**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**MISC. APPLICATION NO. 52 OF 2018**

**XPLICO INSURANCE CO. LIMITED.....APPLICANT**

**V E R S U S**

**ELIAS MAINA MWANGI.....RESPONDENT**

**RULING**

1. The applicant Xplico Insurance Company Limited filed an application by way of Chamber Summons seeking orders that leave be granted to appeal out of time against the whole ruling and decree in Baricho SPM CC No. 130 of 2017 delivered by Hon. M. Kivuti on 9/8/2018. That the court do issue an order of stay of execution of the decree in this matter pursuant to the ruling delivered by Hon. M. Kivuti on 9/8/18 as against the applicant pending the hearing and determination of this application.

2. That the court do issue orders of stay of the said decree pursuant to the ruling delivered by Hon. M. Kivuti on 9/8/18 pending the hearing and determination of the intended appeal. That costs be provided for.

3. The application is based on the following grounds: -

**a) That the Honourable M. Kivuti (MS) on the 9th of August, 2018 struck out the Defendant/Applicant's statement of defence and entered summary Judgment thereon.**

**b) That the Honourable M. Kivuti (Ms) on the 9th of August, 2018 equally dismissed/disallowed the Defendant/Applicant's Notice of Motion application dated 16th May, 2018 seeking to amend its defence and entered summary Judgment thereon;**

**c) That the Defendant/Applicant being dissatisfied and aggrieved by the aforesaid decision of the Honourable Court, intends to appeal the same and has to this extent requested for certified typed copies of the proceedings;**

**d) That the certified typed proceedings have not yet been availed to the Defendant by the court registry.**

**e) That meanwhile, the time for filing the appeal has lapsed, as the instructions to lodge the appeal came late and the applicant had not received the typed proceedings.**

**f) That the defendant/Applicant has a good reason as to why the memorandum of appeal was not filed within the time prescribed in law and this Honourable court should exercise its discretion in their favour.**

**g) That the Honourable M. Kivuti (Ms) granted the defendant/applicant 30 days stay of execution from the 9th day of August, 2018 which will lapse on the 9th day of September, 2018 or thereabouts.**

**h) That the Defendant/Applicant has an arguable appeal with a very high probability of success as the Honourable court erred in law and in fact by failing to consider the issues raised in the Defendant/Applicant's Replying Affidavit, Statement of Defence, Notice of Motion Application and submissions.**

**i) That if the stay of execution is not granted, the Defendant/Applicant's appeal will be rendered nugatory and the Applicant is poised to suffer substantial and irreparable loss;**

**j) That the Applicant is ready and willing to abide by any directions of this Honourable Court.**

**k) That is in the interest of justice that this application be heard expeditiously and the orders sought herein granted.**

**l) That this application has been made without any unreasonable delay.**

4. The application is also supported by the affidavit of Mike G. Muriithi the Principal Officer of the defendants company.

**Background of the application.**

The Plaintiff/Respondent Elias Maina Mwangi was involved in a road traffic accident on 31/08/2014 involving a Motor vehicle registration number KYS 595 and KAY 895Z. The Plaintiff/Respondent sustained serious injuries. He filed a civil suit No. PMCC No. 99/2014 against Benard Muriithi Muita the owner of Motor vehicle registration Number KAY 895Z. The vehicle was insured by the applicant Xplico Insurance Company Limited. The applicant was informed of the filing of the suit and was served with summons to enter appearance. The applicant instructed Advocates to defend him. The suit proceeded to hearing and judgment was entered in favour of the Plaintiff/Respondent on 20/4/2016. He later filed a plaint dated 3/9/17 in the Principal Magistrate's court at Baricho seeking a declaration that the applicant is statutorily bound to satisfy the Judgment and decree in Baricho PMCC No. 99/2014. The suit was brought to the attention of the applicant after interlocutory judgment had been entered. The Plaintiff and the defendant entered a consent to allow the defendant file a defence. The defendant proceeded and filed a defence denying the allegations in the plaint. The applicant investigated the claim and obtained information that the policy issued for motor vehicle KAY 895Z was obtained through fraud and misrepresentation of material facts by its insured and therefore void abinitio, invalid and cannot be enforced against the applicant.

5. The Plaintiff/Respondent filed an application dated 27/3/18 seeking to strike out the defence. In a ruling dated 9/8/18 the trial Magistrate ordered the striking out the defence and entered a summary judgment. The applicant claims that the trial court erred in law by striking out the defence without considering the issues it had raised.

6. The time for filing the appeal lapsed. The applicant contends that he will be prejudiced and suffer loss. That he has an arguable appeal with chances of success. The respondent Elias Mwangi opposed the application and filed a Replying Affidavit and contends that the application is incompetent, misconceived, bad in law and ought to be struck out. It is deposed that the applicants have not sufficiently explained the delay in filing the appeal and the application should be dismissed. He further depones that the applicant has not met the threshold for the grant of stay of execution as he has not demonstrated that he will suffer substantial loss. That the appeal cannot be rendered nugatory by a money decree being satisfied by payment particularly where substantial loss has not been demonstrated. He prays that the applicant should pay at least half of the decretal amount and the balance be held in an interest earning savings account held in joint names of both Advocates on record.

The applicant filed a supplementary affidavit sworn by Mike G. Muriithi. He depones that failure to file a Memorandum of Appeal in time is the mistake of counsel which should not be visited on the innocent litigant. That the application to amend a defence takes precedence to an application to strike out a defence. That the trial Magistrate referred to an amended defence in her ruling of 9/8/2018 and declined to grant leave to amend the defence. That the appeal is arguable and has high chances of success. He reiterates the averments in the supporting affidavit on substantial loss, the delay has been explained and is ready to provide security. The parties agreed to canvass the application by way of written submissions. For the applicant it is submitted that issues for determination are whether:-

**a) Mistake of counsel should be visited on the applicant.**

**b) Whether the applicant has satisfied the court on conditions for grant of stay of decree pending intended appeal.**

**c) Whether the appeal is arguable with high chances of success.**

7. On the issue of the mistake by counsel it is submitted that the Advocate misdirected herself by relying on **Order 43 rule (2) & (3)** instead of **Order 43 rule 1 of the Civil Procedure Rules** on the timeline for filing an appeal. The Advocate filed application seeking leave to appeal out of time on the mistaken believe that she was already out of time. That the mistake should not be visited on the applicant. He relies on **Philip Cheminolo & Another –v- Augustine Kubende(1982-88) KAR 103** where it was stated:-

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits …… I think the broad equity approach to this matter is that unless there is fraud or intention to overreach there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline".***

The court was also referred to **Duckett –v- Grover 6 Ch.D.82** where it was stated:-

***"Bonafide mistake"*** includes a mistake of law as well as of fact. The applicant further relies on **Article 159(2)(b) of the Constitution** which provides that justice shall be administered without undue regard to procedural technicalities.

8. On whether the applicant has satisfied conditions for the grant of stay it submitted that **Order 42 rule 6 Civil Procedure Rules** is applicable. It is submitted that the applicant will suffer substantial loss. The respondent has not proved he will be able to refund the decretal sum if the appeal succeeds. That in **National Industrial Credit Bank Ltd –v- Aquina Francis Wasike Civil Appeal 238/05** it was held that the evidential burden to prove that the respondent has resources to pay the decretal sum shifts to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.

9. It is further submitted that the appeal was filed without unreasonable delay and the delay has been explained.

**On whether the appeal is arguable with chances of success–**

It is submitted that the claim is brought **under Section 11 of the Insurance (Motor vehicles Third Party Risks) Act Cap 405** which provides:-

> ***That if any person, for the purpose of obtaining a policy of insurance as required by Section 5, makes any false statement in consequence whereof the policy is liable to be avoided, or does or omits to do anything by virtue of which he becomes disentitled to claim under the policy, he shall be guilty of an offence."***

10. It is submitted that the contract of insurance was void **'ab initio'** as it was acquired through misrepresentation of material facts. That the applicant applied to amend the defence. The application was not heard and trial Magistrate erred by hearing the application to strike out the defence before the one to amend. He relies on the Court of Appeal decision in **Salesio M'aribu –v- Meru County Council Civil Appeal No. 183/2002** where it was stated:-

> ***"There was an application before the superior court seeking leave to amend the plaint which application was filed before the preliminary objection was filed. That application was seeking to inject some life into the suit. The learned Judge should have first heard and should have first determined that application before hearing the preliminary objection against the entire suit. That application was trying to bring on board matters that could have been relevant to the claim and was thus seeking to breathe life into the claim. The court in hearing the preliminary objection shut out the amended plaint which could have possibly revealed a different aspect of the case and in doing so, the court threw out the entire case without knowing what it was all about as it left the application seeking to amend the plaint unheard. Had that application been heard and determined before the objection was heard, the objection might have not been entertained in case that application was determined in favour of the appellant. In short, what might have appeared a weak pleading might have had some life injected into it through amendment. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought to not to act in darkness without the full facts of a case before it …… The procedure where a court is faced with an application for summary dismissal or striking out a pleading or faced with a preliminary objection to a pleading which seeks to dispose of that pleading, which the other party seeking to amend, is to have the application seeking leave to amend heard first and determined before hearing the application for summary dismissal or for striking out or an objection seeking disposal of the pleading. In that way, the court will ensure that all aspects of the matter are before it before the application for summary dismissal or striking out or the objection seeking to dispose of the pleading is heard and determined".***

11. The applicant prays the court to exercise discretion in its favour.

12. For the respondent he has raised the following issues –

> **a) Invocation of the wrong procedure.**
>
> **b) Failure to meet the threshold for grant of orders sought.**
>
> **c) No arguable appeal.**

**Invoking the wrong procedure**:

It is submitted that the applicant has not invoked the statutory provisions for the order sought. He submits that the relevant provisions are **Section 79 G and 95, Order 50 rule 5 & 6 of the Civil Procedure Act.** He relies on the case of **Charles Karanja Kiiru –v- Charles Gitinji Muigwa (2017) eKLR at page 6** where it was held:-

> ***Accordingly, it is clear that the Applicant has used a procedure unknown in law. The applicant ought to have filed the appeal first, and seek to have it admitted out of time. The procedure adopted being non-existent in law, the court would have no basis granting the leave sought.***

13. It is submitted failure to follow the right procedure raises the issue of jurisdiction and relies on **Owners of the Motor vessel "Lillians" –v- Caltex Oil (Kenya) Ltd (1989) KLR 1**

> ***Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.***

**Failure to meet thresh hold for the grant of orders.**

It is submitted that the application was filed out of time. That the mistake of counsel does not hold sway any more as not all mistakes are excusable. He relies on:-

On appeal, the Court of Appeal in **Rajesh Rughani –vs- Fifty Investments Limited & Another (2016) eKLR** at pages 5 and 6 held as follows:-

> *In **Habo Agencies Limited –v- Wilfred Odhiambo Musingo (2015) eKLR** this Court stated that it is not enough for a party in litigation to simply blame the Advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by*

*counsel.* In ***Mwangi –v- Kariuki (199) LLR 2632 (CAK)*** *Shah, JA ruled that mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude. In the instant case, there is nothing on record to show what action the appellant took between 24th October 1998 and 7th April 2005 to ensure that the suit he had filed at the High Court was prosecuted. There is no credible explanation for the delay by the appellant's former Advocate.*

*Our re-evaluation of the record leads us to conclude that no credible, satisfactory and sufficient explanation for delay has been given. It is insufficient to blame previous counsel on record without an explanation as to the action taken by the litigant to show he did not condone or collude in the delay*. (emphasis added).

*In reiterating this position, the Court of Appeal had earlier in* ***TANA AND ATHI RIVERS DEVELOPMENT AUTHORITY –VS- JEREMIAH KIMIGHO MWAKIO & 3 OTHERS (2015) eKLR*** *at page 4 held as follows:-*

> ***From past decisions of this court, it is without doubt that courts will readilu excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client: he has a corresponding duty to the court in which he practices and even to the other side. (See. Halsbury's Laws of England, 4th Edn, Vol 44 at P 100-101)*** *and also* ***Re Jones (1870), 6 Ch. App 497*** *in which* ***Lord Hatherley*** *communicated the court's expectations this way:* ***'……. I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned ……'***

14. He submits that the applicant is not worth of this court's discretion as the varying explanation for delay reek of fraud and intention to over reach.

**Stay of Execution:**

It is submitted that stay of execution cannot be granted as it is conditional upon existence of an appeal. That since the appeal has not and/or is yet to be filed, the court grant the same as it would be acting in ***'valuo'***. He relies on the High Court decision in **Rosalid Wanjiku –v- James Kingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri) deceased (2017) eKLR** where it was stated that the filing of an appeal is a condition precedent to the exercise of this courts discretion under **Order 42 Rule 6(1) Civil Procedure Rules.**

15. In the alternative it is submitted that the applicant has not met the conditions under **Order 42 rule 6 of the Civil Procedure Rules** which provides that the applicant must establish that he is likely to suffer substantial loss, that the appeal was filed without unreasonable delay and thirdly that he is ready to provide security.

16. On extension of time, the respondent relies on the Supreme Court decision in **Nicholas Kiptoo Arap Korir Salat –v- Independent Electoral and Boundaries Commission and Seven(7) Others (2014) eKLR** where the court stated:-

> **1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
>
> **2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
>
> **3. Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis;**
>
> **4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**
>
> **5. Whether there will be any prejudice suffered by the respondents if the extension is granted;**
>
> **6. Whether the application has been brought without undue delay; and**
>
> **7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.**

17. He submits the applicant has not come in clean hands and that equity aids the vigilant not the indolent.

18. On the issue of arguable appeal, it is submitted that this court is not required to consider whether the appeal has a reasonable chance of success. He relies on various authorities. He prays that the application be dismissed.

19. I have considered the application and the submissions. I will proceed to consider the issues raised. I will deal with the issue of filing the appeal out of time as it has raised the issue of jurisdiction and as held in **Owners of Motor Vessel "Lillians" –v- Caltex Oil (Kenya) Limited** which has been quoted above, jurisdiction is everything and without it the Court must down its tools.

20. The applicant filed the application under the following provisions – **Section 1A & 1B and 3A, Order 42 rule (6) 22 (22) (1) and 51 Civil Procedure Act, Section 2(1) (2) of the Judicature Act.** The prayers are for leave to appeal out of time, stay of execution. **Section 1A & 1B Civil Procedure Act**, provides for the overriding objectives of the Civil Procedure Act. It provides:-

> **1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate**

**and affordable resolution of the civil disputes governed by the Act.**

**(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).**

**(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.**

**1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—**

**(a) the just determination of the proceedings;**

**(b) the efficient disposal of the business of the Court;**

**(c) the efficient use of the available judicial and administrative resources;**

**(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and**

**(e) the use of suitable technology.**

It calls on the court to exercise discretion without giving undue consideration to procedural technicalities. ***Order 42 rule 6 (6) of the Civil Procedure Rules*** provides:-

> ***"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."***

21. It gives the court discretion to issue a temporary injunction on condition that the procedure for instituting an appeal has been followed.

**Order 22 (22) (1) Civil Procedure Rules**

Refers to stay of execution by a court to which the decree has been sent for execution while Order 51 deals with application. None of the provisions cited deals with stay of execution or leave to appeal out of time. The overriding objectives of the **Civil Procedure Act** quoted (supra) and the **Article 159(2)(d) of the Constitution** gives court discretion to ignore procedural technicalities and do substantive justice. Failure by the applicant to quote the relevant provisions of law is in my view a procedural technicality which should not bar the court from doing justice by determining the issue in dispute. The primary concern by the court is to do justice without being fettered by procedural technicalities. Even where a party has not quoted the provisions, the court will give effect to the overriding objectives. **Order 51 rule 10 Civil Procedure Rules** has reinforced this by stating that failure to quote the provisions does not bar the court from determining the merits of the application. It provides:-

> ***"Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule. No application shall be defeated on a technicality or for want of form that does not effect the substance of the application."***

22. These gains in the **Civil Procedure Act and the Constitution** are meant to ensure that disputes are heard and determined on merits but not on procedural technicalities. I find that failure to quote the relevant provisions of law are procedural technicalities and failure to cite them is no bar to determining the matter on merit. The applicant seeks leave to appeal out of time and stay of execution.

23. My view is that a party can file an application for leave to file appeal out of time before filing the appeal. In **Nicholas Riptoo Arap Korir Salat –v- Independent Electoral and Boundaries Commission & 7 Others (2014) BKLR,** Supreme Court though the Supreme Court dealt with Rule 53 of the Court's rule, it went on to state, which in my view binds this court:-

> ***"However it cannot be gainsaid that where the Law provides for the time within which something ought to be done, if that time lapses one, need to first seek extension of time before he can proceed to do that which the law requires. By filing an appeal out of time and subsequently seeking the court to extend time and recognize such an appeal is tantamount to moving the court to remedy an illegality. This the court cannot do. To file an appeal out of time and seek the court to extend time is presumptive and in appropriate. No appeal can be filed out of time without leave of the court. Such filing renders the document' so filed a nullity and of no legal consequence."***

The proviso to **Section 79 (a) of the Civil Procedure Act** gives discretion to the High court to admit an appeal out of time. It is presumptive where a party files an appeal out of time and assumes that leave will be granted as of right. It is a matter of exercise of discretion.

My view is that the court can exercise discretion to give leave even before the appeal is filed. In **Martha Wambui –v- Irene Wanjiru Mwangi & Another (2015) eKLR**, Judge Aburili – stated:-

> ***"In my view, the use of the term "admitted" connotes both the Act of allowing an appeal to be filed out of time and also the act of allowing or permitting an appeal already filed to be admitted out of time."***

**Section 79G** is the substantive law on filing an appeal and admitting an appeal filed out of time. In line with the decision by the Supreme Court in the case of **Nicholas Kiptoo** an appeal filed out of time without leave of the court is a nullity. The court is seized of jurisdiction to consider the application for leave to file the appeal out of time.

**The second issue is filing an appeal out of time**.

**1. Filing an appeal out of time**

**Section 79G of the Civil Procedure Act** deals with the time for filing appeals from subordinate courts and states:

> *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.*

Refer to **Paul Musili Wambua v Attorney General & 2 others [2015] eKLR**

The Court of Appeal in considering an application for extension of time and leave to file Notice of Appeal out of time stated the following;

> **…..it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.**

**a) Length of delay and reasons thereof**

Judgment was delivered on 09/08/2018 and the appellant filed the application on 06/09/2018 stating that they were given 30 days stay of execution which will lapse on 09/09/2018 or thereabouts. They claim that the legal officer handling the matter went on leave and did not bring this matter to the attention of another legal officer to enable them instruct the advocates on record.

24. In response, the respondent stated that the ruling was delivered in the presence of counsel of the applicant and he has not sufficiently explained the delay in filing the appeal in time. That at the time of filing the application, the applicant was within the time and ought to have filed the appeal which is dated 06/09/2018 therefore it was ready within time. The reason that they are waiting for typed proceedings or that a legal officer went on leave does not hold water. As per their annexure ***'MGM-5'***, it shows that the applicant gave their advocates instruction on 28/08/2019 and they had all the requirements to file an appeal.

25. Be thus as it may the applicant has deponed that it was a mistake by his counsel who failed to file a memorandum of appeal in time and that the mistake should not be visited on the client. At the time the counsel filed application for leave to appeal out of time the time for filing appeal had not lapsed. There was therefore a mistake by counsel.

26. The Advocate made a blunder which led to the lapse of time provided for filing appeal. Unless it is proved that there was fraud or intention to overreach, there is no mistake that cannot be put right with an order that the party pays for the mistake by providing costs. The mistake on the part of the counsel should not bar a party from justice. There is no allegation that the mistake was deliberate. The applicant depones that failure to file appeal within the stipulated time is an honest and regrettable mistake. In **Paul Asin t/a Asin Supermarket –v-Peter Mukembi (2013) eKLR** the court stated that the mistake of counsel should not be visited on the applicant. The applicant's counsel made a mistake. It was not intentional. The court has a duty to ensure that the party does not suffer injustice due to the mistake of counsel. The applicant cannot be said to be obstructing justice. He gave instructions timeously and counsel took action but under mistaken belief that she was out of time. It was not deliberate. The party had acted the way he should by giving counsel instructions. This mistake should not be visited on the litigant. The delay has been explained and there are factual basis on record. I find that the applicant has come to court in clean hand and the court will therefore exercise discretion in his favour.

**3.Chances of Appeal Succeeding.**

The applicant states that the trial court erred in law and fact by failing to consider the issues raised in their replying affidavit, statement of defence, notice of motion application and submissions.

The respondent states that the applicant was a party to the suit and instructed their Advocates to defend their insured. That the applicant failed to repudiate liability within 3 months as provided under **Section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405** it cannot now repudiate. That the applicant cannot substitute the appeal for a declaratory suit repudiating liability.

27. The parties advanced substantive grounds on this subject. However, in applications for stay and for extension of time to file appeal, in the High Court, there is no obligation by a party to prove that he has an arguable appeal. The High Court is not supposed to consider whether

the appeal has a reasonable chance of success. **Order 42 Rule 6(2) of the Civil Procedure Rule** sets out the conditions which the court has to consider when determining whether to order stay of execution. Whether or not a party has an arguable appeal is not one of the grounds or condition precedent in granting an order of stay.

28. Indeed making such a consideration at this stage will deny the party a chance to argue his appeal independently and a chance to be heard on his first appeal to this court which has a duty to consider facts and law. It would violate his right to natural justice which requires that a party should not be condemned without being heard. This court need not consider whether the appeal is arguable or has high chances of success. It would therefore be futile to consider the merits of the appeal at this stage.

**2. Stay of execution**

> **Order 42, rule 6**
>
> *No order for stay of execution shall be made under subrule (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.*

29. The applicant needs to satisfy the court on the following conditions before they can be granted the stay orders:

> ***a)*** **Substantial loss may result to the applicant unless the order is made,**
>
> ***b)*** **The application has been made without unreasonable delay, and**
>
> ***c)*** **Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.**

**a) Substantial loss occurring**

The onus of proving that substantial loss would occur unless stay is issued rests upon and must be discharged accordingly by the applicant. It is not enough to merely state that loss will be suffered, the applicant ought to show the substantial loss that it will suffer in the event the orders sought are not given.

Refer to **James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR.** The Court held the following view on the issue of substantial loss;

> **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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:**
>
> ***"…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."***

30. In the present application, the applicant states that if stay is not granted, the appeal will be rendered nugatory and he is poised to suffer substantial and irreparable loss. That he may never recover the decretal sum herein as the respondent is unknown to him.

31. Once the applicant raises the issue that the respondent will not be able to reimburse the decretal sum if the appeal is successful, he effectively shifts the burden on the respondent who is then required to prove that he is a person of means and will be able to reimburse.

32. It is only the respondent who knows his means and the one who can prove that he is capable of reimbursing the decretal sum. This not a matter that the applicant can prove it is sufficient for him to allege the inability of the respondent to reimburse.

33. The respondent has not proved that he will be able to reimburse. This in my view confirms the fears by the applicant and is proof that he is likely to suffer substantial loss and the appeal will be rendered nugatory. Furthermore, the applicant has alleged that there was misrepresentation of material facts and therefore the contract of insurances was void ***'ab intio'***. The misrepresentation was that the contract was taken in the name of a minor who had no capacity. If this be the case the policy is liable to be avoided. If stay is not ordered and execution is levied, substantial loss maybe suffered if the respondent will not be able to reimburse.

34. The main consideration is whether the applicant will suffer substantial loss. This will be in the end irreparable loss. The applicant has discharged the burden to prove that he is likely to suffer substantial loss. There will be no prejudice as the applicant may be ordered to deposit the decretal sum in an interest earning account jointly with the respondent pending the hearing and determination of the appeal.

**b) Requisite security**

The applicant has not given option of security but stated that is ready and willing to abide by any directions of the court.

The respondent states that since there is no evidence of substantial loss and liability is not in question, the applicant should pay at least half of the decretal amount and the balance to be held in an interest earning savings account held in joint names of both advocates on record.

**c) Was there undue delay?**

Judgment was delivered on 09/08/2018 and the applicant filed the application on 06/09/2018, stating that they were given 30 days stay of execution which will lapse on 09/09/2018 or thereabouts. Therefore they filed the application before the days lapsed. The applicant was ahead of time. There was no inordinate delay.

**In Conclusion:-**

I find that the applicant has explained the delay in filing the appeal. The explanation is plausible. I find that the application has merits. I order as follows:-

**i) There be stay of execution pending the hearing and determination of the appeal.**

**ii) The time for filing the appeal is extended by 30 days from the date of this ruling.**

**iii) The applicant shall provide security by depositing the decretal sum in a joint interest earning account in one of the reputable banks to be agreed upon by the parties in the names of Advocates for the applicant and those of the respondent. The decretal sum be deposited within a period of 21 days. In default the respondent will be at liberty to execute.**

**iv) The order to also apply in Misc. Application No. 53/2018 and 54/2018.**

**v) Costs to the applicant.**

**Dated at Kerugoya this 17th day of October, 2019.**

**L. W. GITARI**

**JUDGE**