



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.98 OF 2019

MONARCH INSURANCE COMPANY LIMITED....PLAINTIFF/APPLICANT

-VERSUS-

GEOFFREY GITHINJI ITHAL.....DEFENDANT/RESPONDENT

RULING

1. This is a ruling on application dated 24th June 2019. It seeks stay of execution of judgment delivered on 8th May 2019 in CMCC No.42 of 2016.
2. Grounds on the face of the application are that, the applicant being aggrieved by the said judgment has lodged an appeal; that the appeal has high chances of success and has been brought expeditiously; that the respondent's financial position is unknown and the respondent is likely to suffer irreparable loss as the applicant will not be able to recover the amount if appeal is successful.
3. The applicant aver that it is ready to abide by conditions that the court may order.
4. In response, the respondent filed replying affidavit dated 11th July 2019 sworn by the defendant. He averred that the applicant has failed to meet the three condition for grant of stay pending appeal which are as follows:-
 - i. The court is satisfied that substantial loss may result to the applicant unless the order is made.
 - ii. That the application has been made without unreasonable delay.
 - iii. Security as the court orders for due performance of such decree as may ultimately be binding on him has been given by the applicant.
5. He averred that the appeal was filed one month after the decree was made by the court and that the applicant never sought extension of time to file appeal rendering the appeal incompetent and stay cannot be granted on the basis of incompetent appeal.
6. Respondent further aver that this application was filed after one and half months after issuance of decree and that it was prompted by his advocate who sought compliance of the decree; that the applicant has not therefore fulfilled the second condition of filing application without unreasonable delay.
7. Respondent further averred that he is likely to suffer substantial loss. He also averred that the decree herein arose from indemnity claim and that the court ordered that he be returned to position he was in before the accident; that he was asked to give him the vehicle he had before the accident and its value was kshs 1,200,000 before the accident and in the event the appeal is successful nothing will stop the applicant from repossessing the vehicle.
8. In response to averment that his economic status is unknown, he averred that the allegation is malicious as he disclosed that he is a public servant in position of Deputy County Commissioner in Ruiru County and is also a Director of Menengai Ostrich Resort and Campsite a limited liability company which owns exclusive tourist resort.
9. He averred that in the event that this court finds this application meritorious, the applicant be ordered to deposit kshs 1,200,000 being value of the vehicle and kshs 95,000 being nominal costs for the case.

ANALYSIS AND DETERMINATION

10. I have considered averments in affidavits filed and submissions by the parties. I concur with counsel for respondent that, for grant of stay

pending appeal to be issued three conditions set out hereunder must be met:-

- i. The court is satisfied that substantial loss may result to the applicant unless the order is made
- ii. That the application has been made without unreasonable delay
- iii. Security as the court orders for due performance of such decree as may ultimately be binding on him has been given by the applicant

11. On appeal being filed out of time, I note that it was filed on 10th June 2019 two days after time allowed for filing appeal though it's dated 7th June 2019. The applicant has not explained why he never sought leave to file appeal out of time having filed it out of the stipulated period for filing appeal. I cannot however say much because it has not been expunged from record.

12. As to whether the applicant is likely to suffer irreparable damage, the respondent has demonstrated that he is in a position to refund amount paid if appeal is successful. He has attached a pay slip and certificate incorporation document of Menengai Ostrich Resort and Camps Limited. My view is that, the applicant has not demonstrated that the respondent is a person of unknown means. On the contrary the respondent has been able to demonstrate that he is in salaried employment and is also in business and that he will be able to refund the applicant the decretal amount in the event that the appeal succeed.

13. From the foregoing, the applicant has failed to demonstrate that he is likely to suffer irreparable damage if the appeal is successful. I see no merit in this application.

14. FINAL ORDERS

- 1) Application is dismissed with costs to the respondent.

Ruling dated, signed and delivered at Nakuru this 30th day of January, 2020

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer - Court Assistant

Ms. Kiberenge holding brief for Muiya Counsel for applicant

Ms. Sambu holding for Githui Counsel for respondent