



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 46 OF 2019

SANLAM GENERAL INSURANCE LIMITED.....APPELLANT/APPLICANT

VERSUS

JECINTA NJERI MAINA.....RESPONDENT

RULING

1. The applicant prays for stay of execution of the decree pending the determination of this appeal.
2. The applicant is aggrieved by the Order of S. K. Nyaga, Resident Magistrate made on 30th September 2019 in *Murang'a Chief Magistrates Civil Suit No. 328 of 2018*.
3. The notice of motion is dated 9th December 2020. It is predicated upon the deposition of *Joan Oburu*, the applicant's Legal Manager sworn on even date. There is also a supplementary affidavit by the same deponent dated 15th January 2021 in response to the respondent's replying affidavit sworn on 10th December 2020.
4. The motion is thus opposed. Both parties filed written submissions on 21st January 2021 and 9th February 2021 respectively. When learned counsel for the parties appeared before me on 9th February 2021, they informed the Court that they would rely entirely on those submissions.
5. The brief background of the dispute is as follows: An *ex parte* judgment was entered on 8th July 2019 in favour of the respondent for Kshs 359,080 pursuant to a claim involving motor vehicle registration number KAZ 305T allegedly insured by the appellant. The appellant lodged an application dated 25th July 2019 seeking to set aside the decree but it was dismissed by the Learned Magistrate on 30th September 2019.
6. The ruling triggered the instant appeal. It is worth mentioning that on 4th October 2019 and upon lodging the appeal, the appellant sought further stay in the lower court pending the determination of its appeal. The latter application suffered a similar fate on 9th December 2019. That led to yet another appeal at the High Court (Appeal No. 69 of 2019).
7. The substance of the motion is that the applicants have an arguable appeal; and, that unless stay is granted, the appeal will be rendered nugatory. The applicant has also deposited in court the sum of Kshs 359,080. It pleads that the deposit be accepted as security for due performance of the decree. In its view, the respondent is a *woman of straw* and incapable of refunding the decretal sum.
8. In her replying affidavit, the respondent avers that the motion is as an abuse of court process aimed at delaying the resolution of the dispute. She asserts that the suit emanated from *Civil suit No. 215 of 2013* and predicated upon an insurance policy between *James Maina Nguya* and *Gateway Insurance Company*. She argues that she is a stranger to any application or appeal by the applicant as the pleadings have never been served. She averred that the motion is a stratagem to deny her the fruits of her judgment.
9. I am well guided by the *overriding objective* to do justice to the parties. See generally **Article 159** of the **Constitution**. See also ***Harit Sheth v Shamas Charania***, Court of Appeal at Nairobi, Civil Application No 68 of 2008 [2010] eKLR.
10. This motion is founded upon Order 42 rules 6 of the **Civil Procedure Rules**. The court *may* grant a stay if *substantial loss* may occur; that the application has been made *without delay*; and, that the applicant furnishes *security* for the due performance of the decree that may ultimately be binding on him.
11. From the timelines of the applicant's two ill-fated motions in the lower court that I highlighted in paragraphs 5 and 6 of this ruling, I am satisfied that the application for stay was made to the High Court without unreasonable delay
12. In ***Butt v Rent Restriction Tribunal*** [1982] KLR 417, Madan JA (as he then was) quoted with approval the views of Cotton L.J. in

I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory.

13. In the **Butt v Rent Tribunal case** (supra), the Court of Appeal laid out five broad principles to be employed in such a matter: Firstly, the power of the court to grant or refuse an application for a stay of execution is a discretionary power that should be exercised in such a way as not to prevent an appeal. Secondly, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion. Thirdly, a judge should not refuse a stay if there are grounds for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings. Fourthly, the court should consider the special circumstances of the case and unique requirements. Fifthly, the court in exercising its powers under Order XLI rule 4(2) (b) [now Order 42(6)(b) of the **Civil Procedure Rules 2010**] can only order security upon application by either party or on its own motion.

14. Applying those principles, I find as follows. There is an arguable appeal on whether the learned trial magistrate exercised her discretion in a judicious manner when she refused to set aside the impugned judgment. I must emphasize that this does *not* mean that the appeal will succeed.

15. I remain alive that as a general proposition, the execution of a *money decree* does *not* constitute substantial loss. **Kenya Shell v Benjamin Karuga** [1982-88] 1 KLR 1018. The applicants have now deposited the sum of Kshs 359,080 as ordered earlier by the lower court. In her replying affidavit, the respondent has not countered on her capacity to refund the decretal sum if the appeal were to succeed.

16. But to ensure that neither party is left holding the short end of the stick, I will grant the respondent thrown away costs; and, direct that this appeal be fast-tracked.

17. My final orders are thus as follows:

- a) That there shall be a *conditional stay* of execution of the decree pending the hearing and determination of this appeal.
- b) That the applicant shall pay the respondent thrown away costs of Kshs 10,000 to be paid within the next thirty days.
- c) That the deposit of Kshs 359,080 made in the lower court shall be maintained as security for the due performance of the decree.
- d) That in the interests of justice, the appellant shall cause the record of appeal to be lodged not more than *ninety days* from today's date; and, shall ensure that the appeal is presented to the judge in chambers for admission or directions within a *further thirty days*.
- e) That costs shall be in the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 25th day of March 2021.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

No appearance by counsel for the appellant/applicant.

No appearance by counsel for the respondent.

Ms. Dorcas Waichuhi & Susan Waiganjo, Court Assistants.