



ICEA Lion Assurance Co. Limited & another v Waigwa (Civil Application E394 of 2021) [2023] KECA 143 (KLR) (17 February 2023) (Ruling)

Neutral citation: [2023] KECA 143 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E394 OF 2021
W KARANJA, HM OKWENGU & S OLE KANTAI, JJA
FEBRUARY 17, 2023**

BETWEEN

ICEA LION ASSURANCE CO. LIMITED 1ST APPLICANT

ICEA LION GENERAL ASSURANCE CO. LIMITED 2ND APPLICANT

AND

DAVID MITHAMO WAIGWA RESPONDENT

(Being an application for injunction and stay of execution of the Judgment of the High Court pending the hearing and determination of an Appeal from the Judgment of the High Court of Kenya at Nairobi (Sergon, J) dated 8th October 2021 in HCCA No. 140 of 2019.)

RULING

1. The 1st and 2nd applicants herein were initially the defendants in the Chief Magistrate's Court at Milimani, where the respondent had sued them for recovery of Kshs 2,600,000 being the value of a motor vehicle that the applicants had provided an insurance cover, and which motor vehicle was stolen during the existence of the insurance cover. The suit was heard by a Senior Principal Magistrate who dismissed the suit.
2. The respondent who was dissatisfied with the judgment of the magistrate's court appealed to the High Court, and the High Court upon hearing the appeal, delivered a judgment in which it overturned the judgment of the magistrate's court and substituted an order entering judgment in favour of the respondent against the applicants for the sum of Kshs 2,600,000.
3. The applicants filed a notice of appeal dated October 18, 2021 against the High Court judgment. They subsequently moved this court by way of a notice of motion dated November 16, 2021, filed under rule 5(2)(b) of the court's *Rules* seeking in the main an order of stay of execution of the judgment of the High Court pending the hearing and determination of the appeal against the High Court judgment. This is the motion subject of this ruling.



4. The applicants maintain that they have an arguable appeal. They have annexed a draft memorandum of appeal in which they raise five grounds. They further contend that the respondent is in the process of taxing the bill of costs with a view to proceeding with the execution of the judgment of the High Court, and that unless the orders of stay of execution is granted, they are apprehensive that the respondent will not be able to refund the decretal sum if the appeal is successful as his occupation and financial means are unknown to the applicants. The applicants argue that they are a large and stable insurance company capable of settling the judgment if the appeal is disallowed.
5. The respondent has opposed the applicants' motion through a replying affidavit in which he maintains that the applicants have not demonstrated that they have an arguable appeal or that the appeal will be rendered nugatory if the order of stay of execution is not granted. He maintains that he is not a man of straw as he works in the Kenya defence forces currently holding the rank of a major and is deployed at the Kenya/Somalia border under Amisom. His monthly salary is Kshs 140,978. He maintains that he has the capacity to refund any sums that may be required in the unlikely event that the applicants' intended appeal succeeds. In addition, his sister Faith Waigwa who is an advocate of the High Court with a stable practice has agreed to give an undertaking as collateral to refund the decretal sum. He urges the Court that he should be entitled to the fruits of his litigation as the cause of action arose 13 years ago.
6. Both the applicants and the respondent have filed written submissions, each citing authorities and urging the Court to rule in their favour.
7. We have carefully considered this application and the contending submissions. Under rule 5(2)(b) of the *Court of Appeal Rules*, an applicant must satisfy the Court that he has an arguable appeal, and that the appeal would be rendered nugatory if the orders of stay are not granted. (*Attorney General v Okiya Omtata & anor* [2019] eKLR; *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 others* [2013] eKLR).
8. The applicants have maintained that they have an arguable appeal.

In their draft memorandum of appeal that they have annexed to the motion, the applicants have raised five grounds generally faulting the findings of the High Court. At this stage, it is not for us to go into the merit or correctness of the grounds raised. All that is required is that the stated grounds are capable of being argued and that they are not frivolous, and we are so persuaded.
9. As regards the second limb of the nugatory aspect, the applicants are apprehensive that the respondent may not be able to repay the decretal sum if paid out to him, should the applicants succeed in their appeal. The respondent has exhibited a pay slip showing that his monthly salary is around Kshs 150,000. He has not demonstrated that he has any other income. Although the respondent is not exactly a man of straw, his stated income is too low compared to the decretal sum of Kshs 2,600,000. He appears to rely on the position of his sister who is an advocate of the High Court. However, the sister is not a party in the suit and the applicants' fear is therefore justified.
10. For these reasons, we are satisfied that the applicants have satisfied the requirements of rule 5(2)(b) of the *Court of Appeal Rules*. As the applicants had indicated their willingness to provide security and in order to protect the interest of the respondent, we grant The applicants' motion and issue an order of stay of execution subject to the applicants depositing the amount of Kshs 2,600,000 in a joint interest earning account in the joint names of the parties advocates within 30 days from the date hereof.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023.

W KARANJA

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**JUDGE OF APPEAL
HANNAH OKWENGU**

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**JUDGE OF APPEAL
S OLE KANTAI**

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

