



**Directline Assurance Co Ltd v Tsofwa (Civil Appeal E109 of 2023)
[2024] KEHC 3667 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3667 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E109 OF 2023
SM GITHINJI, J
MARCH 19, 2024**

BETWEEN

DIRECTLINE ASSURANCE CO LTD APPELLANT

AND

JULIUS KASENA TSOFWA RESPONDENT

*((Being an Appeal from the Ruling of the Honourable Magistrate – Hon
J.Ongondo in Malindi Cmcc NO.E042 of 2023 delivered on 12th July, 2023))*

RULING

Representation:

Mouko & Co. Advocates for the Appellant

Njuki & Co. Advocates for the Respondent

1. For determination is the Applicant’s Notice of Motion dated 25th July 2023 seeking the following orders;
 1. Spent.
 2. Spent.
 3. That this honourable court be pleased to stay execution of the trial court’s ruling delivered on 12th July 2023 in Malindi CMCC No E042 of 2023 Julius Kasena Tsofa alias Jefa Tsofa v Directline Assurance Company Limited and all consequential orders and/or actions therein pending the hearing and determination of the present appeal herein.
 4. That the costs of the application be in the cause.



2. The application is premised on the grounds set out on its face and the supporting affidavit of Kelvin Nguire who stated that the Respondent filed a declaratory suit vide a plaint dated 2nd March 2023 seeking to have the Applicant compelled to settle the decretal sum of Kshs 182,771 decreed in his favour in Malindi CMCC No E102 of 2021. That the Appellant instructed the firm of Cootow and Associates to enter appearance and the firm filed a Memorandum of Appearance on 14th March 2023 and a Defence on 29th March 2023. It was stated that the Respondent by way of a Notice of Motion dated 5th April 2023 sought orders to strike out the Applicant's defence. It was further stated that on 12th July 2023 the subordinate court delivered its ruling allowing the Respondent's application with costs. That dissatisfied with the ruling, the Applicant lodged an appeal and it is apprehensive that the respondent will proceed to execute his decree before the appeal is heard and that the applicant may not be able to recover the decretal sum from the respondent should the appeal succeed. Further, that the Applicant is willing to deposit security in the form of a bank guarantee for the decretal sum.
3. The Respondent filed a replying affidavit sworn by Geoffrey Kilonzo his advocate stating that the Applicant has not proved that it may suffer substantial loss or even demonstrated how it will suffer any loss thus has not met the conditions for stay. He also stated that in any case the decree which the applicants seek to stay is monetary and a money decree stay should not be granted.

Disposition

- 4.. The application was canvassed by way of written submissions. I have considered the rival affidavits, the submissions by the parties as well as the authorities relied on. The issue for determination is whether the order sought for stay of execution is merited.
5. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:
 - 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.
6. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and in light of the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#), the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions.
7. Section 1A(2) of the [Civil Procedure Act](#) provides that "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objectives are; "the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties."
8. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result



to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye v African Virtual University* [2015] eKLR.

9. As to what substantial loss is, it was observed in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, 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.”

10. In the instant case, the applicant avers that it stands to suffer substantial loss of over Kshs 182,771 as well as costs and interest if stay of execution is not granted. They further aver that the respondent has not demonstrated that he is able to refund the sum if the appeal succeeds. The applicant has also pleaded that they are able to comply with any order as to security of costs as in the form of a bank guarantee.

11. The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

12. Guided by the foregoing, I am of the view that the applicant has not demonstrated how it stands to suffer irreparable or substantial loss. In any case, if any loss was to occur the same can be compensated by way of damages. I am also of the view that the applicant has not demonstrated the Respondent’s inability to raise the decretal sum as alleged.

13. As regards security for costs, the Applicant has offered security in the form of a Bank Guarantee. However, it is trite that a court is not bound by the type of security offered by an applicant. It can make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal. In the instant case, the security the applicant is offering is not appropriate.

14. At the end, I find that the applicant has not met the conditions for grant of orders for stay of execution. Consequently, the application dated 25th July 2023 fails for want of merit and the same is hereby dismissed with costs to the Respondent.



RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 19TH DAY OF MARCH, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of; -

Miss Nyambuto for the Respondent

Atieno for the Applicant – (absent)

