



Sanlam General Insurance Co Ltd v Barrow & another (Civil Appeal E017 of 2024) [2025] KEHC 10045 (KLR) (27 June 2025) (Ruling)

Neutral citation: [2025] KEHC 10045 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CIVIL APPEAL E017 OF 2024**

**JN NJAGI, J
JUNE 27, 2025**

BETWEEN

SANLAM GENERAL INSURANCE CO LTD APPLICANT

AND

DOFA ABDI BARROW 1ST RESPONDENT

GEDI MOHAMED KANYERE 2ND RESPONDENT

RULING

1. The Appellant/Applicant has filed an application dated 20th November 2024 seeking for stay of execution of the ruling delivered on 30/10/2024 in Hola MCCC/E046 /2024 pending hearing and determination of the Appeal in Garsen HCCA No. E017 of 2024.
2. The application is based on the ground that the Applicant's defence was struck out on the ground that it did not raise any triable issue and judgment was accordingly entered for the respondent for the sum of Ksh.271,659/=.
3. The respondent on the other hand opposed the application on the ground that it lacks merit, is meant to deny the respondent from enjoying fruits of litigation, is brought in bad faith, is bad in law and incompetent, has no likelihood of success and is an abuse of the court process.
4. The application was canvassed by way of written submissions of the Applicant and those of the Respondent. The applicant submitted that it has satisfied the principles in Order 42 Rule 6 of the Civil Procedure Rules, 2010 for stay of execution pending appeal being that they have shown that:

They will suffer substantial loss if the application is not allowed;

That the application has been brought without unreasonable delay, and they are willing to provide security.



5. It was submitted that the ruling of the trial court was delivered on 30/10/2024 and the instant application filed on 20/11/2024 which is less than a month after the delivery of the ruling and therefore there was no unreasonable delay.
6. The applicant submitted that it stands to suffer substantial loss if the application is not granted since the respondent have on 4/11/24 sent the applicant's advocates costs of Ksh. 444, 932/= being payment for the alleged balance of the decretal sum and they have threatened execution.
7. It was submitted that the respondent has failed to disclose its financial status and their means of income is unknown and it is therefore most unlikely that they will be capable of refunding the decretal sum in the event that the appeal is successful. The Applicant relied on the case of Masisi Mwita v Damaris Wanjiku Njeri (2016) eKLR where the court cited the case of Equity Bank Ltd v Taiga Adams Company Ltd (2006) eKLR where it was stated that:

The only way of showing or establishing substantial loss is by showing that if decretal sum is paid to the respondent – that is execution is carried out- in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse – as/he is a person of no means.

8. Reliance was also made on the case of National Credit Bank Ltd v Aquinas Francis Wasike & another (2006) eKLR where it was held that:

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 ia a matter which is pecuniary within his knowledge.

9. On furnishing of security of costs, the applicant submitted that it deposited security of Ksh.271,659/=as ordered by the court though it did so after the deadline ordered by the court had lapsed. The applicant argued that it is the discretion of the court to determine the security which it did on 25/11/2024. That applicant submitted that deposit of security is a mark of good faith as was stated in the case of Focin Motrcycle Co. Ltd v Ann Wambui Wangui & another (2018) eKLR that:

Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.

10. The applicant submitted that the court ordered the applicant to deposit security within 30 days from 25/11/2024 which period lapsed on 25/12/2024 and the deposit was made on 10/1/2025. It was submitted that the court order having lapsed on Christmas, the principle is that once an order lapses on during a holiday, the courts are to consider that a party's actions is not in contempt of a court order. The applicant relied on Order 50 Rule 4 which states that:

“The period between the 21st day of December in any year and the 13th day of January in the year next following shall be omitted from computation of time.

11. It was submitted that the applicant was not in contempt as the circumstances were beyond his control.
12. The application was opposed by the respondent on the ground that the deposit was supposed to be made by 25/12/2024 but was made on 10/1/2025 which was after the time given by the court lapsed. The respondent submitted that court orders must be obeyed. Reliance was placed in the case of



Shimmers Plaza Limited v National Bank of Kenya Limited (Civil Appeal 33 of 2012) (2015) KECA 945 (KLR) where the court said that:

As a principle, Courts do not act in vain and their orders must at all times be obeyed. This was articulated by the Court of Appeal in Shimmers Plaza Limited vs National Bank of Kenya Limited [2015] eKLR which stated as follows:

“We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said:-

“No man is above the law and no man is below it; nor do we ask any man’s permission to obey it. Obedience to the law is demanded as a right; not as a favour”.

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by *the Constitution*. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy.”

13. The respondent submitted that the applicant has failed to demonstrate substantial loss without which the orders for stay of execution should not issue. The respondent cited the case of James Wangalwa & another v Agnes Naliaka Cheseto (2012) eKLR where it was held that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

14. It was submitted that the respondent is not a man of straw as he has stated in his replying affidavit that should the appeal succeed he is capable of refunding the decretal sum.
15. It was submitted that the applicant has no arguable appeal as the court properly applied the principles of law in striking out the applicant’s defence. That the application is an attempt by the applicant to obstruct the course of justice and granting the orders sought would occasion undue hardship and prejudice to the respondent. The respondent urged the court to dismiss the application.

Analysis and determination

16. The application for stay of execution pending appeal is brought pursuant to the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules which provides as follows:

(2) 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 Applicants 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 Applicants”.

17. An Applicant for stay of execution pending appeal has to satisfy the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. These are that:

1. The application was brought without unreasonable delay.
2. The Applicant will suffer substantial loss unless the orders sought are granted.
3. The Applicant has given security for due performance of the decree as may be binding on him.

18. The ruling of the trial court in this case was delivered on 30/10/2024 and the instant application filed on 20/11/2024. There was thus no delay in filing the application.

19. On the issue of substantial loss, the applicant stated that it is apprehensive that the respondent may proceed with execution and they may not be able to recover their assets from the respondent should the appeal succeed.

20. The respondent on the other hand says that he is in a position to refund any money paid to him in the event that the appeal succeeds.

21. It however to be noted that execution is a lawful process. In the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, it was observed that for a party establish substantial loss he/she has to show:

..factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

22. It was the duty of the respondent to file an affidavit of means to show that he is in a position to refund any money paid to him in the event that the appeal is not successful. He has not done so. This means that the applicant may have difficulty in recovering any money paid to the respondent in the event that the appeal succeeds. That in itself will be substantial loss on the part of the Applicant. The issue of substantial loss has therefor been established.

23. The third condition for grant of stay of execution pending appeal is that the Applicant has to offer security for the due performance of the decree. This is meant to give the respondent something to fall back to in the event that the appeal is not successful. In Arun C. Sharm Vs. Ashana Raikundalia T/A/ Rairundalia & Co. Advocates & 2 Others [2014] eKLR, the court stated:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor...”

In Focin Motorcycle Co. Limited Vs. Ann Wambui Wangui & Anor [2018] eKLR, it was stated that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of



judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security.”

24. The security offered by the Applicant must be sufficient. The court in the case of *Mwaura Karuga T/ a Limit Enterprises v Kenya Bus Services Ltd & 4 Others* (2015) eKLR stated as follows:

...The security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted - which is seldom. The security to be given is measured on that yardstick.

25. The Applicant in this case has offered security save that the same was deposited in court after the period granted by the court to deposit the same had lapsed. The applicant says that the time to deposit security lapsed on a Christmas day and that being the case, the provisions of Order 50 Rule 4 come into play which provide that the period between 21st December and 13th January of the following year should be omitted from any computation of time in filing any pleading.

26. The respondent on the other hand says that the deposit was not made within the time granted by the court. That the applicant was in contempt by failing to comply with the order of the court.

27. The applicant was given 30 days to deposit the money. The period lapsed during Christmas holiday and the deposit was made on 10/1/2025. Order 50 Rule 4 of the Civil Procedure Rules provides that the period between the 21st day of December in any year and the 13th day of January in the year next following shall be omitted from computation of time. In *Kenya Commercial Bank Ltd v Fredrick Mallya* [2016] eKLR the court while making reference to the said rule held;

“...Taking this provision into consideration, the appellant ought to have lodged its appeal on 26th January 2016. The appellant filed its Memorandum of Appeal on 25th January 2016. Even without considering the reasons given by the appellant for the purported delay in filing the Appeal, it is apparent that it was well within the time limit contrary to the assertions made by the Respondent.”

28. In view of the clear provisions of Order 50 Rule that the period between 21st December and 13th January of the following year should be omitted from any computation of time in filing any pleading, I find that the deposit was made within the time allowed by the law. There was thus no contempt of court when the respondent did not make the deposit by 25/12/2025. The purpose of security in this matter has been met.

29. In the end, I find that the application has met the threshold for stay of execution pending appeal. Stay of execution pending appeal is thereby granted in terms of prayer 4 of the Notice of Motion dated 20th November 2024.

30. Costs of the application to abide by the outcome of the appeal.

DELIVERED, SIGNED AND DATED AT GARSEN THIS 27TH DAY OF JUNE 2025.

J. N. NJAGI



JUDGE

In the presence of:

Ms. Lekoi for Applicant

Ms. Murithi for Respondents

Court Assistant – Ndonge

