



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO 53 OF 2019

PHINEAS KOOME MARANGU.....APPELLANT

VERSUS

AFRICAN MERCHANT ASSURANCE CO LTD.....1ST RESPONDENT

J.P NYAGA KAUNGA.....2ND RESPONDENT

R U L I N G

1. I have perused the Notice of Motion dated 29.5.2019 in line with the Appeal filed. I have also perused the Affidavit sworn and filed support thereof as well as the Replying Affidavit filed by the 2nd respondent. In addition, I have perused the submissions filed by both parties.

Without rehashing same, I do consider the application to seek an answer to three threshold and fundamental questions: -

1. Does the order sought to be appealed against bear an appeal as of right?

2. Is this court clothed with power and discretion to order stay of execution of an order of decree upon which no appeal has been preferred.

3. Was the application for stay before the trial court properly before the court?

2. The first question, and which goes to jurisdiction is whether the order sought to be appeal against attracts an appeal as of right. The applications dismissed by the trial court was premised upon the provisions of **order 20 Rule 22 Civil Procedure Rules**, the overriding objectives and inherent process of a court under **Sections 1A, 1B and 3A of Act as well as Article 159** of the Constitution.

3. In this county an appeal to this court must be expressly allowed by the statutes or pursued pursuant to leave granted by the court. Appeals from orders, whether interlocutory or supplemental are governed by the provisions of order 43. My reading of the law order that order is that there is no sight of appeal to pursue an appeal from a decision on an application brought pursuant to **order 20 Rule 22 of the Act**. According I doubt if the appeal is properly before the court as of today.

4. In answering the second question have taken note that the appeal in this file challenges the decision dated 9.5.2019 in Nkubu PMCC No. 84 of 2019 declining request for stay of execution proceeding in Nkubu PMCC No 59 of 2015.

5. Accordingly, the appeal is not concerned with the judgment of the trial court in Nkubu PMCC 59 of 2015 yet the application seeks that I do stay the decree in that suit pending one appeal preferred against a decision, not a final judgment,, in Nkubu 84 of 2019.

6. In my opinion, the discretion given to court under **order 42 Rule 6** is one that is only available where the order or decree to be stayed is the same one impugned before the judge from whom stay is sought. For that reason alone, I do find that my jurisdiction has not been properly invoked and that the applications is on wholly misconceived

7. There is a third question I have posed to myself which is whether the application before the trial court, and seeking stay, was indeed properly before that court if regard is given to the dictates of **section 34 of the Civil Procedure Act**. I leave the answer to that question for another day just as I leave the question whether the suit itself is in tune with the provisions of **section 10(4), Insurance, (Motor Vehicle Third Party Risks) Act**.

8. All the four issue I have raised lead me to conclude that the appellant may not have an arguable appeal which stands the prospects of being rendered nugatory and thus visiting upon the applicant substantial loss, which I appreciate to be the backbone of any application for stay pending appeal.

9. That being my position, I found no merit in the application which I order to be dismissed with costs.

Dated, signed and delivered at Meru by **MS Teams**, this 26th day of May 2021.

In presence of

Murigi for the Appellant

Ms Mbogo for the 2nd Respondent

PATRICK J.O. OTIENO

JUDGE