



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CIVIL DIVISION)

MISC. CIVIL APPLICATION NO. E519 OF 2020

KENYA ORIENT INSURANCE CO. LTD.....APPLICANT

VERSUS

KENNEDY KAGAI KIRUKU.....RESPONDENT

RULING

1. Before the Court is the application by **Kenya Orient Insurance Co. Ltd.** (hereafter the Applicant) dated 3rd December, 2020 seeking stay of execution of the judgment and decree issued on 29th May, 2020 in **Nairobi CMCC No. 6900 of 2019 Kennedy Kagai Kiruku v Kenya Orient Insurance Co. Ltd.**, pending hearing and determination of the appeal. The motion is expressed to be brought inter alia under Section 1B & 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules and is supported by the affidavit of **Catherine Kendi**.

2. The gist thereof is that judgment in **Nairobi CMCC 6900 of 2019** was delivered by the trial court on 29th May 2020 in the sum of Kshs. 8,953,310/- in favour of **Kennedy Kagai Kiruku** (hereafter the Respondent); that being aggrieved therewith, the Applicant instructed his counsel to file an application to review the said judgment which was dismissed on 30th November, 2020; and that the Applicant thereafter preferred an appeal being HCCA No. E344 of 2020. The deponent stated it had prior to the ruling in the lower court remitted Kshs. 3,000,000/- being the statutory limit of indemnity payable by the Applicant, to the Respondent's advocate in partial satisfaction of the decree, and that a further sum of Kshs. . 4,899,826/- as well as a cheque for Kshs. 230,000/- odd was paid to the Respondent's counsel pursuant to the garnishee *nisi* order issued in the ruling of the lower court; and that these latter monies were in excess of the statutory cap and that if paid out to the Respondent the Applicant would suffer substantial loss and its appeal rendered nugatory with being visited upon it. Finally, the Applicant deposed that the Respondent will not suffer any undue prejudice and it was willing to abide by any conditions on stay of execution that may be imposed by the court.

3. The Respondent swore a replying affidavit in opposition to the motion 2021. It was the Respondent's case that the appeal is an afterthought as the issues raised in the appeal were neither pleaded nor canvassed in the lower court and therefore the appeal was frivolous. The Respondent admitted receipt of Kshs. 3,000,000/- during the pendency of the lower court ruling and the subsequent further sums as narrated by the Applicant; that the said latter sums were being held by his counsel pursuant to the interim order of stay granted herein, pending further directions of this court. The Respondent concluded by deposing that the motion was intended to deny him the fruits of successful litigation and he therefore urged that it be dismissed, and order made for the release of the funds held by his counsel to himself.

4. The motion was canvassed by way of written submissions which the parties subsequently highlighted orally. For the Applicants, it was submitted, after reiterating the matters in their affidavit, that the Applicants motion being one brought under Order 42 Rule 6 of the Civil Procedure Rules has fulfilled the requirement to demonstrate that the appeal would be rendered nugatory if execution were not stayed because the judgment sum is substantial: that funds in excess of Kshs. 3,000,000 already being held by his counsel will be released to the Respondent if stay of execution pending appeal is denied, while the Respondent has not shown that he has the means to make a refund in the event the appeal succeeds.

5. Additionally, it was submitted that the business operations of the Applicant are likely to be adversely affected by the payment of such substantial amounts. Counsel urged, concerning security, that the funds held by counsel for the Respondent sufficed and ought to be deposited in a joint interest earning account in the names of both advocates. In support of his submissions, the Applicant's counsel cited the case of **John Gachanga Mundia Vs Francis Muriira Alias Francis Muthika & Another [2016]**. It was also contended that the appeal had a high chance of success and there was no delay on the part of the Applicant filing the instant application and the appeal and that the application was not brought to delay the Respondents' fruits of successful litigation but in pursuit of justice .

6. The Respondent's counsel submitted on various issues which appear to go to the merits of the appeal. In addition, he argued that an application to stay execution pending appeal presupposes the existence of a valid appeal and that no valid appeal exists herein as the Applicant's right to appeal stood forfeited when the Applicant opted to exercise its rights under Order 45 Rule 1 of the Civil Procedure Rules and to seek review of the judgment of 29/05/2020. Taking issue with the prayers in the memorandum of appeal seeking the setting aside of the lower court judgment, the Respondent submitted that there was no substantive appeal from the judgment delivered on 29/5/2020, which

in any event would have required leave of the court as the appeal period had lapsed. Reliance was placed on the pronouncement of the court in **Francis Ndahebwa Twala V Ben Nganyi [2018] eKLR** for this submission, counsel and contending that the question of stay pending appeal does not arise, therefore. In his view, the appeal filed herein is a disguised appeal from the judgment of 29/5/2020 and is therefore incompetent. Finally, counsel submitted the present motion was an afterthought intended to deny the Respondent the enjoyment of the fruits of his judgment and ought to be dismissed with costs.

7. The court has considered the rival affidavit material and parties' submissions in respect of the motion dated 3/12/2020. Order 42 Rule 6 of the Civil Procedure Rules provides that:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.”

(3) ...

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) ...

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

8. The Respondent has correctly submitted that the provisions of Order 42 Rule 6 (1) presuppose the existence of an appeal. The instant motion was apparently filed simultaneously with the memorandum of appeal in **HCCA No. E344 of 2020** dated 3rd December, 2020. The preamble thereof states:

“The Appellant, KENYA ORIENT INSURANCE CO. LTD being aggrieved and dissatisfied by and with the ruling and orders of the Hon. Senior Principal Magistrate Mrs. G. A. Mmasi on 30th November, 2020 in CMCC No. 6900 of 2020 Nairobi hereby prefers an appeal to this Honourable court on the grounds set out hereunder. (sic).

9. And while the grounds in the memorandum of appeal (annexure CK3, to the supporting affidavit) appear to target the ruling delivered on 30th November 2020, prayer (b) is in terms that:

“The order dismissing the appellant’s application for review be set aside and in its place an order setting aside the judgment dated 29th May, 2020 be reinstated.” (emphasis added)

10. The second part of this prayer has evidently caused umbrage with the Respondent who asserts, quite correctly, that the Applicant did not seek leave to appeal from the judgment of the lower court delivered on 29th May, 2020. Although none of the parties herein have supplied a copy of the ruling of 30th November 2020 from which the instant appeal was expressed to arise, it is clear from the parties' respective material that the ruling was in respect of the Respondent's garnishee application and the Applicant's motion for review of the judgment of 29/05/2020. Hence the Respondent's objection to prayer (b) of the memorandum of appeal. If indeed the Applicant's real intention was to challenge the judgment of 29/05/2020, then leave ought to have been sought, the appeal period having lapsed 30 days since the judgment.

11. The second reason why the second part of prayer (b) is offensive is found in the wording of Order 45 Rule (1) of the Civil Procedure Rules which states:

“(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).... ____

may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

The Applicant having exercised the option of applying to review the judgment of 29/05/2020 rather than appeal, cannot also lodge an appeal from the same judgment.

12. In **The Chairman Board of Governors Highway Secondary School V William Mmsoi Moi Civil Application No. 277 of 2005** the Court of Appeal stated that:

“The Board was at liberty to pursue the option of review of the orders despite filling a notice of appeal to challenge the same orders. However, upon the exercise of that option and pursuit therefrom until to conclusion, there would be no further jurisdiction exercisable by an appellant court over the same orders of the court. That was the end of the matter and the notice of appeal was rendered purposeless. Both options cannot be pursued concurrently or one after the other”

See also **Otieno, Ragot & Col Advocates V. National Bank of Kenya [2020] eKLR.**

13. Thus, the Applicant herein could not purport to appeal against the judgment of the lower court upon the review application having failed. That said, the Applicant is entitled under Order 45 Rule 3 of the Civil Procedure Rules to appeal the order of dismissal in relation to the review application. Order 43 Rule 1(x) provides that an appeal lies as of right from Order 45 Rule 3 of the Civil Procedure Rules under which a review application may be granted or rejected. Looking at the prayers (a) and (c) and the first part of prayer (b) in the memorandum of appeal, it does seem that these are principally targeting the dismissal of the review application and not the judgment on 29/05/2020. The offensive part of prayer (b) which refers to the judgment of 29/05/2020 ought to be amended accordingly but it cannot be said, as the Respondent has proposed that there is no competent appeal before the court. There is an appeal, principally against the order of dismissal of the review application but not against the judgment of the lower court.

14. In the result, it would be premature for this court to conclude as urged by the Respondent that the appeal herein is a disguised appeal from the judgment of the lower court and is therefore incompetent for want of leave.

15. Secondly, it is incorrect to assert as the Respondent has done, that Order 42 Rule 6(1) presupposes an appeal against a judgment or decree. The rule envisages an appeal from a decree or order, and the appeal filed by the Applicant being principally one against a dismissal order falls within the rule. Does the fact that the appeal by the Applicants is from a dismissal order preclude the key prayer in the motion to stay execution of the judgment and decree of 29th May, 2020 and consequential orders? I do not think so. By their dismissed application, the Applicants had sought the review of the judgment of 29th May, 2020 on the key basis, whether valid or not, of an asserted statutory cap by which they were allegedly bound to indemnify the Respondent up to a limit of Kshs. 3,000,000/-. The decree of the lower court was in the sum of Kshs. 8,955,310/=.

16. The Respondent has by submissions gone into the merits of the appeal in attempting to demonstrate that the grounds for review were not merited. The court cannot deal with such matters at this stage. What is clear is that the Respondent has already received a sum of Kshs. 3 million from the Applicants under the decree prior to impugned ruling and pursuant to the ruling by which the garnishee orders became absolute while dismissing the renew application, a further sum of Kshs. 4,899,826/- the subject of the garnishee order. The dismissal of the review application and making absolute of the garnishee order meant that the “extra” monies could be released to the Respondent and that execution in respect of the judgment of 29/05/2020 could proceed against the Applicants until the entire decretal sum was satisfied.

17. In these circumstances, the Applicant, while not appealing against the judgment of the lower court but the review ruling was perfectly entitled to seek the more efficacious order, namely stay of execution of the judgment, rather than merely seeking to stay the dismissal or garnishee order, pending the appeal. That is not however to say that the orders sought are merited and the court proposes to turn now to the merits of the application.

18. The provisions of Order 42 Rule 6(2) of the Civil Procedure Rules have already been set out. There is no doubt that the instant application was brought without delay. The next question is whether the Applicant has demonstrated the likelihood of suffering substantial loss if stay is denied. One of the most enduring legal authorities on the issue of substantial loss is the case of **Kenya Shell Ltd V Kibiru & Another [1986] e KLR 410**. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2,3 and 4 of the **Shell** case are especially pertinent. These are that:

“1.

2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.

3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.

4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.

5.”

19. The decision of Platt **Ag JA**, in the **Shell** case, in my humble view set out two different circumstances when substantial loss could arise,

and therefore giving context to the 4th holding above. The Ag JA (as he then was) stated inter alia that:

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts...(emphasis added)”

20. The learned Judge continued to observe that:-

“It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”
(emphasis added)

21. Earlier on, **Hancox JA** in his ruling observed that:

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would,... render the appeal nugatory.

This is shown by the following passage of Cotton L J in Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said:-

“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 rendered nugatory.”

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

See also **Butt v Rent Restriction Tribunal [1982] KLR 417.**

22. The judgment sum in the lower court is almost Shs.10 million out of which the Applicants admit liability for a sum of Kshs. 3 million which is admittedly already paid to the Respondents, and in addition a further sum of over Shs. 4million. The Applicants by their affidavit depose that they will suffer substantial loss if they are compelled to settle the entire sum. In submissions they assert that their operations will be adversely affected by the payment; that the Respondent’s means are unknown hence there is no evidence that he would be able to refund the “extra” sums beyond the Kshs. 3million if the appeal succeeds. The Respondent by his replying affidavit and submissions does not address this matter. Indeed, the Respondents submissions appear to be confined to the question whether the Applicants have an arguable/valid appeal, which is not a relevant consideration in an application of this nature. The decretal sum in this case is substantial and in the event that the appeal was to succeed, the Applicants would certainly suffer substantial loss and their appeal rendered nugatory if unable to recover from the Respondent.

23. In the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] e KLR** the Court of Appeal stated that:

“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 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.”

24. As stated in the **Shell** case substantial loss is what has to be prevented even while securing the Respondent’s rights under the decree. The Applicants have demonstrated willingness to provide security, and indeed have already paid the sum of kshs. 3,000,000/-to the Respondent. The Respondent admits that under the garnishee nisi his advocate received a further sum of Kshs. 4,899,826/- and a cheque for the sum of Kshs. 232,562/=. The Applicants have urged that these subsequent sums, now held by the Respondent’s advocate pursuant to the interim orders issued herein, be treated as security for the performance of the decree. While not addressing this point directly, the Respondent has submitted that any stay orders would only apply to the “unexecuted part of the decree” that is the sum of Kshs. 1,861,388/=. The Respondent has strongly urged that the held funds be released to him. I agree with counsel for the Applicant that the sums paid to and currently held by the Respondent’s advocate after the ruling of 30/11/2020 would constitute adequate security, as the advance sum of Kshs. 3 million already paid to the Respondent is not in contention.

25. The words stated in **Nduhiu Gitahi and Another -Vs- Anna Wambui Warugongo [1988] 2 KAR**, citing the decision of **Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198** are apt:

“We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are

concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff.....

It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal.....”

26. The court is therefore persuaded to grant prayer 3 of the motion dated 3rd December 2020. In the circumstances, the sums paid to the Respondent’s advocates after ruling of 30/11/2020, that is Kshs. 4,899,826/- and cheque for the sum of Kshs. 232,561/- shall be treated as security and are to be deposited into an interest earning account, in the joint names of the parties’ advocates within 21 days of today’s date. The Applicant will bear the costs of the application in any event.

Delivered and signed on this 20th Day of May 2021.

C. MEOLI

JUDGE

In the presence of:

Mr. Chege for the Respondent

Ms. Mati h/b for Mr. Kairaria for the Applicant

Court Assistant: Carol