



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 6 OF 2019

REAL INSURANCE CO. LTD....APPELLANT/APPLICANT

VERSUS

TITUS ITUMO NDAMBUKI.....RESPONDENT

RULING

1. The Appellant/Applicant has filed a Notice of Motion dated 21/2/2019 seeking the following reliefs namely:-

(i) (spent)

(ii) (spent)

(iii) That there be stay of execution of the judgement and decree in Machakos CMCC No. 361 of 2017 given on 13/12/2018 pending the hearing and determination of the appeal.

(iv) That the appellant be allowed to deposit in court an insurance sum as security for the performance of the judgment/decree pending the hearing and determination of the appeal.

(v) That the costs of the application be in the cause.

2. The application is supported by the grounds on the face thereof as well as by an affidavit of Caroline Kimetto the Legal Manager of the Appellant sworn on even date who has raised several issues *inter alia*; that the Appellant is dissatisfied with the judgement of the lower court and has already lodged an appeal against the same; that the Appeal has overwhelming chances of success and which will be rendered nugatory if stay is not granted pending the hearing of the said appeal as the Appellant stands to suffer irreparable loss and damage; that the Respondent may not be financially able to refund the decretal amounts if same is paid out before the determination of the appeal should the same succeed; that the applicant is ready and willing to offer reasonable security within a reasonable period by way of an insurance bond and or deposit in a joint interest earning account equivalent to the judgement sum; that the applicant is not snatching the fruits of judgement from the Respondent but is exercising its legal right of appealing.

3. The Application was opposed by the Respondent who filed a replying affidavit sworn on the 14/06/2019 and who raised several grounds of opposition *inter alia*: that the application is an afterthought and intended to deny him the fruits of a legally obtained judgment; that the Memorandum of Appeal has been filed out of time; the present application was filed three months after delivery of judgement and there is no plausible explanation for the delay; that the Applicant has not shown what substantial loss will be suffered should execution proceed; that he is a man of means owning several herds of cattle and large parcels of land and thus capable of refunding the entire decretal sum should the appeal succeed; that in the event that the application will be allowed then half of the sum should be released to him while the remainder to be deposited in a joint interest earning account in the names of both advocates; the offer of security in the form of an insurance bond is not acceptable due to the instability of insurance companies in the country.

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

5. It was the Applicant's submission that the appeal raises triable issues and has overwhelming chances of success. It was further submitted that the Applicant has met the conditions imposed by Order 42 Rule 6(2) of the Civil Procedure Rules in that the Application has been made without undue delay, substantial loss will result unless the order of stay is made and that the Applicant is ready to furnish security. Learned counsel sought reliance in the following authorities:-

(i) *Focin Motorcycle Co. Ltd =vs= Ann Wambui Wangui & another [2018] eKLR*

(ii) *Housing Finance Company of Kenya =vs= Sharokkher Mohamed Ali Hirji & Another*

On the issue of delay to lodge the appeal, Counsel sought reliance on order 50 Rule 4 of the Civil Procedure Rules which provide that the period between 21st day of December in any year and the 13th day of January in the year next following shall be omitted from any computation of time. Counsel submitted that judgement was delivered on 13/12/2018 while the appeal was filed on 18/1/2019 and the present application lodged on 26/2/2019 and hence there was no inordinate delay. Finally counsel submitted that the Respondent has failed to file his affidavit of means to prove that he is able to refund the sums in the event of success of the appeal and thus the Appellant stands to suffer great loss if it pays up the money which will not be recoverable once the appeal succeeds.

6. It was the respondent's submissions that the applicant only rushed to court after the respondent commenced execution processes and which is a well calculated move by the applicant to enjoy interim orders at the expense of the respondent. It was further submitted that the lower court case quoted by the applicant does not exist. The respondent finds the conduct of the applicant rather appalling in the manner it has conducted itself right from filing the suit as it has dragged its feet as can be seen by the fact that no evidence has been availed to prove that proceedings have been requested or even setting the appeal for directions. The respondent is of the view that the no leave has been sought for the late appeal which has no chances of success anyway. Finally it was submitted that the applicant has not satisfied the conditions for the grant of an order of stay of execution as the offer of security in the form of an insurance bond is not suitable in view of the rampant instability of insurance companies in the country. Learned counsel for the respondent added that it is the respondent who stands to suffer substantial loss unlike the appellant as he has a judgement which was validly obtained and as such the application should be dismissed with costs and in the event that the court allows it, then half the decretal sums should be paid to the respondent while the other half be deposited into an interest earning account. Several cases were cited namely **Corporate Insurance Co. Limited-vs- Makau Kaithu Musomba(Machakos CA No. 110 of 2013)**, **Amal Hauliers Ltd-vs- Abdulnasir Abubakar Hassan (Malindi HCA No. 18 of 2107)**, **Samuel Kimutai Korir-vs- Nyanchwa Adventist Secondary School (Kisii HCA No. 229 of 2010)**

7. I have considered the Appellants application plus the rival affidavits as well as the submissions presented. The only issue for determination is whether or not the Applicant has met the conditions set out under Order 42 Rule 6(2) of the Civil Procedure Rules.

8. It is trite that an applicant seeking for an order of stay of execution of a judgement or decree must meet the threshold under Order 42 Rule 6(2) of the Civil procedure Rules. The conditions are as follows:

(a) That the Application has been made without undue delay.

(b) That substantial loss will result to the Applicant if the order of stay is not granted.

(c) Security for the due performance of the decree has been offered by the Applicant.

9. As regards the first condition, I note that the judgement of the trial court was delivered on the 13/12/2018 and that the appeal vide a Memorandum of appeal should have been filed by close of business on the 13/1/2019. The Appellant herein filed the Memorandum of appeal on the 18/1/2019 while the present application was filed on 26/2/2019. Clearly there was some bit of delay and that the Appellant ought to have sought leave to lodge the appeal out of time. However the Appellant has sought refuge under the provisions of Order 50 Rule 4 of the Civil Procedure Rules which provide as follows:-

“except where otherwise directed by a Judge for reasons to be recorded in writing, the period between the twenty first day of December in any year and the thirteenth day of January in the year following both days included shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act;

Provided that this rule shall not apply to any application in respect of a temporary injunction.”

Looking at the above provision, I find that the Appellant was not outside the stipulated period for lodging appeals. As the judgement was delivered on the 13/12/2019 and putting into account the operation of Order 50 Rule 4 of the Civil Procedure Rules, the filing of the Memorandum of Appeal on 18/1/2019 was within the time limit. The explanation to the effect that it was engaging the Respondent out of court regarding the issues of conditions of stay of execution pending appeal and upon the Respondent taking out proclamation of the Appellant's goods the Applicant was compelled to move to this court vide the application filed on 26/2/2019 seems plausible in my considered view. I am satisfied that there was no inordinate delay in lodging the present application. In any event the appellant's request to lodge appeal out of time would still have been favorably considered by the court as the delay would only have been by five days which is not that inordinate and backed by the reasons for that delay.

10. As regards the second condition, the Applicant has stated that it stands to suffer substantial loss if the stay is not granted as the Respondent is silent on his financial wherewithal as he has failed to file an affidavit of means to prove that he is able to refund the decretal sums in the event the appeal succeeds. The only response from the Respondent is that he owns cattle and some land. However, the issue of the Respondent's financial ability is a matter peculiar and within his knowledge and is under obligation to come out clearly and assure the Appellant that he will have no problem refunding the monies if they are to be paid now. The Applicant maintains that its appeal has high chances of success and will be rendered nugatory if stay is not granted. Indeed a perusal of the memorandum of appeal filed herein reveals that the appeal raises various issues thereby making the same to be arguable. According to the Applicant, the trial court's declaratory order was erroneous as the Appellant intends to prove in the appeal that it was not the insurer of the subject motor vehicle at the time of the alleged accident. The sums in issue are not small by any standards in these hard economic times and as such a loss of such sum will cause a dent on the appellant's finances. I am satisfied that the Applicant has established that it stands to suffer great loss unless an order for stay is granted.

11. As regards the third condition, the applicant has indicated that it is ready to furnish security in the form of an insurance performance bond or deposit of the decretal sums into a joint interest earning account in the names of the parties. The Respondent on the other hand seeks that half of the sums be paid to him while the balance be deposited in the joint account. The Respondent further averred that the issue of insurance bond should not be allowed in view of the fact that several insurance companies in the country are currently facing financial

turbulence. Indeed the respondent's concerns are genuine as he is on the seat of judgement and that his interests must be taken care of. Similarly the appellant has lodged an appeal with the main ground being that it did not insure the subject vehicle at the time of the alleged accident and therefore it is not liable to the respondent or any other parties. This then calls for a balancing act. I am of the view that a deposit of the decretal sums in an interest earning account in the names of both Advocates is the best way forward in the matter pending the determination of the appeal. None of the parties herein would be prejudiced since the monies will be earning interest as the parties canvass the appeal.

12. The respondent has maintained that the lower court case cited by the applicant namely 361 of 2016 does not exist. Indeed the applicant cited the lower court case as such in the application but the memorandum of appeal as well as the proclamation and warrant has the correct case number namely 361 of 2017. Hence there was a typographical error which is excusable. It is obvious that the minds of the parties herein are engrossed over the **case number 361 of 2017** over which an appeal has been lodged by the applicant and not any other case. Thus the respondent's request that orders herein should be directed to the case cited in error is not convincing as I am satisfied that the consensus ad idem by the parties relate only to **Civil Case number 361 of 2017**.

13. In the result I find the appellant's application dated 21st February 2019 has merit. The same is allowed in the following terms:

(a) An order of stay of execution of the judgement in Machakos CMCC No. 361 of 2017 is granted on condition that the applicant deposits the entire decretal sums in a joint interest earning account in the names of both Advocates within thirty (30) days from the date of this ruling failing which the stay shall lapse.

(b) The costs hereof shall abide in the appeal.

It is so ordered.

Dated and delivered at Machakos this 25th day of July, 2019.

D.K. Kemei

Judge