



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL CASE NO. 8 OF 2019

TAKFUL INSURANCE OF AFRICA LTD (KENYA).....PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF GARISSA.....1ST DEFENDANT

THE COUNTY SECRETARY, GARISSA COUNTY...2ND DEFENDANT

CHIEF OFFICER, FINANCE AND ECONOMIC

PLANNING, GARISSA COUNTY.....3RD DEFENDANT

RULING

1. The applicant seeks orders for stay of proceedings of the instant matter pending hearing and determination of the applicant's appeal *inter alia*.
2. The application is premised on the grounds that on a ruling delivered on 12/2/2020 on the applicant's application to set aside an interlocutory judgement this court-imposed conditions for applicant's to be allowed to defend by namely ordering depositing part of alleged balance unpaid Kshs. 53,351,945/= in joint account of parties' advocates within 45 days and the defence and/or counterclaim was to be filed and served within 14 days *inter alia*.
3. In default of any of the given conditions, the application to stand dismissed and execution process to proceed. The applicant says he has filed notice of appeal to challenge the aforesaid decision.
4. The application is supported by a supporting affidavit of Ismail Aden Dabar sworn on 26/2/2020 which reiterates the same contents above stated.
5. The respondent has filed grounds of opposition to oppose the application namely –
 - i. That the application is an abuse of the process of the court.***
 - ii. That the court has no jurisdiction because it cannot sit on its own appeal.***
 - iii. That some of the grounds raised are res judicata.***
 - iv. That there cannot be a stay of a ruling that has been delivered.***
 - v. That the defendants cannot stay proceedings they requested for.***
 - vi. That the defendants have not obeyed the orders issued on 12/2/2020 on deposit of cash in a joint account and payment of costs.***
 - vii. That no defence has been filed and served within 14 days as directed by court on 12/2/2020.***
 - viii. That the application is a non-starter because it seeks no stay of execution.***
6. This court did issue orders subject of being impugned in the intended appeal to the effect that; default judgement herein is set aside

subject to the following conditions;

- a. (i) Kshs. 53,351,945/= is deposited in a joint interest earning account in Kenya commercial bank of Kenya Garissa branch in names of the parties' advocates within a period of forty five (45) days from dates herein.**
- (ii) The defence and/or counterclaim together with bundle of documents be filed and served upon respondent advocate within 14 days.**
- b. costs to the respondents Ksh. 100,000/= be paid within 45 days.**
- c. In default of any of the above conditions (a) i, ii and (b) the application will stand dismissed and execution process to proceed.**
- d. The auctioneer to file his bill in court for the deputy registrar to assess under the relevant provisions of the law.**

7. I have carefully considered the arguments advanced by both parties in this case and the relevant law and authorities as enumerated later in this ruling. The application though not expressed under Order 42 but Order 51 of the Civil Procedures, it apparently invokes the reliefs under 42 of civil procedure Rules 2010 and Section of the Civil Procedure Act. The same provides as follows:-

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 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 of stay 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 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

8. In the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** the court held;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.” (Emphasis added)

9. To my mind, the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;

- a) Whether the applicant has established that he/she has a prima facie arguable case.**
- b) Whether the application was filed expeditiously and**
- c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.**

10. Clause C of the above orders stated that in default of any of the conditions above application to stand dismissed and execution to ensue. As at the time of the hearing the instant application, clause (a) (ii) of the order had been defaulted with consequences that the application which gave to orders above stood dismissed and the situation ante before of issuance of the ruling of 12/2/2020 reverted to.

11. The proceedings now being sought to be stayed thus would be only execution which was and is ongoing. The applicant has not offered any explanation as to why they could not comply with the court order and especially filling and service of the stated documents.

12. The only explanation which can be discerned is the fact that there is an intended appeal in the process of filing vide the copy of notice of appeal attached. The court finds that there no pending proceeding before case as the case now stands finalized and only execution is ongoing and no prayer or justification has been put afore for the same.

13. Thus, the court makes the following orders;

- i) The application is dismissed with costs.**

DATED, DELIVERED, AND SIGNED AT GARISSA THIS 28TH DAY OF APRIL, 2020.

.....

C. KARIUKI

JUDGE