

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 324 OF 2019

AFRICA MERCHANT ASSURANCE CO. LTD.....RESPONDENT/APPELLANT

VERSUS

MAMA RAEI MEMORIAL FOUNDATION (Suing through its registered trustees) ...APPLICANT

RULING

By a ruling dated 20th February, 2020 the court allowed an application by the appellant in relation to an earlier application for stay of execution delivered on 5th December, 2019. In that earlier ruling the court stayed the execution of the decree in favour of the respondent by ordering a deposit of Kshs. 5 Million in an interest earning account in the joint names of the advocates on record to secure the stay of execution.

This was followed by yet another application which resulted in the ruling delivered on 20th February, 2020. In this subsequent ruling, the court reviewed its earlier orders by setting aside the order for the deposit of Kshs. 5 Million and in place thereof the appellant was to deposit Kshs. 2 Million in interest earning account in the joint names of the advocates on record. The balance of the decretal of Kshs. 13 Million was to be secured by a bank guarantee from a reputable bank to be agreed upon by the parties. The appellant was also ordered to pay costs amounting to Kshs. 30,000/=.

It appears there was default on the part of the appellant leading to the application by way of Notice of Motion dated 30th July, 2020 seeking execution against the appellant based on the default to secure the bank guarantee. The application is supported by grounds set and supporting affidavit attached thereto. It is opposed and there is a replying affidavit sworn by the Claims Manager of the appellant. I have also on record a further affidavit sworn by the advocate for the respondents.

Parties have filed submissions which I have on record. The ultimate purpose of giving orders of stay of execution is to enable or allow the appellant to pursue the right of appeal, while at the same time securing the interest of the respondent who has a decree in its favour. Under such circumstances, parties must demonstrate utmost good faith while at the same time showing respect for court orders. It is not open for parties to comply with court orders upon personal timelines or file compliance outside the timelines set by the court without leave.

Further, where there is any doubt as to the credibility of any institution, it behoves the party alleging otherwise to prove the same. In the submissions, some observations relate to the main dispute which is yet to be canvassed in the appeal. I decline to address my mind in that regard. The appellant has not complied with the orders of this court for stay of execution even after the review of the same.

It is not enough to state that there has been willingness and measures taken to comply therewith. Some litigation must come to an end. After reviewing the materials presented by both parties, I am persuaded that the appellant is in default and therefore the application dated 30th July, 2020 must succeed in terms of prayers C and D thereof. The costs shall be in the cause.

Signed at Nairobi this 8th day of December, 2020.

A.MBOGHOLI MSAGHA

JUDGE

Dated, signed and delivered online via Microsoft Teams at Nairobi this 16th day of December, 2020

J.K. SERGON

JUDGE