



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 144 OF 2017**

**CANNON ASSURANCE LIMITED.....APPELLANT/APPLICANT**

**VERSUS**

**PETER MULEI SAMMY.....RESPONDENT**

**RULING**

1. The Appellant herein filed a Notice of Motion dated 22/3/2018 expressed to be brought under the Provisions of Sections **1A, 1B** and **3A** of the Civil Procedure Act, **Order 42 Rule 6, Order 22 Rule 22** and **Order 52 Rule 1** of the Civil Procedure Rules. the Applicant seeks the following prayers namely:-

(a) (spent)

(b) That this Honourable court be pleased to issue orders of stay of execution of the terms of the ruling of the trial court made on 5/3/2018 directing the Appellant to release Kshs.744,333/= of the decretal sum to the Respondent pending the hearing and determination of the application.

(c) That this Honourable court be pleased to set aside the orders of the trial court made on 5/3/2018 directing the Appellant to release Kshs.744,333/= of the decretal sum to the Respondent as a condition for grant of orders for stay of execution pending the hearing and determination of the present appeal.

(d) That this Honourable court be pleased to issue fresh orders for stay of execution of the judgment/decree of the trial court entered pursuant to a judgement delivered on the 12/10/2017 pending the hearing and determination of the present appeal.

(e) That the costs of the application be provided for.

2. The application is supported by the annexed Affidavit of MARTHA MUTORO the legal officer of the Appellant sworn on even date and further by grounds on the face thereof the gist of which are as follows:-

(a) That the Appellant is aggrieved by the terms of the ruling the trial court made on 5/3/2018 directing the Appellant to release Kshs.744,333/= of the decretal sum to the Respondent wherein the Appellant has since lodged an appeal against the judgement in the declaratory suit namely **Machakos CMCC No. 729 of 2014**.

(b) That the said orders of the trial court render its appeal nugatory as the same principally challenges the entire award including but not limited to the existence of any relationship between the defendant in the primary suit and the Appellant herein.

(c) That if the orders are not set aside, the appellant would suffer irreparable harm as the Respondent may not be in a position to refund the decretal sum of Kshs.744,333/= to the Appellant should the present appeal succeed.

(d) That the Appellant is ready to give such security as this Honourable court may order including depositing the entire decretal sum in court as a condition for the setting aside of the terms of the said ruling and granting fresh orders for stay of execution

(e) That the application has been made timeously without any unreasonable delay.

3. The application was strenuously opposed by the Respondent who filed a replying affidavit dated 10/4/2018 raising several grounds of opposition *inter alia*: that the application is frivolous and a vile attempt to keep respondent off the fruits of his judgment; that the Respondent has the financial means with which to refund the decretal sums in the event of success of the appeal since he is the area manager (Mt Kenya Region) of Kinangop Dairy Limited and also owns several motor vehicles and parcels of land; that no substantial loss has been established that may result to the Appellant if the sum of Kshs.744,333/= is released to the Respondent; that the application is a mere delaying tactic and

an abuse of the court process since there are five pending matters involving the Respondent and the Appellant's insured resulting from an accident that occurred on the 25/11/2010.

4. Parties herein agreed to canvass the application by way of written submissions.

#### **Appellant's submissions**

5. It was submitted that the Appellant has met the conditions imposed under Order 42 Rule 6 of the Civil Procedure Rules namely: application lodged without undue delay, substantial loss and security.

On the issue of delay, it was submitted that upon the entry of judgement on 12/10/2017 the Applicant promptly lodged appeal on 31/10/2017 and filed application for stay of execution in the lower court on 1/11/2017 wherein ruling was delivered on 5/3/2018 and the present application lodged on 22/3/2018.

On the issue of substantial loss, it was submitted that the Applicant stands to suffer loss if the sum of Khss.744,333/= is released to the Respondent who might not refund the same in the event of the success of the Appeal.

Further the Respondent's failure to file an affidavit of means makes the situation even more hazardous for the Appellant as it will not get the money refunded.

On the issue of security, it was submitted that the Applicant is ready and willing to deposit the sum of Khss.744,333/= in court within such time as the court deems fit as security. Learned counsel relied on a list of six authorities in support of the application.

6. The Respondent did not file submissions but only relied on a list of six authorities in opposition to the application.

7. I have considered the parties rival affidavits, submissions and the authorities cited. Under the provisions of Order 42 Rule 6 of the Civil Procedure Rules an Applicant seeking for an order of stay pending appeal is required to demonstrate that: the application has been made without unreasonable delay; such security as the court orders for the due performance of the decree has been given by the Applicant and; that substantial loss may result to the Applicant unless the order is made.

8. On the issue of unreasonable delay in making the application, it is noted that judgment was entered against the appellant on the 12/10/2017 and who lodged its Memorandum of Appeal on 31/10/2017. An application for stay of execution was filed before the trial court which determined it on the 5/3/2018. The present application was filed about two weeks thereafter. I am satisfied that the Applicant indeed lodged the present application timeously.

9. On the issue of security, the applicant has indicated that it is ready and willing to deposit Khss.744,333/= of the decretal sum in court within such a given time as the court deems fit as security. The Applicant's willingness to deposit the said sums as security is a clear indication of compliance by it as required by Order 42 Rule 6 of the Civil Procedure Rules and hence I find the said condition has been met by the Applicant.

10. On the issue of substantial loss, it is the Applicant's case that should the sum of Kshs.744,333/= is released to the Respondent there will be a dent in the operations of the Applicant and further that the Respondent has not availed any documents such as an affidavit of means and hence he will not be in a position to refund the decretal sum if the appeal succeeds.

11. The Respondent has sworn a replying affidavit in which he has indicated that he is the area manager (Mount Kenya Region) of Kinangop Dairy limited and further that he owns several motor vehicles and parcels of land and is in a position to refund the decretal sums in the event the appeal is successful. The issue of substantial loss is a key component in an application for stay pending appeal and which must be established by the Appellant. The court of Appeal in the case of **Kenya Shell Ltd. =vs= Kibiru [1986] KLR 410** held as follows:

***“Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondent should be kept out of their money.”***

It is noted that the decree in issue herein is a money decree and therefore it is generally a straight issue. The Applicant should demonstrate clearly that the Respondent is such a person of straw who cannot be expected in all probability to refund the decretal sums in the event of success of the appeal. The Respondent has categorically stated that he is a person of means as he is a regional manager of Kinangop Dairy Limited (Mt. Kenya Region) and owns several assets to boot. I am quite convinced that the Respondent is not a pauper as is claimed by the Applicant. I note that part of the decretal sums have already been deposited in court as directed by the lower court and the amount in issue here relates to the balance thereof. Hence the sums already deposited into court should be sufficient to act as security while the Appellants appeal is canvassed. The Respondent has come a long way in pursuing his claim right from instituting the primary suit all the way to filing a declaratory suit against the Appellant and that he should not be unduly kept away from the fruits of the judgement. It is common knowledge that the commencement of suits for claims for damages arising from injuries due to road accidents begins with the issuance of notices to the insurance companies of which the Appellant is one of them pursuant to Section 10 of the Insurance (Third Party Risks) Act Cap 405 and as such the Appellant/Applicant was expected to have been made aware of or got wind of the court proceedings. It would therefore be unfair to deny the Respondent access to at least part of the fruits of the judgment. The Respondent has clearly indicated that he has the means with which to refund the decretal sums should the appeal succeed in the end. The Applicant is a giant insurance company and therefore part of the decretal sums herein if released to the Respondent will not cause a financial dent upon its operations. I am satisfied that the Applicant herein has not demonstrated that it stands to suffer substantial loss if an order of stay is not granted. The trial court had already directed that the applicant do deposit part of the decretal sums as security which it has already done and release part thereof to the Respondent. The Applicant should thus proceed and comply with the second order.

12. In the result, it is the finding of this court that the Appellant/Applicant's application dated 22/3/2018 lacks merit. The same is ordered dismissed with costs to the Respondent.

Orders accordingly.

**Dated and delivered at Machakos this 24<sup>th</sup> day of January, 2019.**

**D. K.KEMEI**

**JUDGE**