Mayfair Insurance Company Limited v Insurance Regulatory Authrority & 2 others (Civil Appeal E182 of 2024) [2025] KEHC 714 (KLR) (Commercial and Tax) (31 January 2025) (Ruling)

Neutral citation: [2025] KEHC 714 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E182 OF 2024

BM MUSYOKI, J

JANUARY 31, 2025

BETWEEN

MAYFAIR INSURANCE COMPANY LIMITED ..... APPELLANT

AND

INSURANCE REGULATORY AUTHRORITY ..... 1ST RESPONDENT

GRAY CONSOLIDATED LIMITED ..... 2ND RESPONDENT

I & M BANCASSUARANCE INTERMEDIARY LIMITED ..... 3RD RESPONDENT

(Being an appeal from judgment of the Insurance Appeals Tribunal in its appeal numbers 7 of 2023 dated 711-06-2024)

RULING

1. The only prayers alive in the appellant's notice of motion dated 10th July 2024 are;
    1. Pending hearing and determination if the intended appeal, this Honourable Court be pleased to stay the enforcement and execution of the judgement of the Insurance Appeals Tribunal dated and delivered on 11th June 2024 in appeal no. 7 of 2023, Mayfair Insurance Co. Ltd vs Commissioner of Insurance and Gray Consolidated Ltd and I & M Bancassurance Intermediary Ltd.
    2. Costs of this application be provided for.
2. The application is supported by affidavit of the appellant's legal manager one Consolata Kiura. The affidavit does not say much safe that it gives the history of the matter and states that unless the application is allowed, the appellant is likely to suffer substantial loss as it may not recover the decretal sum in the event the appeal succeeds.

3. The application is opposed by the 1st and 2nd respondents. The 2nd respondent filed a replying affidavit sworn by one Dr Muthami Kimani who describes himself as the director of the 2nd respondent on 24th July 2024. It has also filed grounds of opposition dated 15th July 2024. On its part, the 1st respondent filed grounds of opposition dated 23rd August 2024 while the 3rd respondent has not filed any document in opposition to the said application. The application was argued by way of written submissions. I have read the submissions by the applicant, 1st respondent and the 2nd respondent.

4. Applications for stay of execution pending appeal to the High Court are governed by Order 42 Rule 6 of the Civil Procedure Rules. Sub rule (2) thereof provides that;

> '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.'

5. The respondent has argued that the judgement of the tribunal was in the negative and as such there is nothing to stay. I do agree that where the judgement being appealed is a negative one, the application for stay would be unmerited as no orders for stay can emanate therefrom. In this matter the tribunal in its judgment issued the following orders;

> 1. That the final decision of the Commissioner of September 5, 2023 was correct and the same is upheld.
>
> 2. That the appellant is liable to settle the 1st interested party's repudiated claim in respect of policy number 01/01/024/0657/2022.
>
> 3. That each part shall bear its costs.

6. It is clear from order 2 above that the same has the effect of decreeing payment to the 2nd respondent and it is capable of being executed. In the circumstances I find that the same is a positive decree and this argument by the respondent is not merited.

7. There is avalanche of authorities on the conditions as enumerated in the above Rule. The rationale and purpose of the conditions is to ensure that the benefits accruing to a successful decree holder are not compromised by an order of stay of execution while at the same time safeguarding the judgment debtor's right to appeal and ensure that the right is also secured at the end of the appeal. While considering the conditions, the court must ensure that the positions of both parties are secured so that the trial court's decree is not rendered obsolete by denying the decree holder fruits of its successful litigation and at the same time give security to the judgement debtor that it will not end up with a judgement in the appeal which is useless due to the change of position or status of the parties.

8. The appellant has argued that it stands to suffer substantial loss if the application is not allowed. According to the applicant, the amount it was ordered to pay the 2nd respondent is colossal and it may not be able to recover it in the event the same is paid to the 2nd respondent and the appeal herein eventually succeeds. It is averred that the 2nd respondent is insolvent which averment is based on a statement by the 2nd respondent in its pleadings that it is insolvent. The 2nd respondent has refuted this claim and told the court that the statement about insolvency was not in relation to its whole business but a component which was affected by the appellant's failure to settle the claim.

9. It has not escaped the attention of this court that the 2nd respondent has not demonstrated its liquidity and that it will be able to refund the decretal sum, in the event the appeal succeeds. It has not shown its assets or financial ability. However, it should be the norm that a decree holder should not be denied fruits of judgement simply because of its perceived weak financial muscle. Perhaps the decretal sum would be what is preventing the decree holder from remaining afloat in circumstances that show that denying them the fruits of their judgement would be digging the hole deeper rather than lifting them up. The point I am making here is that the applicant should establish more grounds other than the apparent liquidity status of the decree holder. A mere statement that the decree holder would be unable to refund the decretal sum is not enough per se. The applicant should go further and demonstrate what should make the court believe that the decretal sum would be lost beyond the reach of the court process.

10. In this matter, I am not satisfied that the appellant would not be able to recover the decretal sum if the same were to be paid and appeal succeeds but owing to failure by the 2nd respondent to demonstrate its liquidity, I am minded to balance the interest of both parties on this point by imposing conditions for grant of stay of execution.

11. On the issue of security for due performance of the decree, the 2nd respondent has not shown strong opposition but has urged that the full decretal sum should deposited in an interest earning account held by the parties' advocates. The applicant proposes that the Kshs 5,000,000.00 already deposited vide consent order dated 13th August 2024 be retained as the security. The law provides that the applicant should provide security for due performance of the decree. To me, this means that the security must be able to satisfy the decree if the appeal does not succeed. The five million proposed by the applicant is too far below the decretal sum and no reasons have been advanced why the court should adopt that figure. In the premises, I hold that the appellant should deposit the whole decretal sum in an interest earning account.

12. I will not to say much about the timing of the application. The judgment of the tribunal was delivered on 11-06-2024 and the application herein was filed on 10-07-2024. That is a period of about a month which cannot by all descriptions be an inordinate period. The application was in my view, filed timeously and thus satisfied the third condition.

13. In the final analysis, the application is allowed in the following terms.

    1. There shall be a stay of execution of the decree of the Insurance Tribunal in its appeal number 7 of 2023 dated 11-06-2024 pending hearing and determination of this appeal on condition that the appellant deposits the entire decretal sum in a joint interest earning account in a reputable bank in the names of the advocates for the appellant and the advocates for the 2nd respondent within forty-five (45) days from the date of this ruling.

    2. I the event the appellant will fail to comply with order 1 above, the order for stay shall automatically lapse on the last day of the period given therein.

    3. The costs of this application shall abide outcome of this appeal.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT

RULING DELIVERED IN PRESENCE OF MR. MAILU FOR THE APPELLANT, MISS KIHIMA HOLDING BRIEF FOR MISS NDIRANGU FOR THE 1ST RESPONDENT, MR. OMONDI FOR

THE 2ND RESPONDENT AND MR. KIPLAGAT FOR THE 3RD RESPONDENT FOR THE APPELLANT.