



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 67 OF 2019

CORPORATE INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

MAHARAJA SHIPCHANDLERS LIMITED.....RESPONDENT

RULING

1. I have for determination an application by the Appellant/applicant, brought pursuant to the provisions of Order 42 Rule 6 as well as the provisions on the Overriding Objectives Of The Court and the Inherent Powers Of The Court and seeking, in the main, an order that the court grants to the appellant an order of stay of execution pending appeal.

2. The judgment appealed against is to be found in the ruling dated 26/3/2019 in which the trial court delivered itself and said:

“I have however agonized on the request to enter judgment as prayed in the plaint because under Section 10(1) of Cap. 405, the payment is supposed to be made to the plaintiff in CMCC No. 1858 of 2014. Of course the plaintiff’s advocates in this case are not acting for Dorcas Kero Mwakiremba who is the plaintiff in CMCC No. 1858 of 2014. It would therefore be wrong to order that what is payable to Dorcas Kero Mwakiremba should be paid to the person she had sued in that case. Ideally, the plaintiff in the instant suit should have prayed for a declaration that the Defendant is statutorily bound to satisfy the judgment in CMCC 1858 OF 2014. However, in the spirit of Article 159 (2) (d) of the constitution which requires courts to administer justice without undue regard to procedural technicalities, I enter judgment as prayed in the plaint but direct that the decretal sum of Kshs.4,393,143/= shall be paid to Dorcas Kero Mwakiremba, the plaintiff in CMCC No. 1858 of 2014. The plaintiff in the instant suit will only have costs of this plus interest on those costs at court rates. Orders accordingly. Right of Appeal in 30 days”.

3. In the application for stay, the applicant says at ground 7 of the notice of Motion and paragraph 5 & 8 of the Affidavit in support to the effect that if the sum ordered to be paid is actually paid and the appeal ultimately succeeds chances of recovery would be minimal. In effect the applicant is asserting that the person adjudged to be paid the sum will not be able to effect a refund because her means and assets are unknown.

4. To that assertion the Respondent filed a Replying Affidavit in which it is asserted that the person ordered to be paid the sum, Dorcas Mwakiremba is a ‘*diploma holder in Information Technology and would be capable of paying the decretal sum should the appeal succeed*’ hence no prospects of the appeal getting rendered nugatory. There are other matters deponed in the said Affidavit to the effect that the application has been filed outside time set by the trial court and that the stay granted by the trial court was within its discretion and this legal. I opt not to anything on those matters because I consider the same to be immaterial for the determination of the matter before me.

5. In an application of this nature, the consideration by the court is whether the applicant, as appellant, is exposed to suffer substantial loss if stay is not granted and that security for the due performance of the decree in the event the appeal succeeds is given.

6. The courts have decreed that inability or difficulty to recover sums paid on a decree upon success of an appeal to be a substantial loss. And the loss is substantial not only account of the amount involved but to me the property in the sum or asset that is forever lost if recompense is not achievable. Recently in *Turbo Transporters Ltd vs. Absalom Dova Lumbasi [2013] eKLR* on this issue, the Court held that:

“The burden of proving that the Respondent will not be able to refund to the Applicant any sums paid to the Respondent lies on the Applicant. But where the records show some financial limitations on the part of the Respondent, it may as well raise evidential burden on the Respondent to file an affidavit of means. In this case the Respondent’s income is such that it may not be sufficient to constitute ability to pay...”

7. Once the applicant says that it shall be difficult or impossible to achieve a recovery of the sum if paid, the courts have held that it behoves the respondent to prove the ability to affect a refund^[1].

8. Here I do not entertain any doubt that the sum involved is substantial and that it was the onus of the respondent to demonstrate to court the ability of the person to be paid to effect a refund should the appeal succeed. That to this court has not been done because the fact that one has academic qualification and no more is not evidence of mean and financial ability to effect a refund.

9. Consequently, I find merit in the application, I do allow it and grant to the Appellant stay pending appeal but on the following terms:-

i. Within 30days from today the appellant shall deposit the full decretal sum being Kshs.4,393,143/= into a joint interest earning account in the names of the advocates of the parties.

ii. Within 60 days from today the Appellant shall compile file and serve a Record of Appeal to enable the appeal be progressed?

iii. If there shall be a default to comply with any of the two conditions for stay, the same order shall lapse and the Respondent shall be at liberty to execute.

10. I direct that the costs of the application be costs in the appeal.

Dated and delivered at Mombasa on this **11th** day of **April 2019**.

HON. P.J.O. OTIENO

JUDGE

^[1] *Kenya Shell Limited v Benjamin Karuga Kibiru and Ruth Wairimu Karuga*, [1986]eKLR