



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 11 OF 2020

KENYA ORIENT INSURANCE CO. LTD.....APPELLANT

VERSUS

MARGARET WAMBUI NJENGA.....1ST RESPONDENT

ELIZABETH WAIRIMU GICHUHI.....2ND RESPONDENT

(Suing as the administrators of the MUKORA KINYANJUI (Deceased))

R U L I N G

1. Judgment was entered against **Kenya Orient Insurance Company Ltd.** before the Limuru Chief Magistrate's Court on 20th December 2019, in case **No. SRM Limuru No. 213 of 2018** (the Limuru case). Kenya Orient has filed this Appeal against that judgment. Kenya Orient by a Notice of Motion application dated 3rd March 2020 sought stay of execution of the decree issued by the Limuru Court. On 4th March 2020 this Court granted an order pending *inter partes* hearing of that application as follows:

“Stay of execution is granted in terms of prayer 2 on condition that the applicant (Kenya Orient) deposits a sum of Shs 2,000,000 (Two Million) into court within 21 days of today's date.”

2. The respondents to this Appeal, **Margaret Wambui Njenga** and **Elizabeth Wairimu Gichuhi** suing as administrators of **Estate of Mukora Kinyanjui** (hereinafter the respondents) also filed a Notice of Motion dated 12th August 2020. The respondents by that application seek review of the conditional stay of execution granted by this Court on 4th March 2020, to the extent that Kenya Orient be ordered to deposit into interest earning account, of the respective advocates of the parties, the decretal amount, in the Limuru case, of Ksh 5,212,114.80; and that the respondents be ordered to pay auctioneer's costs.

3. Both applications, one by Kenya Orient and the other by the respondents, are the subject of this Ruling.

ANALYSIS AND DETERMINATION

4. When Kenya Orient approached this Court with its application, dated 3rd March 2020, for stay pending appeal the respondents had already instructed Daystar Auctioneers to attach Kenya Orient's moveable goods. Daystar auctioneers proclaimed Kenya Orient's goods on 23rd January 2020 Kenya Orient, through its affidavit in support of its application, alleged that the goods proclaimed by Daystar auctioneers were its tools of trade and are therefore exempt from attachment. Kenya Orient also supported its application on its deposition that if stay of execution was not granted and as a consequence execution of the Limuru case decree proceeded the respondents would not be in a position to repay the decretal sum in the event the appeal succeeded. Kenya Orient by its affidavit stated that it was willing to provide reasonable security.

5. The respondents moved the court by their application for review of the interim stay orders on the grounds that Kenya Orient sought stay of execution at the Limuru Court by its application dated 27th January 2020; the Limuru Court grant conditional stay of execution, that is on condition that the decretal sum be deposited in joint interest earning account; that Kenya Orient did not comply with the condition set by the Limuru court but instead moved to this Court seeking stay of execution pending appeal. The view of the respondents is that this Court lacks jurisdiction to entertain the application for stay of execution pending appeal because Kenya Orient failed to comply with the conditional stay granted by the Limuru Court. In other words, Kenya Orient cannot seek stay when stay was granted by Limuru Court.

6. I have considered the affidavits sworn by the parties hereof. Kenya Orient in its replying affidavit by Seth Khisa was accurate where it stated the argument by the respondent was misconceived and based on erroneous principle of Law. The respondents' argument is not

supported by Order 42 Rule 6 of the Civil Procedure Rules (hereinafter the Rules). Order 42 Rule 6 of the Rules provides:

Stay in case of appeal. 6. (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 subrule (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. (emphasis mine)

7. It is evident from the above Rule that a party is permitted by the above Rule to file an application for stay pending appeal to the court appealed to whether or not it was granted stay pending appeal by the court appealed from. The fact Kenya Orient sought stay of execution pending appeal before the Limuru Court and the fact the application was granted on condition, in as far as Order 42 Rule 6 is concerned, is not a bar to it approaching this Court.

8. The respondent erred to seek the review of this Court's order, of interim stay, issued on 4th March 2020, firstly, because the basis given to review that order do not fall within the purview of Order 45 Rule 1 of the Rule, which Rule provides:

“1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”

9. Respondent secondly also erred because the Order of 4th March 2020 was an *ex parte* order pending *inter partes* hearing of the application for stay. In other words, that order would cease to have effect once the stay application was heard *inter partes*. The hearing of that application for stay was heard before me *inter partes* and hence this Ruling.

10. Order 42 Rule 6 of the Rules is the Rule this Court will apply in the consideration of the application for stay pending appeal. The purpose of granting stay of execution under that Rule was discussed in the case **HGE –V- SM (2020) eKLR** as follows:

“13. The court, in *RWW vs. EKW* [2019] eKLR, addressed its mind to 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.”

11. The respondents were correct to submit that the court in considering the application for stay pending appeal was obligated to balance the interest of the applicant and the respondent. This too was the point of view in the case **HGE V SM** (*supra*) as follows:

15. With regard to security for costs, the court in *Absalom Dova vs. Tarbo Transporters* [2013] eKLR, stated:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

12. The respondent's erred to refer as baseless to Kenya Orient's assertion, that the respondents would be unable to refund the decretal sum if the appeal was successful. Kenya Orient cannot be expected to know the respondents' ability to repay the decretal sum. The burden was on the respondents to disprove Kenya Orient's assertion. This indeed was the holding in the case **National Industrial Credit Bank Ltd. –v- Aquinas Francis Wasike & Another (2006) eKLR**. thus:

“This Court has said before and it would bear repeating that while the legal duty is on an 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 a 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 — see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

13. It needs to be stated that Kenya Orient failed to prove that the goods attached by auctioneers were its tools of trade and hence exempt as provided by Section 44(1) of the Civil Procedure Act. It was not enough to make a bare statement that those were tools of trade. Evidence to that effect should have been produced.

14. Having considered parties' affidavit evidence in respect to the two applications I make the following orders:

a. The amount of Kshs 2,000,000 (TWO MILLION) deposited into Court by Kenya Orient Insurance Co. Ltd. shall be refunded to it.

b. A stay of execution of case SRM Limuru Civil Case No. 213 of 2018 is hereby granted pending the hearing and determination of this Appeal on condition that Ksh 3,000,000 (THREE MILLION) is deposited within 30 days from today's date into an interest earning account in the names of the advocates for the parties in this matter.

c. If there is no compliance to the order (b) above solely due to the default of Kenya Orient Company Ltd. execution in SRM Limuru Civil Case No. 213 of 2018 to issue.

d. Kenya Orient to pay the auctioneer's fees of Daystar Auctioneers within 30 days from today, such fees to be agreed and in the absence of agreement the same to be taxed.

e. The costs of the Notice of Motion dated 3rd March 2020 and 12 August 2020 shall abide with the outcome of this Appeal.

SIGNED AND DELIVERED VIRTUALLY THIS 18th DAY OF MARCH 2021.

MARY KASANGO

JUDGE

18th March 2021

Before Justice Mary Kasango

C/A - Kevin

For the Appellant – Ms Kibet

For the Respondent – No appearance

COURT

Ruling virtually delivered in their presence.

MARY KASANGO

JUDGE