



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 08 OF 2019**

**KENYAN ALLIANCE INSURANCE CO. LTD.....APPELLANT/APPLICANT**

**=VRS=**

**CLEOPHAS NYAMONGO.....RESPONDENT**

**RULING**

By the Notice of Motion dated 19<sup>th</sup> July 2019 filed herein on 22<sup>nd</sup> July 2019, the Appellant/Applicant seeks orders: -

**“1. (Spent)**

**2. (Spent)**

**3. THAT, there be a stay of execution with respect to Keroka PMCC No. 107 of 2018 CLEPHAS NYAMONGO VS KENYAN ALLIANCE INSURANCE CO. LTD pending the hearing and determination of the Appeal to the Court of Appeal.**

**4. THAT the costs of this application be provided for.”**

The application is expressed to be made under **Order 42 Rule 6** and **Order 50 Rule 1 of the Civil Procedure Rules** and all other enabling provisions of the law.

The gist of the application, as can be discerned from the grounds on its face as well as in the affidavit of Antony Kariuki sworn in support of the application, is that the applicant being dissatisfied with the ruling of this court delivered on 18<sup>th</sup> July 2019 has lodged an appeal in the Court of Appeal which appeal has appreciable chances of success as this court did not appreciate that the appellant/applicant had satisfied the conditions for granting an order for stay of executing pending appeal; that this court relied on issues introduced in submissions but not in the replying affidavit contrary to rules of evidence; that the application was made timeously and that the appellant/applicant is willing and able to comply with any reasonable terms that may be imposed by this court and proposes to deposit the entire decretal sum in the joint names of Counsel for the parties in the suit. Further, that the orders sought are intended to preserve the substratum of the appeal which would otherwise be lost in the event attachment and eventual sale is allowed to proceed. It is also averred that the appellant/applicant stands to suffer irreparable damages should execution proceed as the decretal amount of Kshs. 3,193,486/= risks being removed from the appellant/applicant's reach given that the respondent's worth is not known to the appellant. It is also urged that it is in the interest of justice that the stay sought be granted.

In opposition to the application, Counsel for the respondent filed a preliminary objection urging that, firstly, the application is bad in law as the leave of this court to appeal was not sought and obtained before filing the appeal and as such the application should be dismissed Ex-Debito Justitiae for contravening the provisions of **Section 75 of the Civil Procedure Act** and **Rule 43 of the Civil Procedure Act**. Secondly, that the appeal is resjudicata; that the application is defective, incompetent and bad in law in so far as the prayers sought are time barred by dint of **Section 10 (4) of the Insurance (Motor Vehicle Third Party Risks) Act**; and further that the appeal itself is time barred as the window of repudiation of the contract of insurance is no longer available to the application. The respondent also avers that this court's hands are tied and therefore it should decline the invitation to direct the lower court to allow the appellant to advance an untenable and unlawful defence and it should therefore dismiss the application with costs to the respondent.

This court heard the arguments of Counsel for the parties both on the application and the preliminary objection on 25<sup>th</sup> July 2019. The genesis of this application is the ruling of this court dated 18<sup>th</sup> July 2019 which declined to stay the orders of the lower court in Keroka PMCC No. 107 of 2018 pending the hearing and determination of this appeal. This court gave the reasons for dismissing the application as firstly, that the appellant/applicant had sought similar orders in Nyamira HCCC No. 01 of 2019 and for reason that the orders had been declined on account of statutory limitation. There the appellant/applicant was seeking to stay the proceedings in the lower court pending a suit it had filed in this court wherein it sought inter alia to avoid the insurance policy under **Section 10 (4) of the Insurance (Motor Vehicle**

**Third Party Risks) Act.** However, following a preliminary objection filed by the respondent this court found the suit was time barred as it had not been filed within the three months stipulated in **Section 10 (4)** and so the suit was out of time and as such the protection provided under **Section 10 (4)** could not avail the appellant/applicant. In the ruling dated 18<sup>th</sup> July 2019 this court ruled that to allow the application before it would be a round-about way of granting the orders it had declined to grant in Nyamira HCCC No. 01 of 2019 and dismissed the application. Counsel for the appellant/applicant then made an oral application for stay which this court rejected and directed that the application be made formally. It is then that the appellant/applicant filed the present application. The present application seeks to stay the orders of the lower court pending an appeal against the ruling of this court dated 18<sup>th</sup> July 2019.

The application is brought under **Order 42 Rule 6 (1) of the Civil Procedure Rules** which empowers this court to stay execution either of its own orders or those of the court whose decision is being appealed from pending appeal. The conditions to be met before stay is granted are provided in **Sub-rule 6 (2) of the Rules** and have been well cited by the appellant/applicant. The principles governing grant of the order which is discretionary are well settled and were enunciated by the Court of Appeal as follows in **Butt v Rent Restriction Tribunal [1982] KLR 417:-**

- “1. The power of the court to grant or refuse an application for a stay of execution is discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.**
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**
- 4. The court in exercising its discretion whether to grant and refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**
- 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”**

The conditions have been expanded by the courts over time and the courts are enjoined to consider the decree holder’s plight when granting stay. In **Joseph Gachie t/a Joska Metal Works v Simon Ndeti Muema [2012] eKLR** Odunga J stated: -

*“It is not sufficient merely to state that the decretal amount is a lot of money and the applicant would suffer if the money is paid. In an application of this nature the applicant should show the damages it will suffer if the order for stay is not granted since granting stay would mean that status quo should remain as it were before judgement and that would be denying a successful litigant of the fruits of judgement which should not be done if the applicant has not given to the court sufficient cause to enable it exercise its discretion in granting the order of stay.”*

In **M/s Portreitz Maternity v James Karanga Kabia Civil Appeal No. 63 of 1997** cited with approval in **Mohammed Salim T/a Choice Butchery v Nasserpuria Memon Jamat [2013] eKLR** the court stated: -

*“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgement delivered in his favour. There must be a just cause for depriving the plaintiff of that right....”*

So whereas the appellant/applicant has an unfettered right to appeal, the court must balance that right with that of the respondent to the fruits of his judgement. The appellant/applicant must also demonstrate substantial loss which is the cornerstone of such applications and it is not enough merely to state as has been done in this case that the decretal amount is huge and the respondent cannot pay. The applicant must demonstrate that assertion sufficiently in order for this court to shift the burden of proving that he can repay to the respondent. That has not been done in this case. In its place we have an applicant who asserts that he won’t pay can’t pay and brought multiple suits and applications to frustrate the respondent. If indeed the appellant was interested in appealing and nothing else, then she ought to have appealed the decision of this court in Nyamira HCCC No. 1 of 2019 but that does not appear to be the case. The court exists to preserve the rights of both parties as both are equal before the law and must enjoy equal benefit of the law which would not be the position if this court were to allow this application and as the applicant has not demonstrated substantial loss, the application is dismissed with costs to the respondent.

**Signed, dated and delivered in Nyamira this 26<sup>th</sup> day of September 2019.**

**E. N. MAINA**

**JUDGE**