



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 204 OF 2018

CONSOLIDATED WITH CIVIL APPEAL NO. 62 OF 2018

RESOLUTION HEALTH INSURANCE LIMITED.....1ST APPELLANT

NAIROBI WOMEN'S HOSPITAL.....2ND APPELANT

VERSUS

EMA.....RESPONDENT

RULING

These proceedings were initiated by the respondent who filed a claim against the appellants before the HIV and AIDS Tribunal. In the process of those proceedings the Tribunal found in favour of the respondent but the appellants, and in particular the 1st appellant herein, Resolution Health Insurance Limited applied for stay of execution of the said judgment.

In an order issued on 4th April, 2016 the 1st appellant was ordered to deposit a sum of Kshs. 2,138,740/= within 14 days with Kenya Commercial Bank at Milimani Law Courts pending the hearing and determination of the case. Subsequently an appeal was lodged in the High Court and in a judgment dated 27th February, 2020 the appeal was allowed with costs to the appellant by setting aside the judgment of the Tribunal delivered on 12th January, 2018.

There is now before me an application by way of Notice of Motion under Order 51 Rule 1 of the Civil Procedure Rules and Sections 1 A, 1B and 3A of the Civil Procedure Act for the substantive Order that the sum of Kshs. 2,138,740/= deposited as set out in the order above, be released to the 1st appellant with no order as to costs. The application is supported by grounds set out on the face thereof and a supporting affidavit sworn by the advocate for the 1st appellant.

The 2nd appellant, Nairobi Women Hospital does not object to that prayer while the respondent has raised an objection. The respondent filed a replying affidavit and both the 1st appellant and the respondent have filed submissions in that regard.

The said sum was deposited in court towards securing a decree in favour of the respondent while the 1st appellant pursued its right of appeal.

There is no contest that the said sum belongs to the 1st appellant, neither is it in dispute that the award in favour of the respondent has been set aside at the conclusion of the appeal lodged by the 1st appellant. The respondent has filed a Notice of Appeal before the Court of Appeal. That alone does not change the fact that the appeal has been determined in favour of the 1st appellant.

The respondent has submitted that this court is *functus officio*. However, execution proceedings remain a preserve of this court and in any case, there is no evidence whatsoever of any application for stay of execution, either before this court or the Court of Appeal in which the Notice of Appeal has been filed.

Whichever way, the respondent cannot move the court to stay any order not in her favour. I say so because, there is no decree in favour of the respondent against the 1st appellant. On the contrary, the 1st appellant holds a decree in its favour and has a legitimate claim over the funds deposited as above. Even if the respondent were to have a decree in her favour, she would still be required to demonstrate that substantial loss may occur if the order is not given and even be required to post security in that regard.

The unique circumstances in this matter are still in favour of the 1st appellant where the money deposited belongs to it, and the respondent has not demonstrated, in the event she succeeds in the Court of Appeal, the 1st appellant shall not be in a position to meet the decree.

Lastly, the cited provisions of law are all encompassing in determining the rights of the parties and therefore, the 1st appellant may not be

faulted for citing the said provisions. I see no prejudice that may befall the respondent if the order is granted, and therefore hold and find the application is well merited and therefore allow the same as prayed. There will be no order as to costs.

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