



REPUBLIC OF KENYA



KENYA LAW
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**Saham Assurance Co. Ltd v Simiyu (Civil Appeal E006 of 2021)
[2025] KEHC 3856 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3856 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CIVIL APPEAL E006 OF 2021
RPV WENDOH, J
MARCH 27, 2025**

BETWEEN

SAHAM ASSURANCE CO. LTD APPELLANT

AND

FRANCIS KUTORO SIMIYU RESPONDENT

RULING

1. The Notice of Motion dated 23/2/2024 seeks an order of Stay of Execution of the judgment of Hon. Mrima. Judge pending appeal. The appellant filed an appeal against the judgment of the Magistrate in Kapenguria CC 10/2019. Judge Mrima dismissed the said appeal on 17/1/2024. The judgment was for a sum of Kshs.1,552,675.00 plus costs and interest. The appellant/applicant is dissatisfied with the judgment of the High Court and has preferred an appeal to the Court of Appeal.
2. This application is supported by the affidavit of Kevin Kitavi, Legal Officer of applicant's Insurer, Mua Insurance Kenya Limited, and grounds found in the body of the application.
3. The applicant's case is that they are dissatisfied with the judgment delivered on 17/1/2024 and have filed a Notice of Appeal against the entire judgment, that the appeal has high chances of success and unless an order of Stay is granted, the applicant will be occasioned irreparable harm; that the application has been brought without any delay and the applicant has provided security which was provided in Kapenguria CMCC 10/2019; that the Respondent has no known means and may not be in a position to refund the decretal sum if paid to him, in the event the appeal succeeds.

The applicant relied on the cases of

1. R. Mukuma-V-J. Abuoga (1988) KLR 645;
2. Tropical Commodities Supplies Ltd & others -V- International Credit Bank Ltd (In liquidation) Misc. Application 379/2003 and;



3. David [Chebutul Rotich & 2 others -V- Emirates Airlines HCC.368/2001](#).
4. In the above cases, the court considered what amounts to substantial loss. Counsel urged that the decretal sum is substantial i.e. Kshs.1,552,675 plus costs and interest and if released to the Respondent, they are apprehensive that he will not repay because his worth is unknown. Counsel also cited the case of [National Industrial Credit Bank Ltd -V- Aquinas Francis Wasike & Another CA 238/2005](#) where the court held that the burden of proving the Respondent's worth rests on the Respondent to show that he has resources and is able to repay back the decretal sum paid to him in the event the appeal succeeds. See also [Allyder Trading Company Ltd -V- Lucy Jepnetich Mibei](#) (2016) e KLR.
5. On the question of provision of security, the applicant relied on the decisions of [Vista Holdings International Ltd -V- Span Image Ltd](#) (2014) eKLR and [Nduhiu Gitahi -V- Warugongo](#) (1988) KLR 621. The reasons for providing security is to secure the judgment sum so that when required, the money is available and no party is prejudiced.
6. The application was opposed and Francis Kutoro, the Respondent swore a replying affidavit. He contended that the application is a delaying tactic meant to deny him enjoyment of the fruits of his judgment; that the case is a straight forward one and has been in court for over ten (10) years and the judge observed as much; that the applicant's appeal is not arguable; that the Respondent is a man of means and able to refund the decretal sum if the appeal succeeds; that this application is vexatious and should be dismissed.
7. Millimo, Muthoni, Counsel for the Respondent filed submissions urging that the applicant had not met the threshold for grant of an order of stay in that the applicant has not demonstrated that he is likely to suffer substantial loss and that it was upon the applicant to prove the allegation that the Respondent is not a person of means.
8. I have considered the application, the response thereto and submissions of both Counsel.
9. Order 42 Rule 6 (2) [Civil Procedure Rules](#) sets out the principles for grant of a stay of execution. The principles are that;-
 1. the applicant must satisfy the court that substantial loss will result to the applicant if an order of stay is not made;
 2. That the application has been made without unreasonable delay;
 3. That the applicant is ready to furnish security as the court may order, for the due performance of the decree.
10. Whether the application was made without unreasonable delay, judgment was delivered on 17/1/2024 and this application was filed on 27/2/2024, It was filed within the thirty (30) days allowed to file notice of appeal. The notice of appeal had been filed earlier on 25/1/2024. The application was therefore made timeously.

On substantial loss;

11. Substantial loss was aptly defined in *Mukuma case (Supra)* as follows

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”



See also Silverstein -V- Atsango Chesoni, (2002) 1 KLR 867 Justice Musinga puts it this way in Daniel Chebutul's (Supra) case "substantial loss " is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted (emphasis added) and that applicant is therefore forced to pay the decretal sum""

12. The decretal sum herein is quite substantial standing at Khs.1,552,675/=. The question is, whether if paid to the Respondent, he is able to refund it in the event the appeal succeeds. The applicant in the affidavit in support of the application alleged that they are apprehensive that if the sums are paid to the Respondent, he will not be able to repay in the event the appeal succeeds. In the replying affidavit, the Respondent swore that he is a person of means and has properties but he never exhibited any evidence to prove his worth, or that he is a man of means and able to refund the decretal sum if the appeal succeeds. In the case of *National Industrial Credit Ltd* (Supra) the Court of Appeal stated as follows;- This court has said before and it would bear repeating that while a legal duty is on the applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge."
13. That once an applicant alleges that the respondent will not be able to refund the decretal sum, the evidential burden to prove his worth or means shifts to the Respondent. Having failed to demonstrate that he is a person of means, the applicant's fears that the decretal sum may not be reimbursed in the event the appeal succeeds crystallised.

Security;

14. The applicant has offered the sum that had been deposited in court in the lower court as security. The purpose of providing security was explained in the Vista's Case (Supra) as follows "The aim is to make sure, in an even-handed manner that the appeal will not be prejudiced and that the decretal sum is available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with the interest at court rates.... In our view, the principles set out in Rosengren's case are eminently worth adopting."
- The court is satisfied that security is available.
15. The grant of an order of stay is an exercise of the court's discretion and the court is alive of the fact that it has to delicately balance the rights of both parties, that whereas the applicant has a right of appeal, the Respondent has the right to enjoy the fruits of his judgment.
 16. In my considered view, the applicant has satisfied the conditions for grant of an order of stay of execution pending appeal. I therefore grant the following orders;-
 1. An order of stay of execution of the judgment (decree dated 17/1/2024) is hereby granted;
 2. The order of stay is granted on condition that the applicant deposits the decretal sum in a reputable institution in a joint interest earning account in the names of Counsel for the parties, within twenty-one (21) days hereof.
 3. Costs of the application to abide the appeal.



DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 27TH DAY OF MARCH, 2025.

R. WENDOH.

JUDGE.

Judgment delivered in open court in the presence of;-

Applicant – Muchela

Respondents – Ms. Bett

Court Assistants -Juma/Hellen

