



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS CIVIL APPLICATION NO. E432 OF 2020**

**DANIEL MWANGI GICHERU ..... APPLICANT**

**VERSUS**

**JAMES NJOROGE GITAU ..... 1<sup>ST</sup> RESPONDENT**

**REUBEN KAMBO MWANGI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

This is an application by way of Notice of Motion seeking orders that there be a stay of execution of the lower court Judgment delivered on 5<sup>th</sup> May 2020 pending the hearing and determination of the appeal. There is also a prayer that leave be granted to appeal and file the Memorandum of Appeal out of time and that the draft Memorandum of Appeal annexed to the application be deemed as duly filed.

The application is supported by the grounds set out on its face in addition to the supporting affidavit sworn by the applicant. The application is opposed and there is a replying affidavit sworn by Roselyne Kihara the Legal Officer at ICEA Lion Insurance Co. Limited who are said to be the insurers of the 1<sup>st</sup> respondent. There is then a further affidavit sworn by Ayub Muhuni Advocate in answer to the replying affidavit. Both parties have filed written submissions and cited some authorities which I have noted.

The application is brought under Order 42 Rule 6 of the Civil Procedure Rules and Sections 3 A, 1A, 1B,3 and 3A of the Civil Procedure Act. The requirements under Order 42 Rule 6 are clear. In this particular case judgment was supposed to have been delivered upon notice given by the trial court. However, this was not done and when it was eventually delivered on 5<sup>th</sup> May, 2020 the applicant was not present and had no notice of the said delivery. This application was subsequently made about five months thereafter. From the grounds set out and the affidavit in support thereof the delay has been satisfactorily explained.

The next issues to consider is whether or not substantial loss may be visited upon the applicant in the event the order of stay is not granted. The applicant has stated that the 1<sup>st</sup> respondent's income is unknown and that he is apprehensive he will not be in a position to refund the decretal sum if paid in the event the appeal succeeds. He is also ready to furnish security by depositing half of the decretal sum of Kshs. 125,000/= pending the hearing of the appeal.

Where any doubt is raised as to the respondent's inability to refund any money paid in the execution of a decree, the burden shifts to such a respondent to prove that such an allegation may not be justified. Paragraph 6 of the replying affidavit sworn by Roselyn Kihara aforesaid has allayed the applicant's concern in respect of substantial loss.

It is stated there that the 1<sup>st</sup> respondent was insured was ICEA Lion Limited, and the suit was brought on its behalf under subrogation rights. The said company is a listed company and has the means to meet the judgment sum if the appeal is allowed. Since the fear of substantial loss is key to applications of this nature, and that fear having been diminished by the insurers of the 1<sup>st</sup> respondent, there is no reason why the 1<sup>st</sup> respondent should be denied enjoyment of the fruits of his Judgment.

I am persuaded that the application may not be allowed without resultant injustice on the part of the 1<sup>st</sup> respondent. Accordingly, the application is dismissed. The costs shall abide by the result of the appeal.

**Dated, Signed and Delivered at Nairobi this 27<sup>th</sup> day of May, 2021.**

**A. MBOGHOLI MSAGHA**

**JUDGE**

In the presence of:

Mr. Muhuni for the Applicant

Ms. Obwori for the 1<sup>st</sup> Respondent

N/A for the 2<sup>nd</sup> Respondent