Kenya Alliance Insurance Co Ltd v AAR Insurance Kenya Ltd (Civil Appeal 578 of 2017) [2025] KEHC 3824 (KLR) (Civ) (27 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3824 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 578 OF 2017

JN MULWA, J

MARCH 27, 2025

BETWEEN

KENYA ALLIANCE INSURANCE CO. LTD ..... APPELLANT

AND

AAR INSURANCE KENYA LTD ..... RESPONDENT

RULING

1. Before the Court for determination are two (2) motions being the one dated 04/04/2024 filed by Kenya Alliance Insurance Co. Ltd (hereafter the Appellant's motion) and the one dated 11/04/2024 filed by AAR Insurance Kenya Ltd (hereafter the Respondent's motion).

2. The Appellant's motion dated 4/4/2024 is premised on Section 1A, 1B, 63(e) & 78(2) of the *Civil Procedure Act* (CPA) and Order 42 Rule 32 of the *Civil Procedure Rules* (CPR) seeking *inter alia*:

    a. Spent

    b. That this Court does order the Respondent to refund Kshs. 2,201,152/= which it had received in execution of the subordinate Court decree that was set aside by this Court on 08/03/2024.

    c. That this Court does order that the Respondent to pay interest on the funds that it had received at the rate of 12% from 31/08/2018 till refund in full.

    d. That the costs of this application be borne by the Respondent.

3. The motion is premised on grounds found at the supporting affidavit sworn by C.K Kiplagat, counsel for the Appellant in which he deposes that vide a ruling dated 06/07/2018, the lower Court declined to grant the Appellant stay of execution orders pending appeal leading to the latter paying the Respondent a sum of Kshs. 2,201,152/ adding that upon hearing of the appeal, judgment was delivered

on 08/03/2024 and therefore it became imperative for the respondent to refund the said money but the Respondent has failed to do so voluntarily. It is upon the above basis that the instant motion was filed.

4. In opposition to the motion, the Respondent avers that it has since filed an appeal vide COACA/E326/2024 at the Court of Appeal against the dismissal of the appeal, and therefore, this court has become functus officio and therefore can not entertain the motion herein arguing that if successful, the Applicant will not be able to refund the same hence will render the appeal nugatory, and further that the applicant has not demonstrated any loss that it would suffer if orders it seeks are denied.

5. On its part, the Respondent's motion dated 11/4/2024 is premised on Section 1A, 1B, 63(e) & 78(2) of the *Civil Procedure Act* (CPA) and Order 42 Rule 13 of the *Civil Procedure Rules* (CPR) seeking inter alia:

    a. Spent

    b. That pending the lodging, hearing and determination of the Respondent's intended appeal at the Court of Appeal, there be a stay of the judgment and all further proceedings in Milimani Civil Appeal Case No. 578 of 2017.

    c. That the costs of this application be provided for.

6. The motion is premised on grounds found at the supporting affidavit sworn by Martin Karuga, the Respondent's legal officer. The gist of his deposition is that being aggrieved with the judgment of this Court, the Respondent has preferred an appeal to the Court of Appeal by way of Notice of Appeal. He goes on to depose that the Respondent's appeal before the Court of Appeal shall be rendered nugatory and a mere academic exercise thus occasioning its substantial loss, if the judgment of this Court is not stayed, given that Appellant's motion seeks a refund. He concludes that the Respondent's appeal is arguable and it would be in the interest of justice that the motion be allowed as prayed.

7. The Appellant opposed the motion by way of grounds of opposition dated 07/05/2024 by stating that the judgment of the court resulted to negative orders which in law is incapable of being stayed; that the Respondent is approbating and reprobating since it had expressed capability of refunding the decretal amount should the appeal succeed; that the Respondent has not demonstrated any substantial loss that it shall suffer if the orders sought in the motion are not granted; and that the Respondent has not demonstrated that it has an arguable appeal that is capable of success.

8. The Appellant opted to rely on its affidavit material in support of its motion. The Respondent despite being given ample opportunity to file submissions in respect of the motions, it has failed to do so. Having set out the above, this Court believes it prudent to first address the Respondent's motion as its outcome would directly affect the Appellant's motion. That said, having duly considered the rival affidavit material and grounds in opposition this Court postulates that the issues for determination concern:

    a. Whether the Court ought to grant an order of stay of execution and proceedings in the instant appeal pending hearing and determination of the Respondent's appeal before the Court of Appeal?

    b. Whether the Court ought to order a refund of Kshs. 2,201,152/= inclusive of interest at a rate of 12% from 31/08/2018 until refund in full?

    c. Who ought to bear the costs of the motion?

Whether the Court ought to grant an order of stay of execution and proceedings pending hearing and determination of the instant appeal?

9. It is trite that the power of the Court to grant stay of execution of a decree pending appeal is discretionary; however, the discretion should be exercised judicially as rendered in the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417. The Respondent's prayer for stay of execution and all proceedings before this Court pending appeal, is brought under Order 42 Rule 6 (1) and (2) of the *CPR* which provides that: -

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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".

10. From the above proviso, it is certain that in order to succeed in an application for stay of execution or proceedings pending appeal, an applicant must demonstrate that substantial loss may result unless the order of stay is issued; that the application has been brought without undue delay; and must give security for the due performance of any decree or order that may ultimately be found to be binding on the applicant. Notably, the test on substantial loss and or prejudice likely to be occasioned to a party, where the decree sought to be appealed is a money decree was conclusively addressed in the of-cited decision of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410.

11. Here, there is no dispute that the Respondent moved with speed in filing the instant motion given that the impugned judgment of the Court was delivered on 08/03/2024 and the instant motion filed on 12/04/2024.and further arguing that the Applicant has not demonstrated any substantial loss that it shall suffer if the orders sought in the motion are not granted. In *Kenya Shell Ltd* (*supra*), Platt Ag JA, set out two different circumstances when substantial loss could arise. He stated inter alia that-:

> "……An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts…."

12. The learned Judge continued to observe that: -

> "It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money."

13. As earlier stated in this ruling, other than the blanket indictment that substantial loss will be occasioned if stay is not granted, no specifics were advanced by the Respondent on the nature of substantial loss, in contravention of the exhortation in Kenya Shell Ltd (supra). Ideally, in an application of this nature, the successful applicant ought to depose expressly, how substantial loss will arise, whether due the hardship resulting from making payments towards the decree, or the impossibility or difficulty in recovery of sums paid out, in the event the appeal succeeds. Without a demonstration of substantial loss, it would be rare that any other event would render the appeal nugatory. In any event, the Respondent had shown its ability to the decretal sum that may be passed against it as it had done by payment of the decree of the trial court without any difficulty. Thus, in light of the above, it would be moot to consider the ingredient of security which the Respondent failed to offer in any event.

Whether the Court ought to order a refund of Kshs. 2,201,152 inclusive of interest at a rate of 12% p.a from 31/08/2018 until refund in full?

14. Without belabouring further on the said question, the Respondent having failed to demonstrate substantial loss to warrant an order of stay of execution or proceedings in the instant matter, the same would automatically transcend that no viable reason would exist to deny the Appellant refund of the funds earlier paid out in execution of the decree before the lower Court. The existence of an appeal and likelihood of being rendered nugatory without more is not a sufficient ground to deny the Appellant refund of the decretal sum that was already paid out.

15. The plea of functus officio as addressed in *Jersey Evening Post Limited vs Al Thani* [2002] JLR 542 at 550 and cited with approval by the Supreme Court in Election Petitions Nos. 3, 4 & 5 *Raila Odinga & Others vs. IEBC & Others* [2013] eKLR equally does not avail to the Respondent in the circumstance. As parties are not relitigating on the appeal, what the Appellant seeks is perfection of the judgment of this Court by way of a refund of the decretal sum that was paid out to the Respondent in execution of this court's decree. To that extent, the Applicants prayer is meritorious, and filing an appeal against the court's decision parse ought not be construed as litigating the matter afresh by the motion, as it is clearly an execution proceeding of its judgment and decree.

16. As to whether the Appellant is entitled to interest, Section 26(1) of the *CPA* provides for applicability and rate of interest. Here, it must be observed that the sum the Appellant seeks as a refund was adjudged as against it. Further, the funds therein were settled in satisfaction of a lawful decree of the Court in favour of the Respondent therefore the Appellant cannot argue that it was deprived of the said sum and as such is entitled to interest. Consequently, this Court reasonably believes that the prayer for interest at 12% on the already paid out decretal sum is not warranted and is accordingly denied. However if the said sum is not refunded by the Respondent within timelines granted by the court, the interest thereon will accrue.

17. In light of above the commending order in respect of the two (2) motions are as follows that-;

    a. The Respondent motion dated 11/04/2024 is hereby dismissed with no order as to costs:

b. The Appellant's motion dated 4/4/2024 partially succeeds by way of an order that the Respondent refunds the sum of Kshs. 2,201,152/= to the Appellant within 30 days. Interest at 12% p.a shall accrue on the said sum if not refunded within the 30 days window, until refund in full.

c. The Appellant is awarded costs on its motion in any event.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 27TH DAY OF MARCH 2025.

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JANET MULWA.

JUDGE