



**REPUBLIC OF KENYA**

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

**H.C.C.A 142 'B' OF 2015**

HERITAGE INSURANCE CO.LTD. .... APPELLANT/APPLICANT

VERSUS

PATRICK KASINA KISILU ..... RESPONDENT

*(Being an appeal from the Ruling of the Chief Magistrate's Court at Machakos by Hon. I. Kahuya  
(RM) in Civil Case No. 939 of 2014 dated 24<sup>th</sup> April 2015)*

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*(Before E. Ogola J)*

**RULING OF THE COURT**

1. By the **Notice of Motion** application dated 25<sup>th</sup> February 2016 and filed herein on 26<sup>th</sup> February 2016. The Appellant/Applicant seeks to secure the following orders:-

- i. That this matter be certified as urgent and heard ex parte in the first instance.**
- ii. That there be a temporary stay of execution of the ruling, order and resulting judgment issued against the Appellant in Machakos CMCC No. 939 of 2014 on 28<sup>th</sup> August 2015 pending inter partes hearing of the application.**
- iii. That the court be pleased to grant stay of execution of the said ruling and resulting judgment in Machakos CMCC No. 939 of 2014 pending the hearing and determination of this appeal.**
- iv. That in the alternative to prayer 3 above, the court be pleased to set aside, vary or alter the lower court's stay conditions issued on 8<sup>th</sup> February 2016 and grant stay of execution on condition that the entire decretal sum is secured by depositing the entire judgment amount in court or in a bank account to be opened in the joint names of the two firms of Advocates on record or securing the same in any other manner as may be ordered by court pending hearing and determination of this appeal.**
- v. That the costs of this application be in the cause.**

2. The application is premised on the grounds set out therein and is supported by affidavit of **Gibson Maina Kamau** sworn on 25<sup>th</sup> February 2016.

3. The Appellant's case is that it was dissatisfied with the lower court's ruling and order dated 28<sup>th</sup> August 2015 which struck out its statement of defence and entered judgment for the Respondent as claimed in the plaint. It therefore filed this appeal against the whole of that decision. The Appellant submits that the Respondent's financial means and earning capacity are unknown to it and states that if the judgment sum is released to him, the Appellant will not be able to recover the same in the event the appeal succeeds which will render this appeal nugatory. The Appellant is ready and willing to furnish security for due performance of the judgment and resulting decree by depositing the judgment amount in an account to be opened in the joint names of the two firms of Advocates on record or by depositing the entire judgment sum in court or securing the same in any other manner as may be ordered by court.

4. By a **Notice of Motion** application dated 4<sup>th</sup> September 2015 the Appellant sought stay of execution before the lower court. The lower court rendered its ruling on 8<sup>th</sup> February 2016, in which it granted stay of execution on condition that the Appellant pays the Respondent herein half of the decretal sum and deposit the remainder in court as security within 30 days.

5. The Appellant was dissatisfied with the lower court's condition that it pays half the decretal sum to the Respondent's Advocates. The appeal challenges the lower court's ruling dated 28<sup>th</sup> August 2015 striking out the Appellant's statement of defence thus entering judgment in favour of the Plaintiff in terms of the plaint. The appellant submitted that any amount paid to the Respondent's Advocates would be released to their client and would ultimately not be recoverable in the event the appeal succeeds. That would render the appeal nugatory.

6. The Appellant urges this court to grant stay on condition that the entire judgment sum is secured as proposed.

7. The application is opposed by the Respondent vide his replying affidavit sworn on 7<sup>th</sup> March 2016. The Respondent's case is that the Applicants have filed two similar applications one in the lower court dated 4/09/2015 and the other dated 5/10/2015. The aforementioned applications sought similar orders and the Applicant was granted conditional stay in the lower court and have failed, ignored and/or neglected to comply with the court orders. The Respondent submitted that this application will greatly prejudice it if allowed as the cause of action herein arose out of a Road Traffic Accident on or about 22/10/2010 involving motor vehicle Reg. No. KBL 897 and this matter has been pending in court for 5 years. The Respondent submitted that the Applicant herein was duly notified of the primary suit being CMCC No. 108/2011 and chose not to pay the Judgment therein precipitating the filing of the declaratory suit being CMCC No. 939/2014. It is the Respondent's case that the Applicant has not demonstrated the prejudice it will suffer in case this application is allowed. The Applicant is able to refund the decretal sum herein as he is a business man earning Kshs.70,000/= and even owns a motor vehicle Reg. No. KBK 660N, and that Litigation must come to an end and the Applicant's conduct in this matter clearly demonstrates they are not willing to let this matter to be finalized.

8. Parties filed submissions which I have considered. The issue I raise for determination is whether the Applicant has satisfied the requirements set out in **Order 42 Rule 6** of the **Civil Procedure Rules**.

9. The brief history of the events leading to this application is that the Appellant herein is the Defendant in **Machakos CMCC 939 of 2014**. By a ruling rendered on 28<sup>th</sup> August 2015 the lower court struck out the Appellant's statement of defence and entered judgment for the Respondent against the Appellant. The Appellant being dissatisfied therewith lodged this appeal seeking to set aside the said ruling and have its statement of defence reinstated. The Appellant approached the lower court under Certificate of Urgency vide **Notice of Motion** dated 4<sup>th</sup> September 2015 seeking stay of execution of the said lower court ruling and order pending hearing and determination of this appeal. The duty magistrate certified the application urgent but declined to grant interim orders prompting the Appellant to file a **Notice of Motion** dated 5<sup>th</sup> October 2015 at the High Court, and at prayer 3, sought stay pending hearing and determination of the earlier stay of execution application dated 4<sup>th</sup> September 2015 before the magistrate's court.

10. **Justice Muriithi** certified the application as urgent on 8<sup>th</sup> October 2015 and issued orders for the

maintenance of *status quo*. The Judge subsequently stayed the **Notice of Motion** dated 5<sup>th</sup> October 2015 pending the hearing and determination of the earlier one dated 4<sup>th</sup> September 2015 before the **Chief Magistrate**.

11. The application before the lower court was subsequently heard and ruling delivered on 8<sup>th</sup> February 2016 granting stay of execution on condition that the Appellant pays half the decretal sum to the Respondent and deposit the other half in court within 30 days. The Appellant was dissatisfied with the conditions set particularly that half the decretal amount be released to the Respondent. It therefore opted to seek remedies from this court.

12. The earlier application dated 5<sup>th</sup> October 2016 that had been stayed by **J. Muriithi** was filed before the conclusion of the lower court matter and did not therefore specifically address issues resulting from that ruling. It was therefore necessary that the Appellant withdraws that application and file another one. By **Notice of Withdrawal** dated 25<sup>th</sup> February 2016 the Appellant wholly withdrew the application dated 5<sup>th</sup> October 2015 and filed the current **Notice of Motion** dated 25<sup>th</sup> February 2016.

13. When this matter came up for hearing on 9<sup>th</sup> March, 2016, the Court directed that parties proceed by way of written submissions. The Appellant cited **Order 42 Rule 6** of the **Civil Procedure Rules**, that provides that;

*“ 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’.”*

14. This court is therefore seized with the jurisdiction to hear the Appellant’s application for stay of execution notwithstanding the lower court’s determination on the same and in the same breath the Appellant is within its right to seek such orders before this Honourable Court.

15. It is trite law that for application seeking stay pending appeal the Applicant must meet the statutory requirements set out in **Order 42 Rule 6** which are:-

(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.**

16. The Applicant submitted that it has satisfied the requirement set out under the said **Order**. This is not disputed by the Respondent who submitted that nonetheless he is entitled to enjoy the fruits of the judgment.

17. In my view, the requirement of the law above is useful but the same can also be tampered with by the discretion of the court whose duty is to ensure justice. Once a judgment has been entered, it should be enjoyed by the Judgment Creditor, and any process of appeal cannot overlook that fact. In my view the conditional stay which was granted by the lower court was in the best interest of all the parties. The submissions by the Appellant that the Judgment Creditor would not repay the money should the appeal succeed, is not entirely true. It is not only banks or insurers or big companies which have the monopoly of money or attachable property. The Judgment Creditor is a businessman and the suggestion that he

cannot repay half of the decretal sum herein should the intended appeal succeed is a ludicrous submission. He submitted that his monthly income is Kshs.70,000. He also owns a motor vehicle and other property. Further, he cannot be baptized a man of straw simply because he does not have the financial means or property that the Appellant could be having. In any event, if he is a man of straw, the law will still ensure that he pays his debts. It is actually an abuse of position to submit that the Respondent is a person of straw when the contrary is true. Although this application is not an appeal against the ruling of the lower court, it is my view that the Applicant is better off complying with the orders of the lower court. For the foregoing reasons, the application herein is not merited and the same is dismissed with costs to the Respondents.

Orders accordingly.

**Dated and delivered at Machakos this 4<sup>th</sup> day of October 2016.**

.....

**E. OGOLA**

**JUDGE**

**In the presence of;**

M/S Juma for Appellant

Court Assistant – Mr. Munyao