It has listed the following grounds as a basis for the reliefs sought namely;

i. That the judgement was delivered on 24th February, 2021 by Hon. F. Nekesa and the Respondent was awarded liability 100% general damages, Kshs. 500,000 and special damages Kshs. 7,850 pain, plus costs and interest and the 30 days within which an appeal is to be filed have since lapsed.

ii. That Applicants/Appellants are aggrieved by the said judgement particularly on quantum and seek to appeal out of time.

iii. That the Applicants/Appellants are aggrieved by the said judgement particularly on quantum and seek leave to appeal out of time.

iv. That the lower court magistrate did not consider the defendant's evidence and submissions on quantum.

v. That the Applicants stand to suffer substantial and irreparable loss and damage as there is likelihood that the Applicants will be unable to recover the decretal sum awarded herein from the Respondent.

vi. That unless this application is allowed, the Applicants; intended appeal will be rendered nugatory and the Applicant/Appellant will suffer irreparable loss and damage.

vii. That the Applicants have a good arguable appeal which has high chances of success.

viii. That the Application has been presented without inordinate delay.

ix. That the Respondent is a person of unknown means hence the Applicant/Appellant is apprehensive that if the decretal sum is paid out, the appeal will be rendered an academic exercise.

x. That the application is made in good faith and the Respondent will not suffer any prejudice if this application is allowed.

xi. That the Applicant/Appellant is ready, willing and able to furnish such reasonable security in the form of a bank guarantee from the Diamond Trust Bank for the entire decretal amount pending hearing and determination of this application and the intended appeal.

3. In its supporting affidavit sworn on 30th March, 2021, by Pauline Waruhiu, the Head of Claims and legal at Directline Assurance Co. Ltd, the Applicant attributes the delay in filing their appeal to the advocate handling this matter claiming that unnamed advocate, who was handling this matter, left the firm of Kimondo Gachoka Advocate, who are on record in this matter without handing over.

4. The Applicant claims that, they are facing imminent threat of execution from Respondent's Advocates and that they are ready to provide security through a bank guarantee.

5. In their written submissions, the Applicant submits that, it has an arguable appeal and that, it will suffer substantial loss if stay is not granted. It contends that, the delay in filing this application has been sufficiently explained as it is attributed to mistake of their Counsel. The Applicant urges this court to grant the prayers sought stating their readiness and willingness to furnish security in form of a bank guarantee.

6. The Applicant relies on the following authorities: -

Edward Kamau & Another versus Hannah Mukui Gichuki & Another (2015) eKLR.

a) This was a matter where, orders in an application for stay of execution were granted by the court on condition that the Applicant pays the Respondent half of the decretal sum while the balance was deposited in a joint interest earning account in the name of the two parties. The court also allowed the Applicant to file an appeal out of time but gave a condition that the appeal had to be filed within 14 days.

b) ***National Industrial Credit Bank Ltd. Versus Aquinans Francis Wasike Court of Appeal Civil Application No. 238/2005***, where the Court of Appeal held that, in a situation where the Applicant expresses fear that their appeal would be rendered a nugatory due to the fact that the Respondent may be unable to repay the decretal sum, the burden of proof at that point shifts to the Respondent to demonstrate the resources that he has.

c) ***Phillip Keipto Chemwolo & Another Versus Augustine Kubende [1986]eKLR,495***. The Court of Appeal emphasized the importance of making determination on cases on merit as opposed to dismissing them on account of a party's mistake. The same principle was applied in ***Lucy Bosire versus Kehancha Div. Land Tribunal & 2 Others [2013] eKLR***.

7. The Respondent has opposed this application vide an affidavit sworn on 27th April, 2021. The Respondent avers that, this application is fatally defective as the supporting affidavit is sworn by a person who is not a party to this case.

8. The Respondent avers in the event the prayer for stay of execution is granted, the Applicant should be ordered to pay 2/3 of the decretal sum being Kshs. 437,402, while the balance of Kshs. 218,701 should be deposited in a joint interest earning account in the name of the parties' advocates.

9. In their submissions dated 7th June, 2021, the Respondent reiterate that, the application is fatally defective as the supporting affidavit is sworn by Pauline Waruhiu who states that she is the head of claims and legal at Direct Line Assurance Company Ltd. The Respondent has placed reliance on the cases of ***Kenya Power & Lighting Company versus Julius Wambale & Another (2019) eKLR and Misc. App. No. 98B, Paul Ngila & Anor. Versus Musili Maloza & Anor.***, where the applications of stay were dismissed on the principle of subrogation after it was established that the applications were filed by insurance companies when no evidence was tendered to show that the insurer had compensated its insured under the contract and was now stepping in the shoes of the insured to sue the third party.

10. On the prayer to file the appeal out of time, the Respondent submits that, the Applicant has failed to demonstrate and/or give any substantive reason to show why there was a delay in filing of their appeal. They have relied on the case of ***Thuita Mwangi Versus Kenya Airways Ltd. [2003] eKLR***. The court of appeal in this matter re-stated the considerations in granting stay of execution as first, the length of the delay: Secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the Respondent if the application is granted. Similarly, the Respondent has also relied on the case of ***Monica Malel & Another versus Civil Application No. Nai 246 of 2008***, where the court emphasized the importance of a party having a clear, satisfactory and specific reason of delay in filing an appeal as this is what allows the court apply its discretionary favour on the party.

11. On the right to access justice, the Respondents submits that, the right is two-way and points out that, she has been in the corridors of justice since 2018. She is asking this court to balance the rights of both parties and relies on ***M/S Portreitz Maternity versus James Karanga Kabia (Civil Appeal No. 63 of 1997)***, where the court stated the importance of balancing between the right to appeal, against the right of a party to enjoy the fruits of his judgement.

12. This court has considered this application and the response made. They are 3 issues that have cropped up for determination which are: -

i. Whether this application is defective because the supporting affidavit is defective.

ii. Whether the Applicant has shown sufficient cause to be granted leave to appeal out of time.

iii. Whether the Applicant deserves a grant of stay of execution.

13. **Whether the application is defective.**

On the first issue, the Respondent's position is that, the application before the court is fatally defective for the reason that, the person who swore the affidavit in support of the application is not party to these proceedings.

14. The Supporting Affidavit in this application however, introduces a deponent, Pauline Waruhiu who states as follows in paragraph two of her Supporting Affidavit;

“That I am the Head of Claims and Legal at Direct Line Assurance Company Limited who are the insurers of motor vehicle registration number KCA 280 B and at whose instance Civil Suit No. 218 of 2018 Kitui is defended and I am conversant with the issues relating to the aforementioned suit and duly authorized and competent to make this affidavit by dint of our rights of subrogation under the relevant policy of insurance and at common law and the right to defend, settle or prosecute any claims in the insured name.”

15. The question posed is whether a representative from the insurance company can swear an affidavit on behalf of an insured in this case being Applicant/Appellant and whether the doctrine of subrogation is applicable in the current situation.

16. **Order 19 Rule 3(1) of the Civil Procedure Rules, 2010** provides that:

“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.”

17. It can be argued that, the Head of Claims and Legal of an Insurance Company, would be privy to the facts of a case involving a car they have insured by virtue of the fact that an insurance firm is ordinarily expected to settle a claim arising from such a motor vehicle. Indeed, in this case, the deponent stated that **Direct Line Assurance Company are insurers of motor vehicle registration number KCA 280B** and at whose instance **Civil Suit no. 218 of 2018 Kitui** is defended further that, they instructed their advocates, the firm of Kimondo Gachoka & Company advocates to enter appearance for the Applicants herein.

That said, a representative of an insurance company can swear an affidavit on behalf of the company in a suit in which the company has an interest in. However, the insurance company can do so after it settles the claim against its insured.

18. A representative of an insurance company can only step in the shoes of the insured, once settlement of a claim has been made, not before because of the doctrine of subrogation. By virtue of being insurers of a party in court, the Insurance Company is entitled to be placed in the position of the insured and succeed all the rights and remedies against third parties in respect to the subject matter of Insurance but only after it settles the claim.

In the case of **Opiss Versus Lion of Kenya Insurance Co. Ltd. (Nairobi Civil Appeal No. 185 of 1991)** the court held as follows;

“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 insured.....”

19. That position was taken in the case of **Kenya Power and Lighting Company Ltd versus Julius Wambale & Another [2019] eKLR** where Githua J, while dealing with a similar issue held;

“... 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 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.....”

Paragraph 490 of the **Halsbury's Law of England 4th Edition 2003 Reissue Volume 25** sets out the circumstances under which the doctrine of Subrogation applies. It states in part;

“.....Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in respect of that subject matter as from the time of the casualty causing the loss... in so far as the assured has been indemnified by that payment for the loss...”

20. The same position also obtains in **Securicor Guards (K) Ltd versus Mohammed Saleem Malik & Anor [2019] eKLR**. Flowing from the above, it is clear that an insurer can only step in the shoes of the insured, after it has settled the amount awarded by the court on behalf of the insured. It cannot step in and swear affidavits on behalf of an insured about active matters pending in court, unless it settles the claim. In this matter, there is no evidence shown to demonstrate that the third party has been paid. The insurer cannot step in to swear an affidavit on

behalf of the insured, because he is a stranger in law. The affidavit in support of this application is therefore, incompetent to that extent. In the case of *Kenya Power & Lighting Co. Ltd (Supra)*, the court opined as follows;

“...In 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.....”

21. The same position is also apparent in *P.M.M Private Safaris Versus Kevin Ijatia [2006] eKLR*, where the court held as follows:

“... 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...”

22. Whether the Applicant has shown sufficient cause for grant of leave to appeal out of time.

This court has considered the reasons advanced by the Applicant and even if my finding on the first issue was in the negative, I would not have found merits in this application because the Applicant has not disclosed good reasons to explain delay. Which I find unreasonable. The reasons that an unnamed advocate failed to handover to the firm of advocates on record in my view, is flimsy and insufficient to warrant exercise of this court's discretion. A grant of leave to appeal out of time is a discretionary matter which can only be granted upon good grounds being advanced or sufficient basis shown. The Applicant has failed on that score and is undeserving of any exercise of this court's discretion.

23. Whether the Applicant should be granted a stay

In view of the findings of this court, on the first two issues above, it is quite apparent that the Applicant has not demonstrated sufficient cause in terms of *Order 42 Rule 6 of the Civil Procedure Rule* to be granted a stay of execution.

The long and short of this is that, this application cannot be sustained for the aforesaid reasons. The same is strike out with costs.

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

HON. JUSTICE R.K. LIMO

JUDGE