



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 516 OF 2017

AFRICA MERCHANT ASSURANCE

COMPANY LIMITEDAPPELLANT/APPLICANT

- V E R S U S -

BETTY SHEILA KAWIRA MUGAMBI.....RESPONDENT/RESPONDENT

RULING

1) Betty Sheila Kawira Mugambi, the respondent herein, filed a compensatory suit in her capacity as legal representative of the Estate of Esther Karugari Mugambi (deceased) against Africa Merchant Assurance Company Limited, the appellant herein before the chief Magistrates Court at Nairobi. The suit was heard judgment entered in favour of the respondent in the sum of kshs.5,300,000/=. The appellant was aggrieved, consequently it preferred this appeal.

2) The appellant/applicant has now taken out the motion dated 28/9/17 in which it sought for the following orders:

1. Spent

2. THAT the honourable court be pleased to extend time to file and serve the intended Appeal out of time.

3. THAT pending the hearing and determination of this application inter partes, a stay be and is hereby granted against the ruling delivered on 30th August, 2017.

4. THAT the temporary stay of execution be and is hereby granted for a period of twenty one (21) days to allow the esteemed firm of M/S Ham Lagat & Associates Advocates to request and fast track the typed proceedings and ruling delivered on 30th August 2017.

5. THAT pending the hearing and determination of the intended appeal a stay of execution be and is hereby granted against the ruling delivered on the 30th August, 2017.

6. THAT this honourable court be pleased to make such order(s) and or any further orders it may deem just and necessary in the circumstances.

3) The motion is supported by the affidavit of Oliver Kipchumba. When served, the respondent filed a

replying affidavit of Betty Sheila Kawira Mugambi to oppose the motion.

4) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion.

5) The applicant aver that the respondent may execute the decree and therefore there is need to maintain the status quo by granting an order for stay. That the decretal sum is inordinately high and the draft decree was not served upon the applicant's counsel.

6) The respondent opposed the motion arguing that the application for stay was filed in bad faith and with the sole intention of preventing the respondent from enjoying the fruits of her judgment.

7) The principles to be considered in determining an application for stay are set out under Order 42 of the Civil Procedure Rules. **First**, an applicant must show the substantial loss it would suffer if the order for stay is denied. **Secondly**, the application for stay should be filed without unreasonable delay. **Thirdly**, that the court should consider the provision of security for the due performance of the decree.

8) The first principle to be considered is the substantial loss the applicant may suffer if the order for stay is denied. The applicant avers that the respondent may execute the decree against the appellant and if the decree herein is executed, then the intended appeal will be rendered nugatory. It is also argued that if the decretal sum is paid to the respondent she will not be in a position to refund if the appeal turns out to be successful. This assertion is not controverted by the respondent, therefore I am convinced that the appellant/applicant has shown the substantial loss it would suffer if the order is denied.

9) The second principle is that the period of delay in filing the application for stay should be reasonable. It is clear on the record that judgment was entered on 30/8/2017 and the current motion was filed on 28/9/2017. The motion was therefore timeously filed.

10) The third principle is the provision for security for the due performance of the decree. I think a fair order here is to direct which I hereby do the applicant to deposit the decretal sum of ksh.5,300,000/= in an interest earning account in the joint names of learned counsels and or firms of advocate within 30 days from the date hereof.

11) Costs of the motion to abide the outcome of the appeal. The applicant is granted 15 days to file an appeal out of time. In default, the application shall be deemed to have been dismissed.

Dated, Signed and Delivered in open court this 26th day of January, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent