



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 362 OF 2019

XPLICICO INSURANCE CO. LTD.....APPELLANT/APPLICANT

-VERSUS-

IMPREZA COSTRUZIONI GIUSEPPE MALTAURO SPA.....RESPONDENT

RULING

1) On 12th July, 2019 this court granted the appellant/applicant an order for stay of execution of the decree in Nairobi C.M.C.C. no. 1010 of 2018 pending appeal on condition that the applicant deposits the decretal sum of kshs.18,826,434 in an interest earning account in the joint names of the advocates or in the alternative to deposit in court.

2) The appellant/ applicant has now taken out the motion dated 30th July 2019 in which it sought for the following orders:

i. THAT this application be certified urgent and be initially heard ex parte on account of its urgency.

ii. THAT the orders for stay of execution of the judgment and decree in Milimani CMCC 1010 of 2018 granted on 12th July 2019 to remain in force pending the hearing and determination of this application.

iii. THAT this honourable court be pleased to review the order on deposit of the decretal sum of kshs.18,826,434 in a joint interest earning account and in its place accept a bank guarantee from the appellant's bankers, M Oriental Bank Limited, for the sum of ksh.18,826,434 as adequate security pending the hearing and determination of the appeal.

iv. THAT the costs of this application be in the cause.

3) The motion is supported by the affidavit of Mike G. Muriithi, the principal officer of the appellant company. When served with the motion, the respondent filed the replying affidavit of Fredrick Njogu to oppose the application.

4) When the motion came up for interpartes hearing, learned counsels made oral submissions. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion plus the rival oral submissions.

5) It is the submission of Mr. Githinji, learned advocate for the appellant/applicant that at the time of hearing the application for stay dated 27.6.2019, the appellant had approached its bankers for the grant of a bank guarantee but the same was not immediately processed and was therefore not available to be offered as security for the due performance of the decree.

6) The applicant avers that it later secured the bank guarantee after this court had delivered its ruling directing it to make a deposit of the decretal sum.

- 7) The appellant has further argued that the amount it has been ordered to deposit is colossal and will be kept away from financing the operations of the appellant company while the appeal is pending and therefore this court was beseeched to review its order and instead make an order directing the appellant to instead provide a bank guarantee.
- 8) It is argued that the bank guarantee is a good and adequate security for the due performance of the decree. It was pointed out that the bank guarantee offered can easily be realized within a period of 5 days upon demand.
- 9) Mr. Kiplagat, learned advocate for the respondent strenuously opposed the application arguing that the same does not meet the requirements of an application for review. The learned advocate pointed out that the appellant has not demonstrated that it has discovered new evidence nor shows that there are sufficient reasons warranting review.
- 10) The respondent stated that the assertion that a bank guarantee was being sourced at the time of hearing the motion dated 27.6.2019 is not true. It is said that the appellant never alluded that it would be proposing to provide another form of security other than the offer to provide a title deed. This court was urged to find that the motion is resjudicata.
- 11) The learned advocate further pointed out that the bank guarantee offered will lapse by 28th January 2020 by which time the appeal may not have been heard and determined hence exposing the respondent to risks of not enjoying the fruits of judgment.
- 12) Mr. Githinji responded to this argument stating that the lifespan of the guarantee can easily be extended and that the appellant is ready to expedite the process of making the appeal ready for hearing before the end of this year and before the lifespan of the bank guarantee expires.
- 13) The respondent also pointed out that the bank offering the bank guarantee is not in a sound financial position since its majority shareholder **Bank M. Tanzania**, was placed under statutory management by the Bank of Tanzania on 2/8/2018.
- 14) It was further pointed out that the net income of **M Oriental Bank** was ksh.8,554,000/= as per its report published on 31st March 2019 therefore the profit is not commensurate with the amount to be guaranteed.
- 15) The respondent also stated that the appellant company has failed to settle various insurance claims as shown in the report published by the Insurance Regulatory Agency (IRA).
- 16) There was also an argument that the appellant delayed in bringing the application for review, hence is guilty of laches.
- 17) It is clear from the provisions of Order 45 rule 1 (1) (b) of the Civil Procedure Rules that a party may apply for review upon the discovery of a new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake an error apparent on the face of the record or any other sufficient reason.
- 18) In this case, the appellant has stated that at the time of filing the motion dated 27.6.2019, it had not secured the bank guarantee hence it could not make an offer to provide a bank guarantee as security for the due performance of the decree. I am convinced by the argument put forward by the appellant/ applicant that the offer for a bank guarantee could not be produced by the appellant at the time of the hearing of the motion dated 27.6.2019. I therefore find that the current motion can rightly be treated as an application for review.
- 19) The delay in bringing the application for review is not inordinate therefore it is excusable.
- 20) It has also been argued that the application for review was filed as an afterthought hence it is resjudicata. With great respect, I do not think the instant application can be said to be resjudicata.

21) Having found that the offer to provide a bank guarantee could not be made because the same had not been obtained at the time of hearing the initial application for stay, it cannot be said that the current application is resjudicata or an afterthought since the issue had not been canvassed at all.

22) It has also been argued that the lifespan of the bank guarantee may lapse before the appeal is heard and determined thus exposing the respondent to risks of not securing its decree.

23) I agree with the submissions of the respondent that the lifespan of the bank guarantee is too short therefore it cannot secure the respondent's interest. However, since the appellant has stated that the period can be extended, then the appellant will be required to do so within a given time line.

24) The other serious issue which was ably argued by the respondent's advocate is the assertion that the financial status of the bank providing the bank guarantee is not sound. It has been pointed out that Bank M Tanzania, the majority shareholder of M Oriental Bank has been placed under statutory management by the Bank of Tanzania.

25) It has also been stated that as of 31.3.2019, M Oriental Bank only made a net profit of kshs.8,554,000/= meaning that it is incapable of satisfying the decree when called upon to do so.

26) The appellant's advocate has pointed out that M Oriental Bank is in a sound financial position to satisfy the decree if called upon to do so. It was pointed out that the fact that the net profit does not surpass the decretal sum does not mean that the guarantor is not in a position to satisfy the decree. It was also argued that the latest financial statement if supplied may paint a totally different picture of the bank. With respect, I am persuaded by the appellant's advocate's argument.

27) The other issue is in respect of the majority shareholder. The fact that the majority shareholder has been placed under a statutory management in another jurisdiction by itself, cannot be used to conclude that the bank providing the guarantee is not in a sound financial position to provide such a security. There is no evidence that M Oriental bank is not in a sound financial position.

28) In the end, I find the motion dated 30.7.2019 to be meritorious.

The same is allowed in terms of prayer (iii) with costs abiding the outcome of the appeal. For the avoidance of doubt the appellant/applicant should provide a bank guarantee for a year within a period of 7 days from the date hereof, failure to which the motion will be treated as having been dismissed.

Dated, signed and delivered at Nairobi this 9th day of August, 2019.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Applicant

..... for the Respondent