



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E332 OF 2021

FIRST ASSURANCE COMPANY LIMITED....APPELLANT/APPLICANT

VERSUS

SHOKO MOLU BEKORESPONDENT

RULING

The application dated 15/6/2021 is brought under Section 3A of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules 2010 and all other enabling provisions of law. It seeks the following orders;

a. Spent

b. That pending the hearing of this application inter-parties there be an order of stay of execution in respect of Shoko Molu Beko v First Assurance Company Limited Milimani CMCC 6039 of 2019

c. That this honorable court be pleased to grant the applicant leave to file appeal out of time

d. That pending hearing and determination of the appeal this honorable court be pleased to grant a stay of execution in respect of the judgement delivered in Shoko Molu Beko v First Assurance Company Limited Milimani CMCC 6039 of 2019

e. That this honorable court be pleased to direct that the sum of Ksh 10,940,000 being the decretal sum be deposited in a joint interest earning account in the firm of the name M/S Ochieng Opiyo & Co Advocates and the firm of M/S J. O. Juma & Co. Advocates being the advocates of the parties herein.

The affidavit of Sophie Omollo sworn on 15/6/2021 supports the application. The applicants submitted that judgement was entered in favour of the respondent on 12/5/2021. In the judgement the respondent was awarded a total of 10,940,000. The appellant/applicants challenging the award for loss of user and/ cost of hire of alternative motor vehicle. The applicant submitted that the trial court erroneously awarded the amounts and failed to appreciate the fact that an award for loss of user cannot be granted where an award for indemnity for pre accident value has been granted.

The applicant submitted that there is an overwhelming possibility that the appeal will succeed. The trial magistrate erroneously made an award that amounted to double compensation. That the respondent would be unable to repay the decretal amount if the appeal is allowed. It was submitted that the respondent attached his transactional account that captured his account details between 1/10/2020 and 23/4/2021 in relation to his personal current account statement which gives his net worth as Kshs 55,665. Further that there was no search that was carried out to verify the ownership of the assets of the respondent that were provided nor was there any valuation done to establish the true value of the said pieces of land. On security of costs the applicant contends that its willing to deposit the decretal amount in a joint earning account held by the advocates of both parties.

The applicant further argued that the delay in filing the intended appeal was occasioned by the fact that they were yet to obtain a certified copy of the Judgement and typed copies of the proceedings to enable them prepare the record of appeal.

The respondent opposed the application through the replying affidavit of Shoko Molu Beko sworn on 29/6/2021. The respondent in his written submissions submitted that applicant has not met the ingredients for granting stay of execution orders pending appeal. The applicant has not proven any substantial loss will be suffered. The respondent argued that the applicant is not willing to deposit security as the decretal sum is Kshs. 13,663,979 and not 10,940,000 as alleged. The respondent contend that a money liquidated decree if paid to the respondent cannot render the intended appeal nugatory. On the issue of leave to appeal out of time the respondent specified that the applicant did not explain and prove the delay in filing the appeal as he did not show his intention to request for the proceedings and other relevant documents

Analysis and Determination

The issues for determination are:-

- a. Whether the applicant should be granted leave to appeal out of time?
- b. Whether execution of the judgment and decree of the trial court should be stayed pending the hearing and determination of the appeal.

Section 79G of the Civil Procedure Act states as follows:-

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

Judgement was delivered on 12/5/2021 and the application was filed on 15/6/2021 which is 33 days after judgement was delivered. The applicant submitted that the delay was occasioned by the fact that they were yet to obtain a certified copy of judgement and typed copies of the proceedings. The application was filed after the expiry of the 30 days. There is only three extra days delay which I do find not to be inordinate.

In the case of **GITHIAKA –V- NDURIRI, (2004) 2 KLR, 67**, Ringera JA (as he then was) while dealing with the issue of extension of time held as follows:-

“In the exercise of its discretion, the Court's primary concern should be to do justice to the parties. The Court should, among other things, consider: -

- **the length of the delay in lodging the notice and record of appeal;**
- **where applicable, the delay in lodging the application for extension of time, as well as the explanation thereof;**
- **whether or not the intended appeal is arguable;**
- **the prejudice to the respondent if the application is granted.**
- **the public importance, if any, of the matter; and**
- **generally the requirements of the interest of justice in the case.**

Similarly, in the case of **KIRAGU –V- KIRAGU (1990) KLR 323**, the Court of Appeal held inter alia:-

“An application for an extension of time for lodging an appeal may be made even after the prescribed time has expired. However, failure by an applicant to explain away the delay in prosecuting his appeal may lead to the extension being refused.”

On the second issue, in the case of **Sr-Vishram Ravji Halai –V- Thornton & Turpin (1990) KLR 365** the Court of Appeal held:-

“Whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.”

Reference is also made to the case of **BUTT –V- RENT RESTRICTION TRIBUNAL [1979] eKLR** where the Court of Appeal held:-

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.**
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large**

amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

It was the applicant’s case that they have an arguable case with high chances of success. According to the appellant, an award for loss of user cannot be granted where an award for indemnity for pre accident value has been granted.

In the case at hand, the respondent has indicated that he is a man of means and therefore he would be able to refund the decretal amount should the appeal succeed. This fact has been disputed by the applicant as it argued that the documents that the respondent adduced did not conclusively prove so. The applicant thus maintain that if the respondent executes the judgement and the appeal succeeds they will suffer substantial loss.

The respondent in his replying affidavit annexed three logbooks for motor vehicle registration number KCH 787H (Isuzu Bus), KCC 794N (Isuzu Bus), KCC 021A (Isuzu Bus) KCD 179Q (Isuzu Bus), KCQ 222C (Isuzu bus) and KCH 755N (Isuzu bus). The respondent also annexed copies of titles for plot numbers KAJIADO/DALALEKUTUK/9128 (0.0406Ha), KAJIADO /DALALEKUTUK/9134 (0.0406 Ha), and JUJA/KALIMONI BLOCK 2/1005 (0.0200Ha). The respondent also annexed copies of his bank statements. All these documents were provided with the intention of establishing that the respondent is a man of means and no irreparable loss or damage will be suffered by the appellant should the decretal sum be released to him.

The respondent countered this position and submitted that the properties were not valued and that the bank statements show a credit balance of Kshs.55,655. I have evaluated the bank statements and note that the final credit balance of Kshs.55,655 as of 23rd April, 2021 does not reflect the true net worth of the respondent. There was credit balance of Kshs.1,151,278 on 8/4/2021 and Kshs.568,213 on 1/4/2021 among other credit balances.

The appellant does admit that it comprehensively insured the respondent’s motor vehicle registration number KCH 888F, Toyota Land Cruiser. The pre accident value of the accident vehicle by the appellant’s valuer was Kshs.5,000,000 as per the judgment of the trial court. The trial court awarded the respondent Kshs.5 million being the pre-accident value of the accident vehicle and Kshs.5,940,000 for loss of use and/or for hiring an alternative motor vehicle. The appellants contend that the award by the trial court amount to double compensation.

It is the duty of the court to balance the interest of both parties. Whereas the appellant has a constitutional right to pursue an appeal against the decision of the trial court, the respondent has an equal right to enjoy the fruits of his successful judgment. The respondent has established that he is capable of refunding the decretal sum should the appeal succeed. The court has to take into account the appellant’s contention that it is ready and capable of depositing the entire decretal sum in a joint interest earning account. On his part, the respondent maintain that the decretal sum is not Kshs.10,940,000 but Kshs.13,663,979.

The trial court issued a decree on 6th June, 2021. The decree has Kshs.436,470 as the certified costs and Kshs.13,227,509 as the decretal sum. The total award was Kshs.10,940,000 but there is accumulated interest of Kshs.2,287,509 at the rate of 12%p.a. from 14/8/2019 to 12/5/2021.

In order to balance the interest of both parties and taking into account the fact that the insurance policy was valid when the risk attached and considering that the appellant is entitled to pursue its appeal upto its final determination, I do find that the application dated 15th June, 2021 is merited and the same is hereby allowed on the following conditions:-

- 1. Leave is granted to the applicant to file a Memorandum of Appeal within fourteen (14) days hereof.**
- 2. Pending the hearing and determination of the appeal, execution in respect of the judgment in CMCC 6039 of 2019 is hereby stayed.**
- 3. The appellant shall pay the respondent Kshs. Four million (Kshs.4,000,000) being part of the decretal sum within thirty (30) days hereof.**
- 4. The balance of the decretal sum of Kshs.9,227,509 shall be deposited in a joint interest earning account of counsel for both parties within thirty (30) days hereof or in case of disagreement or delay in opening the account, to be deposited in court within the same period.**
- 5. In default of orders three(3) and four (4) above, the orders staying execution shall automatically lapse unless otherwise extended by the court.**
- 6. Costs of the application shall follow the outcome of the appeal.**

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF OCTOBER, 2021.

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S. CHITEMBWE

JUDGE