



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO. 132 OF 2020.**

**CIC GENERAL INSURANCE CO.LTD.....APPELLANT/ APPLICANT**

**VERSUS**

**VERONICA GATHONI NDUNGU.....RESPONDENT**

**RULING.**

1. By its **Notice of Motion** dated **1<sup>st</sup> March 2021** the applicant prays for orders that this court does grant a stay of execution of judgment issued in the primary **suit NAKURU CMCC NO. 1008 OF 2016** and the declaratory suit **NAKURU CMCC NO. 107 OF 2019** pending hearing and determination of both appeals lodged (**instant appeal and NAKURU HCCA NO. 26 OF 2019**) on conditions set out in the consent /order of **18<sup>th</sup> day of September 2020** in the said declaratory suit.
2. The application is supported by the grounds thereof as well as the sworn affidavit of **Erastus Mbaka** the applicant's senior legal officer dated **1<sup>st</sup> March 2021**. What can be gleaned from the said affidavit are that indeed there was a consent order dated **18<sup>th</sup> September 2020** in which it was agreed by the parties herein that the decretal amount be deposited in their counsels joint account within 30 days as a condition to the applicant's appeal pending at this court.
3. The applicant was unable to deposit the cheque within the 30 days when it fell short by a day. The reasons for the delay was that the applicant was unable to consolidate the funds in time because of Covid 19 pandemic and its legal officer was indisposed and on sick leave and there was therefore breakdown of communication.
4. It is instructive also to note that this court in another suit namely **NAKURU HIGH COURT CIVIL APPEAL NUMBER 26 OF 2019** as per **paragraph 8 of the said supporting affidavit** gave conditional stay pending appeal.
5. The applicant deponed that the intended appeal has overwhelming chances of success and that the stay if not granted shall render the appeal nugatory and the respondent may not refund the decretal sum should the appeal succeeds. The applicant went on to state that since the amount will be in safe custody the respondents stands to suffer no loss as the security will still be safe and intact .
6. The respondent on her part has raised a preliminary objection dated **12<sup>th</sup> October 2020** stating that the appeal is incompetent as it was filed without the leave of the court contrary to **Section 75 of the Civil Procedure Act** as read with **Order 43 of the Civil Procedure Rules**.
7. The respondent went ahead to attach the proceedings from the lower court which shows that the applicant sought leave of the court but the said court did not express itself clearly whether it had granted leave to the applicant to appeal against the judgement.
8. One **Denning Muriithi Ndeke** counsel for the applicant in his reply to the preliminary objection filed an affidavit sworn on **7<sup>th</sup> December 2020** stating that leave was secured orally and that the respondent has acquiesced by filing the record of appeal herself thus she should be estopped from relying on this ground.
9. In any case, he proceeded, the provisions of **Section 3a of the Civil Procedure Act as well as Article 159 of the Constitution** renders such technicalities invalid. The respondent by all indications was alive to the validity of this appeal.
10. The court ordered the parties to proceed by way of written submissions which the court has perused as well as the attendant authorities.
11. The respondent on her part submitted that there was no valid appeal on record as leave was not granted in line with **Section 75 of the Civil Procedure Act**. She relied on the case of **MWANIKI MUNYI & ANOTHER (2018) eKLR**.
12. The appellant on its part found that the preliminary objection was improper for the reasons inter alia that the appeal was valid and that by the conduct of the respondent she was aware that the trial court had by implication granted it leave to file the appeal.

13. The court having read the above pleadings carefully is of the considered opinion that the preliminary objection for now is not clear and straight forward. This is for the simple reason that it is premised on the court searching and perusing the lower court proceedings before reaching at the conclusion the respondent's so desires.

14. In other words, whether the lower court granted leave or not to file this appeal for now is not clear on the face of the available pleadings and affidavits in particular. What is before me is an application and not the main appeal. Perhaps it would have been different if what was at hand was whether the appeal should be admitted or not.

15. The famous case of **MUKISA BISCUITS MANUFACTURING CO. LTD V. WEST END DISTRIBUTORS LTD (1969) EA 696** clearly explained what a preliminary objection on a point of law ought to be. It stated that;

*“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop” (underlining mine).*

16. For the above reasons I find that the said objection though it may be meritorious is not for this moment but the respondent may raise it later for consideration.

17. Turning now to the application, what is clear is that the applicant failed to comply with the consent order. It did not deposit the money within 30 days as agreed in the consent. The twin reasons it gave was that the counsel dealing with the matter was on a sick leave and thus there was a communication breakdown. Secondly because of Covid pandemic it was unable to mobilise the resources within time.

18. The court does not find the two reasons convincing at all. There was no for example, any evidence that the counsel handling the matter was indisposed and therefore on a sick leave. The applicant should have at least given the court an iota of evidence. More significantly, it is assumed that if indeed he was unwell, then someone else within the organisation may have taken over the matter.

19. On the issue of Covid pandemic, this court finds it a lazy reason to hang on. The same had been with us from around **February 2020** and the consent on record was done in **September 2020**. Where does corona come in? In any case we are dealing with a court decree which ought to be honoured.

20. Peradventure there was any other reasons for non-compliance with the consent, other than the two or even one of the two there was nothing to stop the applicant from seeking an extension from the said court or at least seeking the respondent's indulgence. For now, I do not find the two reasons plausible.

21. It must also be emphasised that the consent was binding to both parties and this court cannot interfere with it unless there was evidence of fraud collusion or such other which runs contrary to the usual legal practice. The court in **FLORA WASIKE VERSES DESTIMO WAMBOKO (1982 -1988) KLR** emphasise this when it held that that;

*“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.” (see also **Brooke Bond Liebig (T) vs. Mallya**)*

22. The logical thing was for the applicant to seek an extension from the lower court which it would have considered whether to agree with it or not. It cannot be said that a delay for a day is not inordinate in a situation like this where the parties have bound themselves vide a consent.

23. As to whether the appeal would be rendered nugatory or not is not for this court to decide at the moment. It is reserved for that day when all the parties shall be heard on merit.

24. The applicant stated that the respondent is a person of straw and may not refund the sum if paid out should the appeal succeed. Again that is an assumption. There was no tangible evidence presented to support this line of submission and in any case the parties must have considered the same when entering the consent.

25. The court is also aware of **NAKURU HCCA NO 26 OF 2019(supra)** where the applicant was granted stay conditionally but it did not comply. This was not disputed by the applicants.

26. For the above reasons the court has demonstrated that the application is not meritorious. The consent signed by the parties was literally a contract and this court cannot interfere with it. The reasons for non-fulfilment or compliance are not plausible.

27. The preliminary objection is for now as well unmerited for the reasons stated above.

28. The application is hereby dismissed with costs to the respondent. The earlier orders of stay are hereby set aside.

**DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 24TH DAY OF JUNE 2021.**

**H. K. CHEMITEI.**

**JUDGE.**