



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 44 OF 2019

THE MONARCH INSURANCE CO LTD.....APPELLANT

VERSUS

ERIC ONGERI NYABUTO.....RESPONDENT

(Being an appeal from the ruling of Hon M. Opanga (S.R.M) in Kangundo PMCC 59 of 2018 delivered on 19.3. 2019)

RULING

1. The Applicant approached the court with the instant application vide certificate of urgency where it seeks an order for a stay of execution of the ruling and decree and orders rendered between the parties in the lower court on 19.3.2019. The appeal is from a ruling delivered in Kangundo PMCC 59 of 2018 by Hon M. Opanga. The Application is supported by a Supporting Affidavit by Sylvia Motari, who is an advocate from the firm on record for the applicant. She averred that the applicant has filed an appeal against the ruling of the trial court and that on 16.4.2019 the respondent commenced the process of execution. It was therefore her averment that if the orders sought are not granted then the appeal will be rendered nugatory. She annexed a copy of the memorandum of appeal as well as copies of the proclamation and warrant of sale of property. The deponent averred that no loss will be occasioned to the respondent if the application is allowed.

2. The Application is opposed. In opposition, the Respondent deponed on 23.4.2019 a replying affidavit wherein he averred that the application is not in good faith. He averred that the application is intended to deny him the fruits of the judgement.

3. The Application was canvassed by way of written submissions. Learned counsel for the applicants filed submissions on 29.5.2019 whereas the respondent's submissions were filed on 16.7.2019.

4. Learned counsel for the applicant submitted that the applicant came to court with the application without inordinate delay; that the decretal amount is substantial and there is an appeal in respect of the decision that led to the decree. Counsel submitted that the applicant is willing to deposit half of the decretal amount in a joint interest earning account in the names of both advocates on record.

5. According to the Respondent, there are conditions for grant of stay. In that regard counsel cited the provisions of Order 42 Rule 6 of the Civil Procedure Rules and submitted that the applicant has not satisfied the grounds for grant of the stay order and therefore the same should be dismissed. However if the court is inclined to grant the application, then it should order that the decretal amount be deposited in a joint interest earning account.

6. The issue for determination is whether the Appellant is entitled to an order for stay of execution.

7. This application is brought under Order 42 Rule 6 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. Section 3A preserves the applicants' right to approach this court to realize their cherished right of appeal and Order 42 Rule 6 provides for stay of execution pending appeal. The conditions to be met by an Applicant in order to be entitled to an order for stay are laid out in that Rule in the following terms:

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub-rule (1) unless—

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

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.

8. The applicant has to satisfy a four-part test as was highlighted in the case of **UAP Provincial Insurance Company Limited v Michael John Bectett, Civil Application Number 204 of 2004**. He must demonstrate that:

a. *The appeal he has filed is arguable;*

b. *He is likely to suffer substantial loss unless the order is made. Differently put, he must demonstrate that the appeal will be rendered nugatory if the stay is not granted;*

c. *The application was made without unreasonable delay; and*

d. *He has given or is willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on them.*

9. I have perused the filed Memorandum of Appeal in this case as annexed to the application. I am unable to say that the grounds of appeal enumerated are not arguable. I find that the applicant has easily met that standard.

10. But what is the substantial loss that the Applicant is likely to suffer if the order is not granted? The affidavit is silent on the same.

11. I am not convinced that there may be loss occasioned to the applicant if the orders sought are not granted save for the right to be heard on appeal. None of the parties have indicated the willingness to deposit security in their pleadings, and in this regard it cannot be found that the applicant has shown this court what substantial loss it would suffer if stay of execution is not granted, *qua*; none of the parties have managed to satisfy this mandatory requirement for the grant of stay. However the parties have alluded to the same in their submissions that are not part of the evidence in respect of the application.

12. The Application was brought without inordinate delay as it was brought within 30 days from the date of delivery of the judgement. Therefore, my conclusion is that the Applicant has partially met the conditions placed by Order 42 Rule 6.

13. In light of the foregoing, I am inclined to allow the instant application, and add that under Order 42 Rule 6(1), a court is to “**make such order thereon as may to it seem just**”. Having considered the materials placed before me, I shall grant prayer 3 of the application and give the applicant time to deposit the requisite security for performance of the decree.

14. The upshot is that the Application dated 16th April, 2019 succeeds and I direct as follows:

a. *The Applicant shall deposit half of the decretal amount in a joint interest earning account to be opened in the names of advocates on record for the parties within 30 days of this order failing which the stay shall lapse.*

b. *The Costs of the application shall abide in the appeal.*

It is so ordered.

Dated and delivered at **Machakos** this 17th day of **December, 2019**.

D. K. Kemei

Judge