REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 39 OF 2017

FORMAX INSURANCE

BROKERS LIMITED……..APPELLANT/APPLICANT

VERSUS

GLORY HOTELS & INVESTMENTS LIMITED.....RESPONDENT

RULING

The Appellant filed a Notice of Motion dated 13th November, 2017 under the provisions of Order 42 Rule 6 of the Civil Procedure Rules seeking orders that there be stay of execution of the judgment delivered on 16th January, 2017 in Nairobi Civil Suit No. 3852 of 2011 pending the hearing and determination of the Appeal and that costs of the Application to be in the cause.

The Application is premised on the grounds on the body of the application and the Supporting Affidavit dated 13th November, 2017 sworn by **TITUS NZUKI WAMBUA** the Appellant/Applicant's Technical Manager and a Supplementary Affidavit dated 15th January, 2018. The grounds in support of the application are that the Applicants Appealed against the judgment and filed a Memorandum of Appeal on 8th February, 2017 and Record of appeal on 20th September, 2017. That on 8th November, 2017 the Appellant was served with a proclamation notice by M/s Dollar Auctioneers attaching office furniture, computers and other properties in the office and giving the Appellant 7 days to pay Kshs. 48,145 being costs of the lower court and an additional Kshs. 15,200 being the Auctioneers charges. The Appellant further deponed that the Respondent's means of income are unknown and it is likely that the Respondent will not be able to reimburse the costs in case the Appeal succeeds. The Applicant further stated that their Appeal is not frivolous and they are willing to abide by any terms and conditions this Honourable Court deems fit to impose in order to grant the orders sought.

The Respondent filed a Replying Affidavit dated 19th December, 2017 sworn by **JOHNSON MATARA**, the Administrative Manager of the Respondent, in which he has deponed that the applicant has failed to satisfy the parameters set in law for granting stay pending appeal and as such the same is an abuse of the court process. That the Respondent is a well known company with hotels in Nairobi and Mombasa and can easily pay the sum of Kshs. 48,145 to the applicant in the event the appeal succeeds. The Respondent further stated that the application has been brought to derail the Respondent from enjoying the fruits of the judgment.

The Application was canvassed by way of oral submissions which I have considered together with the Applicants list of authorities. **Order 42 Rule 6 of the Civil Procedure Rules** provides the conditions for granting an order of stay of execution which are;

(a) That the application has been made without unreasonable delay;

(b) That security for costs has been given; and

(c) That substantial loss may result to the Applicant unless the order for stay is made.

The said guidelines were outlined by the Court of Appeal in the case of **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** where the Court held that, "*We cannot over emphasize that at this stage we are not required to go to the merits of the case as tempting as it may be or consider whether the issues will be successful in favour of the appellant, lest we embarrass the trial judge. We therefore find that the applicant has discharged this requirement on the balance of probabilities. We are further guided by this court's decision in CARTER & SONS LTD. V. DEPOSIT PROTECTION FUND BOARD & TWO OTHERS – Civil Appeal No. 291 of 1997, at Page 4 as follows: "* ***. . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay****."*

What constitutes unreasonable delay varies from the circumstances of each case. The instant application was filed on 13th November, 2017 whereas the Judgment sought to be stayed was delivered on 16th January, 2017. The question of unreasonable delay was dealt with in the

case of Jaber ***Mohsen Ali & another v Priscillah Boit& another E&L NO. 200 OF 2012[2014] eKLR*** where it was stated:

> ***"The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.***

The Applicant seeks orders to stay a judgment which was delivered 11 months earlier. I am clear in my mind that such a period of 11 months amounts to unreasonable delay which delay the Applicant has not attempted to explain.

On substantial loss, it is the Applicants argument that the Respondent's means of income are unknown and as such they may not be able to refund in case the appeal succeeds. The Respondent submitted that it is a well established company with several hotels in the country and the sum claimed is minimal. The Applicant is also worried that if the orders are not granted, the Respondent will proceed and execute. What constitutes substantial loss was further discussed in the case of **JAMES WANGALWA & ANOTHER V AGNES NALIAKA CHESETO** ***MISC APPLICATION No 42 of 2011*** **[2012] eKLR (Gikonyo J** stated that:

> ***No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.***
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> ***The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail,*****a question that was aptly** ***discussed in the case of Silverstein Vs .Chesoni [2002] 1KLR 867,*** *and* ***also in the case of MukumaVs.Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus*****:**
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> ***"…the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."***

The third tenet for granting an order of stay of execution is that the Applicant must provide security for the due performance of the decree which the Applicant has not offered. The Applicant has not offered any security terms for this court to consider. For the above reasons, the Applicant has not established sufficient cause why the orders sought should be granted.

The upshot of the above is that the application dated 13th November, 2017 is hereby dismissed with costs.

Dated, Signed and Delivered at Nairobi this **19th** Day of **March, 2018.**

…….

L. NJUGUNA

JUDGE

In the Presence of

…….. *For the Applicant*

…….. *For the Respondent*