



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 312 OF 2019

INSURANCE REGULATORY AUTHORITY.....APPELLANT

VERSUS

ONLINE INSURANCE BROKERS LIMITED.....RESPONDENT

RULING

1. The appellant, *Insurance Regulatory Authority*, (hereinafter the applicant) moved this court through a Notice of Motion dated 17th June 2019 principally seeking orders of stay of execution of the ruling delivered by the lower court on 23rd May 2019 in Milimani CMCC No. 1476 of 2019 pending the hearing and determination of its appeal filed on 11th June 2019.
2. The application is premised on grounds stated on its face and is supported by an affidavit sworn on 17th June 2019 by *Mr. Godfrey K. Kiptum*, the Chief Executive Officer of the applicant. The applicant contends that it is dissatisfied with the ruling of the trial court which effectively compelled it to reinstate, register and issue a trade licence to the respondent which it had refused to issue after receiving a complaint from the respondent's client one *Ms. Eunice Ndathi*. The complaint was to the effect that the respondent who are insurance brokers had received money in the form of premiums from *Eunice Ndathi* (hereinafter the policy holder) for onward transmission to her insurance company *AIG Kenya Insurance Company Limited* but failed to remit the premiums to the insurance company which subsequently declined to honour her insurance claim leading to a loss assessed at KShs.14,715,900.
3. The applicant asserted that it was justified in refusing to renew the respondent's licence as the complaint touched on professional misconduct, breach of the law and trust and the respondent failed to remedy the situation despite being issued with warning letters dated 17th February, 12th July and 19th September 2017. The letters were exhibited as annexures to the supporting affidavit marked as GKK2, GKK3 and GKK4.
4. It is the applicant's case that if stay as sought is not granted and the orders of the trial court are implemented, the appeal will be rendered nugatory and the applicant and its officials will suffer prejudice as the respondent has already threatened to commence contempt of court proceedings against the applicant; that it would be in the interests of justice to allow the application to enable the applicant to effectively prosecute its appeal and that in any event, if the application was allowed, the respondent was not likely to suffer any prejudice that cannot be remedied by an award of damages.
5. The application is opposed. *Harrison Chege Kariuki*, the respondent's Managing Director and Principal Officer swore a replying affidavit on 9th July 2019. He averred that the applicant has not demonstrated how the appeal will be rendered nugatory or what loss the applicant will suffer if the application was rejected; that the applicant did not have any good reason to refuse to renew the respondent's registration licence having received fees for renewal of the licence for the year 2019 and considering that the complaint lodged against the respondent was the subject of two cases which were pending before the chief magistrate's court at Milimani being CMCC No. 289 of 2017 and Criminal Case No. 1947 of 2016 and given that a complaint made against the respondent by the applicant to the Insurance Fraud Investigation Unit (IFIU) did not result into criminal prosecution of the respondent under *Sections 150 (1) and (4) of the Insurance Act*.
6. The respondent urged the court to dismiss the application as in its view, the pending appeal lacked merit as the applicant did not have any legal basis to continue in its refusal to renew its trading licence for the year 2019.
7. In response to the replying affidavit, *Mr. Kiptum* swore a supplementary affidavit on 24th June 2019 reiterating that the reason for declining to renew the respondent's trading licence still subsisted as the respondent had not yet dealt with the complaint regarding non-remittance of premiums paid by a policy holder to an insurance company; that payment of renewal fees did not automatically lead to renewal of a trading licence as issues of non-compliance if identified had to be sorted out first before a licence was issued and lastly, that IFIU's role was limited to investigations of criminal culpability and not whether or not conditions precedent to issuance of a trading licence had been met.
8. By consent of the parties, the application was prosecuted by way of written submissions. Those of the applicant were filed on 27th August

2019 while those of the respondent were filed on 26th August 2019.

9. I have carefully considered the application, the rival written submissions filed by the parties and the authorities cited. I have also read the impugned ruling. Having done so, I find that the only issue for my determination in this application is whether the applicant has established sufficient cause to justify the exercise of this court's discretion in its favour by granting the orders sought.

10. I wish to start by pointing out at the outset that the relief of stay pending appeal is discretionary in nature. The Court of Appeal in **Butt V Rent Restriction Tribunal, [1982] KLR 419**

when emphasizing this position stated as follows:

“The power of the court to grant or refuse an application for stay of execution is a discretionary power. ... The general principle in granting or refusing stay is; If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be rendered nugatory should that appeal court reverse the judge's (read tribunal's) discretion. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.”

Madan JA (as he then was) expressed himself thus at page 419:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory.”

11. The court in deciding how to exercise its discretion is guided by the provisions of *Order 42 Rule 6* of the *Civil Procedure Rules* which provides that an order for stay of execution should not be granted unless the applicant satisfied the court that he is likely to suffer substantial loss if the order was not granted and that the application had been made without unreasonable delay. The applicant is also required to give an offer for security as the court may ultimately order for the due performance of the decree.

12. I must state at this juncture that these conditions in my view are more applicable to situations where the decree sought to be stayed is a monetary decree because in such cases, the applicant can be able to quantify the loss he/she is likely to suffer in monetary terms but in all other cases, demonstration of the prejudice a party is likely to suffer if the application was not allowed will suffice.

13. In this case, the applicant contends that if stay is not granted, the respondent will proceed to enforce execution of the impugned orders which will compel it to renew the respondent's trading licence before its appeal was heard on merit; that this will have the effect of rendering the appeal nugatory and will expose the applicant and its officials to the risk of being cited for contempt of court. Further, implementation of the impugned orders will not only be prejudicial to the applicant but will force it to renew the respondent's trading licence when its integrity was questionable which was against the public interest.

14. The respondent has on the other hand argued that the applicant has not demonstrated substantial loss and that if anything, he is the one who was going to suffer irreparable loss in the form of loss of business if the application was allowed and that having received fees for renewal of the licence, the applicant was duty bound to renew the same.

15. It is not disputed that the applicant is a statutory body which is mandated to regulate the operations of the insurance industry in Kenya. The applicant has asserted and this has not been denied by the respondent that the reason it refused to renew the respondent's licence was because there was a complaint touching on the respondent's integrity and alleged breach of trust which has not been resolved to date. The orders made by the trial court in the ruling delivered on 23rd May 2019 besides amounting to final orders at an interlocutory stage had the effect of *inter alia* compelling the applicant to renew the respondent's trading licence for the year 2019 though the orders were crafted to look like interlocutory orders which had been issued pending determination of the suit.

16. Given the foregoing, I agree with the applicant that if stay is not granted, the applicant will have no alternative but to renew the respondent's trading licence despite the subsistence of the complaint which caused it to refuse to renew the licence in the first place. This will in turn have the effect of rendering the appellants appeal nugatory which will expose it to great prejudice given that its right of access to justice and right to exercise its right of appeal will be violated.

17. On the other hand, if the application is rejected, the respondent is not likely to suffer any prejudice that cannot be remedied by an award of costs or damages if at the end of the day the applicant is not successful in its appeal.

18. I have taken note of the respondent's claim that the appellant's appeal lacks merit but at this stage, this court is not required to consider the merits or demerits of the pending appeal. Unlike the Court of Appeal which is required under *Rule 5 (b)* of the *Court of Appeal Rules* to consider whether an appeal is arguable as a precondition to grant of stay pending appeal, this court is only required to consider whether the applicant has met the threshold of stay envisaged under *Order 42 rule 6 (2)* of the *Civil Procedure Rules* or whether sufficient cause for grant of stay had been established before allowing such an application.

19. Regarding whether the application was filed timeously, I find that the ruling of the trial court was delivered on 23rd May 2019. The memorandum of appeal was filed on 11th June 2019 and the application was filed on 17th June 2019 about seven days later. There is therefore no doubt that the application was filed without unreasonable delay.

20. In applications of this nature, the court is duty bound to balance the competing interests of the parties so that in so far as it is reasonably

possible, it arrives at a decision that is fair and just to both parties. I am cognizant of the fact that in as much as the applicant is entitled to have its right of appeal safeguarded, the respondent is also entitled to realize the benefit of orders issued in its favour.

21. In view of the foregoing, I find that the applicant has established sufficient cause to warrant the exercise of the court's discretion in its favour by granting the orders sought but given that the respondent's business may be at stake in view of the delay in renewing its licence, I will grant the stay orders on condition that will ensure expeditious disposal of the appeal.

22. For the foregoing reasons, the application dated 17th June 2019 is allowed on condition that the applicant will file and serve the record of appeal within 30 days of today's date. The Hon. Deputy Registrar is directed to call for the original record of the lower court and to ensure that the same is availed to this court within the same period of time after which the appeal should be placed before a judge for directions under *Section 79 B* of the *Civil Procedure Act*.

23. In the event that the applicant does not comply with the condition stated above, the stay orders will automatically stand discharged.

24. Costs of the application will abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of September, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Salach: Court Assistant

No appearance for the appellant

No appearance for the respondent