



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 415 OF 2019**

**KENYA ORIENT INSURANCE LIMITED .....APPELLANT**

**VERSUS**

**JOSPHAT KYALO KIILU .....RESPONDENT**

**RULING**

1. By a Notice of Motion dated 24<sup>th</sup> July 2019, the appellant, *Kenya Orient Insurance Limited* (the applicant) moved this court seeking orders of stay of execution of the decree emanating from the judgment delivered on 19<sup>th</sup> June 2019 in Milimani CMCC No. 2639 of 2017 pending the disposal of its appeal filed on 19<sup>th</sup> July 2019.

2. The application is premised on *Sections 1A; 3A and 63 (e)* of the *Civil Procedure Act* and *Orders 42 Rule 6 (1) and 51 Rule (1)* of the *Civil Procedure Rules*. It is supported by the grounds stated on its face and the depositions in the supporting affidavit sworn on 24<sup>th</sup> July 2019 by *Ms Morine Wangeci*, the appellant's Assistant Claims Manager – Legal.

3. The applicant contends that its appeal has high chances of success and if stay orders are not granted, the appeal will be rendered nugatory as the respondent is a person of unknown means and may be unable to refund the decretal amount if the appeal is successful. The applicant expressed its willingness to provide security for the due performance of the decree as may be ordered by the court.

4. The application is opposed. The respondent filed a replying affidavit dated 5<sup>th</sup> September 2019 in which he deponed that the application was made in bad faith and that it was meant to delay the realization of fruits of his judgment. He averred that after the accident, he was forced to borrow money from friends which he was repaying with interest and that this was causing him suffering both in his business and emotionally; that if the application was allowed, the applicant should be ordered to pay him half the decretal amount in the sum of KShs.338,987 and the other half to be deposited in a joint interest earning account.

5. At the hearing, though duly served with a hearing notice, the respondent and his counsel did not attend the court. Consequently, hearing of the application proceeded *ex parte*.

6. I have considered the application, the affidavits on record and the oral submissions made by the applicant's learned counsel. The law governing stay of execution pending appeal is set out under *Order 42 Rule 6 (2)* of the *Civil Procedure Rules*. For an applicant to be entitled to orders of stay pending appeal, he must demonstrate the following three conditions namely:

- i. That the application was filed timeously;
- ii. That he is likely to suffer substantial loss if the orders sought are not granted; and
- iii. That he is ready and willing to offer such security as the court may order for the due performance of the decree.

7. Turning to the first condition, I note from the record that the judgment of the trial court was delivered on 19<sup>th</sup> June 2019. The appeal was filed on 19<sup>th</sup> July 2019 while the application was filed on 24<sup>th</sup> July 2019 about five days later. In the premises, I am satisfied that the application was filed timeously.

8. On the claim that the applicant is likely to suffer substantial loss if the orders of stay were not granted, I find that the applicant's claim that the respondent is a person of unknown means and may not have the ability to refund the decretal sums if the appeal is successful has not been controverted by any evidence to the contrary. The respondent in his replying affidavit did not dispute this claim and did not depone to his financial means. His claim that after the accident he had to borrow a loan from his friends which he is still repaying with some difficulty

proves that the applicant's apprehension that the respondent may be unable to refund the decretal amount when called upon to do so is justified. To this extent, I am satisfied that the applicant has demonstrated that it is likely to suffer substantial loss if the orders sought are not granted.

9. As the applicant has also offered to provide security for the decretal sums, I find that it has met all the requirements under *Order 42 Rule (2)* of the *Rules* for grant of stay. The applicant has therefore established sufficient cause to warrant grant of stay orders pending appeal.

10. Since the court must also take into account the interests of the respondent, I allow the application and grant the applicant stay pending appeal on condition that it will deposit the entire decretal amount in court or in a joint interest earning account operated by counsel on record for both parties within 30 days of today's date. In default of compliance, execution to issue.

11. Costs of the application to abide outcome of the appeal.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI** this 24<sup>th</sup> day of October, 2019.

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Kabinga holding brief for Mr. Kiplagat for the applicant

No appearance for the respondent

Mr. Salach: Court Assistant