



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO. 12 OF 2017

MONARCH INSURANCE CO. LTD.....APPELLANT/APPLICANT

VERSUS

RICHARD KILUNGU KATHUKYA (suing on behalf of the estate of

DISMAS KATHUKYA RICHARD (deceased).....RESPONDENT

RULING

1. The application for consideration before this court is the Appellant's **Notice of Motion** dated 1/12/2020. The same is expressed to be brought under **Sections 1A, 1B and 3A** of the **Civil Procedure Act**, **Order 42 Rule 6** of the **Civil Procedure Rules**. The Application prays for the following orders: -

a) Spent.

b) That this Honourable Court be pleased to order a stay of execution of the ruling and order delivered on 28th October 2020, the decree issued on 16th November 2020 and all other consequential orders emanating therefrom pending hearing and determination of this application

c) That this Honourable Court be pleased to order a stay of execution of the ruling and order delivered on 28th October 2020, the decree issued on 16th November 2020 and all other consequential orders emanating therefrom pending hearing and determination of the appeal.

d) That the costs of this application be provided for.

2. The **Motion** is premised on the grounds set out therein and those in the Affidavit sworn on 1/12/2020 by **Simon Kioko** who is the Appellant/Applicant's Legal Services Manager. The deponent averred that a ruling was delivered on 28/11/2020 dismissing the Appellant's application for review dated 13/03/2020 with costs to the Respondent and being aggrieved by the said ruling and order issued on 28/10/2020, they instructed their advocate on record to file a Notice of Appeal to the Court of Appeal and they have also applied for typed and certified copies of proceedings in this appeal for the purposes of compiling a record of appeal.

3. The deponent avers that the instant application was filed without unreasonable delay since there is an imminent threat of execution being levied to satisfy the decree issued in this appeal and it is only prudent for this Court to grant a stay of execution of the ruling and order delivered on 28/10/2020, issued on 16/11/2020 and all other consequential orders emanating therefrom pending hearing and determination of the appeal because the Appellant has an arguable appeal with a high probability of success and stands to suffer substantial loss if the execution is not stayed since the Respondent may not be able to refund the colossal sum, and the Appellant's appeal would be rendered nugatory.

4. The deponent further avers that the Appellant is willing and ready to provide security as the Court may order for the due performance of the decree and that the Respondent will suffer no prejudice if the instant appeal is allowed.

5. The Respondents opposed the Application vide Replying affidavit sworn on 14/12/2020 by **Richard Kilungu Kathukya**. The deponent avers that the decree as it stands is not appealable by operation of law since the Appellant chose the review route. Further, the deponent avers that the orders dated 28/10/2020 are not capable of being stayed.

6. The deponent avers that the instant application is premature, since there is no threat of execution since the bill in the instant appeal is yet to

be taxed and that the decree being a money decree, the applicant has to demonstrate the loss it will suffer, since the money can always be paid back if the appeal succeeds.

7. In rejoinder, the Appellant filed supplementary affidavit sworn on 22/02/2021 by **Rosemary Kangwana** who is the Deputy Legal Manager to the Appellant/ Applicant. The deponent avers that the Respondent has already filed a Party-to-Party Bill of Costs dated 14/01/2021 and a ruling was delivered on 21/01/2021, and the bill of costs was taxed at Kshs. 439,500.48. Therefore, there is an imminent danger of execution.

8. The deponent avers that the Appellant has already filed an appeal before the court of Appeal in Mombasa being Civil Appeal No. 2 of 2021 and the same has already been served upon the Respondent.

9. Following the directions given by the court, the matter was disposed of by way of written submissions. The Appellant/Applicant's submissions are filed on **23/02/2021** whilst the Respondent's submissions are filed on **8/03/2021**.

Submissions

10. **Mr. Kiarie** learned counsel for the Appellant/Applicant submissions rehashed the grounds deponed in support of the application and further submitted that the decretal sum is quite colossal and the Respondent may not be able to refund the money since his financial status has not been disclosed to this Court.

11. **Mr. Oddiaga** learned counsel for the Respondent submitted that the Appellant having chosen to pursue a challenge to the judgment through review under Order 45 Rule (1) and (2) and Section 80 of the Civil Procedure Act, he lost the right to appeal against the judgment and therefore, it cannot purport to stay a decree it has not appealed against. Counsel submitted that the Appellant has not demonstrated that the Respondent is a man of straw and will not be able to pay back the decretal amount if it is released to him.

The Determination

12. Having set out the respective parties' positions as above, in the circumstances, it is my most considered view that the sole issue for determination is whether or not, in the circumstances, this court ought to grant Stay of execution of the ruling and order delivered on 28/10/2020.

13. **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** specifies the circumstances under which the court may order Stay of Execution of a Decree or Order pending an Appeal. It provides:

“6 (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 sub-rule (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.”

14. From the above provision, it is clear that the court must be satisfied that there is **“sufficient cause”** to grant orders of stay. Evidently, the three (3) prerequisite conditions set out in the said **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** cannot be severed. The key word is **“and.”** It connotes that all three (3) conditions must be met simultaneously.

15. The above finding notwithstanding, this Court cannot lose sight of the fact that the ruling and order that the Applicant seeks to stay is the court's ruling issued on 28/10/2020 dismissing the Applicant/Appellant's application for review. In this Court's view, the said order was a negative order.

16. In **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR** the Court of Appeal (Kantai J.A) held as follows:

“An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No. 13 of 1984) where it was stated:

‘..... an order for stay of execution must be intended to serve a purpose’ ”

17. Similarly, in the more recent case of **Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Ors [2016] eKLR**, the Court of Appeal expounded on stay of execution stating:

“16. In Kanwal Sarjit Singh Dhiman v. Keshavji Juvraj Shah [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C).”

17. The same reasoning was applied in the case of Raymond M. Omboga v. Austine Pyan Maranga (supra), that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:

“The Order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the Respondent which is capable of execution, there can be no stay of execution of such an order ... The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise...”

18. I adopt above position, and find and hold that indeed a negative order is incapable of being stayed as the Appellant/Applicant seeks. Accordingly, there is nothing to stay in the present case. This Court merely dismissed the Appellant’s application for review vide ruling delivered on 28/10/2020 with costs. Therefore, the only execution that can flow from the said ruling is with respect to cost since the trial court did not order any of the parties to do anything, to refrain from doing anything, or to pay any sum. Therefore, this Court has no mandate to grant a stay order in the manner prayed for by the Applicant.

19. For the foregoing reasons, the upshot of this Court’s ruling is that the Appellant/Applicant’s **Notice of Motion** dated **1/12/2020** and filed on **4/12/2020** is not merited and the same is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 3RD DAY OF AUGUST, 2021

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Ms. Kabole for Appellant/Applicant

Ms. Mwanzia for Respondent

Ms. Peris Court Assistant