



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 699 OF 2019

GATEWAY INSURANCE COMPANY LIMITED.....PLAINTIFF

-VERSUS-

JANET GAWDENSIA ATIENO AKEYO &

DAVID AJOWI AKEYO

(Both suing as the Administrators of the Estate of

WALTER AKEYO AJOWI Deceased).....1ST DEFENDANT

DICKSON EVANS ONCHIRI.....2nd DEFENDANT

DIADEM LIMITED.....3rd DEFENDANT

RULING

The Appellant/Applicant herein filed the Notice of Motion dated the 3rd day of December, 2019 seeking a stay of execution of the Decree herein pending the hearing and determination of the Appeal. It has also sought for the costs of the application.

The application is premised on the grounds set out on the body of the same and it's supported by the affidavit of JOAN OBURU sworn on the 3rd day of December, 2019.

In her affidavit the deponent who is the legal officer of Sanlam General Insurance Company formally known as Gateway Insurance Company Limited states that the applicant's application dated 21st August, 2019 was determined on the 14th November, 2019 with the result that the same was dismissed with costs.

she asserted that the Appeal filed herein was subject to court's leave which leave the applicant sought and was granted by the trial court vide a ruling dated 14th November, 2019, following which the Appellant filed the Appeal and the present application for stay of execution.

She avers that both the appeal and the application were filed without delay and that since a temporary stay of execution which the Applicant had obtained lapsed on the 6th December, 2019, it is only fair that this court grants a stay of execution pending the hearing and determination of the appeal that it has filed herein as failure by the court to grant a stay will result in substantial loss to it.

She depones that execution is imminent and if the same is levied, the applicant may not recover the decretal sum if the appeal is successful. She contends that the applicant has a reasonable chance of success in the Appeal and if execution is carried out, the appeal will be rendered nugatory.

She asserts that there has been no delay in bringing the application herein and that the Applicant is willing to abide by conditions and terms as to security as the court may deem fit to impose.

In opposing the application, the first Respondent filed a replying affidavit sworn by JANET/GAWDENSIA ATIENO AKEYO, on the 18th December, 2019 in which she avers that the Applicant has not demonstrated the substantial loss that it is likely to suffer that cannot be adequately compensated by way of damages if the orders sought are not granted.

She states that she is a woman of means who can be sued for recovery of the decretal amount in the event that the appeal is successful, which

appeal she contends is frivolous, unmerited and the same can never see the light of the day and hence its dismissal is inevitable. According to her, the applicant should release 3/4 of the outstanding decretal amount and have 1/4 of it deposited in a joint account as a condition for stay of execution pending the hearing of the Appeal. She states that she has been inordinately delayed in enjoying the fruits of her judgment at the expense of various stay orders that the Applicant has been obtaining unconditionally.

On their part the 2nd and 3rd Respondents filed their replying affidavit on the 19th December, 2019. The same was sworn by RICHARD NYAOSI BUGEI, on 19th December, 2019. The deponent who is the director of the 3rd Respondent avers that the application lacks merits it's an abuse of the court process and only intended to lengthen the court rules by delving into matters conclusively dealt with by the trial court.

He deponed that the applicant has failed to substantially raise a defence that precludes it from liability to settle the remaining decretal sum. He asserts that, he has been advised by his advocate that there is a high likelihood the Appeal may not be successful.

He contends that the Applicant has failed to show that it will suffer substantial loss that cannot be adequately compensated for, by way of damages, if the orders sought are not granted. That the Applicant has failed to demonstrate that the Respondents are incapable of refunding the decretal sum in the event the Appeal succeeds. He stated that should the court be inclined to grant a stay, then the Applicant should be ordered to deposit the balance of the decretal sum in court or in a joint interest account to be opened in the name of both advocates.

The Applicant filed a supplementary affidavit sworn by the same deponent on the 5th day of February, 2020, in which she reiterated the contents of her supporting affidavit but further deponed that, if the orders sought are not granted the applicant stands to lose the balance of the decretal sum of Kshs. 4,507,790.33cts.

She asserts that if the balance of the decretal sum is paid to the first Respondent before the hearing and determination of the appeal, the applicant will have to go through the hardship of instituting legal proceedings to recover the sums upon the successful Appeal. She reiterated that the applicant's Appeal has high chances of success and that it has, in good faith, settled a sum of Kshs. 3,000,000/= in order for the 1st Respondent to enjoy the fruits of the judgment and that the 1st Respondent is still legally entitled to seek and pursue settlement of the purported balance of the decretal sum from the 2nd and 3rd Respondents.

The application was canvassed by way of written submissions, which the court has carefully considered together with the application and the affidavits filed herein.

The germane principles/conditions to be considered in determining whether to grant an order for stay of execution are set under Order 42, Rule 6 (2) of the Civil Procedure Rules as follows: -

- a) The application must be brought without unreasonable delay.**
- b) The Applicant must demonstrate that substantial loss may result if the stay is not granted; and**
- c) Provision should be made for security.**

On the first condition, the court is able to establish that the ruling being appealed against was delivered on the 14th November, 2019 whereas the present application was filed on 3rd December, 2019 which is a period of three weeks. In the premises, I am satisfied that there has been no unreasonable delay in bringing the application.

On the second condition, the Applicant took the position that once the balance of the decretal sum is paid to the first Respondent, there is likelihood that the same will not be recovered should the Appeal succeed. On her part, the first Respondent stated that she is a woman of means and she is in a position to refund the decretal sum in the event that the appeal is successful.

In the case of Jason Ngumba Kagu & 2 others vs. Intra Africa Assurance company Limited (2014) eKLR, the court had this to say about substantial loss: -

“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of the court in granting stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules. The court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the applicant on the prospects of his appeal. Even though many say that the test in the high court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory.....”

In its submissions, the Applicant avers that it has settled Kshs, 3,000,000/= out of the total decretal sum of Kshs. 7,507,790.13cts. as per the scope of cover in the insurance policy number 030/070/1/182821/2010/11 which is the statutory and legal limit and therefore, if a stay is not granted it will be unlawfully compelled to pay the balance of Kshs. 4,507,790.13 far and beyond the policy limits which will render the appeal nugatory. The Applicant is apprehensive that the first Respondent will not be able to refund the said sum if the Appeal succeeds in that she has not disclosed any source of income that she can use to refund the money. That she has not filed an affidavit of means to demonstrate her financial ability to refund the money.

The court has considered the submissions by the parties in regard to this condition and the authorities cited. The applicant has expressed reasonable doubt in the first Respondent's ability to refund the money in the event of a successful Appeal. The court noted that rather than

merely stating that she is a woman of means the first Respondent did not give her financial worth or any sources of income that would enable her refund the balance of the decretal sum if the Appeal succeeds. In the case of National Industrial Credit Bank Limited versus Acquinas Francis Wasike & Another (UR) C. A. 238/2005 the court stated as follows: -

“This court has said before and it would bear repeating that while the legal duty is on the applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an Applicant to know in detail the resources owned by the Respondent or lack of them. Once an Applicant expresses that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge”.

It is my considered view that the first Respondent did not discharge the evidential burden. I am satisfied that the Applicant has proved that it will suffer substantial loss if the orders sought are not granted.

This brings me to the final condition on provision of security. I have taken into account the submissions by the parties in this regard. The Applicant has offered to abide by any conditions that this court shall impose. The first Respondent has urged the court to order that ¾ of the outstanding amount be released to her and the remaining ¼ be held as security. On their part the 2nd and 3rd Respondents have urged the court to order that the balance of the decretal sum be secured in an interest earning account.

In this regard, this court is alive to the decision of the court in the case of Machira T/A Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63 in which it was held that;

“..... to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must put into effect by way of applications for stay of further proceedings or execution pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law to prevent abuse of the process of the court”.

Be that as it may, the court considering an application for stay has to balance the interest of both parties. The first Respondent has failed to discharge the evidential burden as herein above discussed and therefore this court cannot allow her to enjoy the fruits of her judgment, at this point and at the expense of the Applicant who has already proved that it is likely to suffer substantial loss.

It is also important for this court to mention that it has considered the grounds set out in the Memorandum of Appeal, and the arguments put forth by the parties herein. I noted that counsels delved so much into the merits of Appeal which is premature at this stage as what is before the court is an application for stay of execution. What this court is able to gather from the submissions filed herein and the affidavits is that, whereas the Applicant argues that it has paid the claim to the limit covered under the law and policy, the Respondents are of a contrary view. The issue can only be determined after the Appeal is heard and therefore, it is clear that the appeal is arguable.

In the premises, it is only fair that the Applicant be granted an opportunity to canvass its Appeal on merits.

The upshot therefore is that I find merit in the application. The same is allowed in terms of prayer 4 on condition that the Applicant deposits the balance of the decretal sum in an interest earning account in the joint names of the parties’ firm of advocates within 45 days from the date of this ruling failure to which, the order shall automatically lapse. Costs of the application shall abide the outcome of the Appeal.

Dated, signed and delivered at NAIROBI this 30th day of July, 2020.

.....

L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Respondents