



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 200 OF 2018

KENINDIA ASSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

MOHAMMED HASSAN KINI.....RESPONDENT

R U L I N G

1. In this appeal, the appellant has filed a Notice of Motion dated 3/10/2018 essentially seeking an order for stay of proceedings before the lower court in Mombasa CMCC No. 900 of 2018 pending the hearing and determination of the appeal.
2. The grounds given to found the appeal are that on 3/9/2018 the trial court declined to set aside an interlocutory judgment entered on default to file an appearance and defence and this appeal was then filed. It is averred that unless stay is granted the appellant stands to substantial loss in that without a defence it will not attend court to participate at trial even if formal proof is to ensure.
3. The suit before lower court is a declaratory one merely seeking an order that the defendant there (Appellant here) is bound to meet and settle the decree issued in Mombasa CMCC No. 2296 of 2015 against a person alleged to have been an insured of the Appellant.
4. It is that suit in which it is said the respondent sought and obtained an interlocutory judgment whose setting aside was declined thereby provoking this appeal.
5. The application was opposed by the Respondent on the foot of a Replying Affidavit sworn by the Respondent himself. In that Affidavit, it is averred and contended that the application was bad in law and not maintainable on the basis of Sections 5(b)(iv) as read with Section 10(1) of Cap 405 and that all the Respondent was interested to achieve was to enforce payment of statutory obligation in the sum of Kshs.3,000,000 being the sum pleaded in the declaratory suit and that the appeal is thus premised on weak grounds.
6. Thereafter parties field and exchanged written submissions. The submissions filed agree on what my mandate to parties in this application invokes and involved. It is that the provisions of Order 42 Rule 6(2) be met and applied by the court the provision reads:-

“No order for stay of execution shall be made under subrule(1)

Unless:-

- a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
- b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”.**

7. My view and understanding of this rule is that stay being intended to preserve the substratum of a dispute in appeal must balance the competing interests of the parties so that the two continue to operate at an even and level ground. That is the need for the party applying to show substantial loss and then give an assurance to the respondent that in the event the appeal fails its interests in the decreed is secured by security as to be sufficient satisfy the decree.

8. In this matter the appellant says its stand to lose substantially by being called upon to settle a decree in excess of Kshs.8,000,00 when the law puts a ceiling to its obligations at Kshs.3,00,000 of which it has paid Kshs.2,000,000 based on a contract between it and the insured. The question on appeal as disclosed in the memorandum of appeal, will rotate around whether there was a validly entered judgment and if so,

what was the sum deemed declared to be due and payable by the Appellant.

9. In my view those are issues that are not vain or phantom. I consider them to present an arguable appeal which to me is the same as a chose in action and thus a property with its attendant constitutional safeguards and guarantees.

10. If no stay is granted, the obvious will take place; the Respondent may opt to go to court and get to formally prove his claim or simply, as implied in the Replying Affidavit, deem it that he has a declaration for the payment of the sum of Kshs.3,000,000 plus costs and interests. (See paragraph 4 and 8 of the Replying Affidavits). With the request to be allowed to file defence and lead evidence declined, it is not strange to assert that financial obligation will be placed on it beyond the limits imposed by law.

11. May be it is now time to look at what the respondent sought and obtained before the trial court. At paragraph 7 of the plaint the fact of a judgment in the primary suit as pleaded in the sum of Kshs.8,253,049/= and then a prayer is crafted as follows:

“A declaration for the judgment in terms of Prayer 7 plus interest for 8th September till payment in full”.

12. It would appear to me that the only judgment which could be sought and obtained based on the pleadings and prayer is the full settlement of the decree in the primary suit. That to me presents an arguable point in the appeal if regard is laid to the provisions of Section 10 of Cap 405.

13. In my view therefore to burden one with an obligation beyond the legal limits is to expose such a person to substantial loss in the nature of being subjected to a burden contrary to law. I thus do find that there is real substantial loss that needs to be prevented by grant of an order for stay.

14. How about security for the due performance of the decree appealed against? I take the note that if an interlocutory judgment was properly sought then it is limited to the declaration as to payment of the decree of the primary suit. What is disclosed in the papers filed is yet to be ascertained hence I do not consider that there is as yet a declared sum to be secured.

15. The upshot is that I do allow the Notice of Motion dated 3/10/2018 in terms of Prayer 3 in that further proceedings before the lower court in SRMCC No. 900 of 2018 are stayed pending the hearing and determination of the appeal. I award the costs to the appellants.

Dated and delivered at Mombasa this 25th day of October 2019.

P.J.O. OTIENO

JUDGE