

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
HCC MIS E244 OF 2023

**APA INSURANCE
LIMITED.....APPLICANT**

=VERSUS=

DAVID KIPKEMEI TARUS.....1ST RESPONDENT

**COOPERATIVE CONSULTANCY.....2ND
RESPONDENT**

INSURANCE AGENCY LIMITED.....3RD RESPONDENT

Coram: Before Justice R. Nyakundi

RULING

1. Before this court is a Notice of Motion seeking the following brought under Rule 16 and 17 of the High Court (Organization and Administration rules 2016) Section 3A of the Civil Procedure Act Order 42 Rule 6 and Order 51 of the Civil Procedure Rules 2010 and all other enabling provisions of the law seeking the following Orders:-
 - (a) That this application be certified urgent and be heard ex-parte in the first instance.
 - (b) **THAT** this Honorable court be pleased to hear this application during the period when the court is on vacation.
 - (c) **THAT** the ruling delivered on 16/4/2024 adopting the Arbitral Award be varied/reviewed and a *set-off/due* credit be given for the excess amount payable by the 1s respondent [20% of the *insured value* of the motor vehicle] as provided in the policy document and that interest on the *claim is not payable on the sum insured*.
 - (d) **THAT** after the due credit of the excess has been given, this matter be marked as settled.

(e) **THAT** the warrants of attachment and the entire execution process herein be declared *unlawful* and *void ab-initio* and the 1st respondent be ordered to settle the auctioneers' charges.

(f) **THAT** costs be provided for.

WHICH APPLICATION is based on the grounds stated hereinunder and upon the annexed affidavit of **JUDITH ONYANGO** and upon other grounds to be adduced at the hearing hereof:

(a) That the ruling was delivered on 16.4.2024 upholding the arbitrators award of Kshs 2,450,000/=

WHICH APPLICATION is based on the grounds stated hereunder and upon the annexed affidavit of JUDITH ONYANGO and upon other grounds to be adduced at the hearing hereof.

- a) That applicant deducted 20% of the arbitral award based on the policy agreement between the applicant and the 1st respondent. The policy provided that in case of theft of an insured vehicle, a policy excess of 20% payable by the insured would be deducted.
- b) That the applicant deducted the 20% excess payable by the 1st respondent and has since settled the whole claim plus interest
- c) That the issue of policy excess deductible was not brought to the attention of the court since the same was not disputed, it was a term of the policy agreement. As such the same was not determined by the court
- d) That the 1st respondent has proclaimed for the excess amount contrary to

DECISION

1. The review of the record, show that this court pronounced itself on the 15.11.2024 as follows:

(a)The grounds as crafted are similar to what is normally grounds of appeal in our normal court procedure. Consecrating the application together with its grounds under the prism of section 35 of the Act, it is my considered view that the said application falls short of the threshold required therein. From the cited decisions, it is evident that it is not in this court's mandate to hear claims of factual or legal error by an arbitrator as an appellate court does. Like I have said, once parties have had a consensus to solve their disputes through arbitration, the court's intervention is limited and can only intervene in circumstances as set in section 45.

(b)The long and short of it is that the application dated 16th November, 2023 lacks merit and is hereby dismissed with costs, Consequently, the application dated 23rd October, 2023 is allowed as prayed with costs.

2. This is the trigger to the instant application in which the Applicant is aggrieved and is desirous of pursuing an appeal. The application is traditionally premised under Order 42 rule 6 of the Civil Procedure Rules which provides as follows: *1) 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. The Applicant or intended Appellant seeking stay of execution pending appeal is bound to satisfy the court that his or her application falls within the ambit of the principles enunciated by the court in the case of **Butt v Ret Restriction Tribunal 1979 eKLR** the court held as follows:- *"It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson-vs- Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458: "I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory."*
4. There is emphasis that under 42 Rule 6 (2) of the Civil Procedure Rules the Applicant or intended Appellant must discharge the burden of proof on substantial loss, the application was brought without unreasonable delay and in a monetary decree offer security to secure the decree subject matter of the judgment. The borne of contention in this matter is traceable to the ruling of this court dated 15.11.2024. It should be remembered that the execution of a judgement or a decree is a lawful process and that by itself should not be a ground for granting the stay under order 42 Rule 6 (1) & (2) of the Civil Procedure Rules. In the instant application, from the dispositions of the affidavit, the Applicant /Intended Appellant prima facie shows that there is a likelihood of being irreparably financially ruined if this court fails to

exercise discretion to grant a stay of execution so that the issues in contention be canvassed at the right forum within our legal system.

5. In this respect, the court in **Samvir Trustee Limited vs Guardian Bank Limited** (2007) eKLR the court stated: *The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.*
6. In construing the provisions, under the Civil Procedure rules together with the principles of law developed over time, I hereby exercise discretion to grant stay of execution to enable the Applicant access the right forum to agitate and argue the intended appeal which from the affidavit evidence might be rendered nugatory in absence of stay of execution.
7. That the costs of this application shall abide the outcome of the next proceedings as premised in the application herein.
8. It is so ordered

GIVEN UNDER MY HAND AND THE SEAL OF THIS COURT THIS 22 DAY OF DECEMBER, 2025

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R. NYAKUNDI

JUDGE