



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 12 OF 2018

THE MONARCH INSURANCE COMPANY LIMITED.....APPELLANT

-VERSUS-

MOSES CALEB OCHANGO & CATHERINE ERNEST

OCHANGO (as the Administrators and Legal Representatives of the Estate of

STAFFORD OCHANGO, DECEASED).....RESPONDENTS

RULING

[1] The Notice of Motion dated **4 May 2018** was filed herein by the Appellant/Applicant, **Monarch Insurance Company Limited**, pursuant to **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya, Order 42 Rule 6 and Order 51 Rule 1** of the **Civil Rules, 2010**, for orders that:

[a] Spent

[b] Spent

[c] Spent

[d] The Court be pleased to order stay of execution of the Judgment delivered on **2 February 2018** as well as the Ruling delivered on **20 April 2018** in **Eldoret CMCC No. 986 of 2015** pending the hearing and determination of this appeal;

[e] That in the alternative, the Court be pleased to vary or alter the stay conditions issued by the Trial Court on **20 April 2018** and grant stay of execution on condition that the Applicant deposits a maximum of **Kshs. 3,000,000/=** in a joint interest earning account in the names of both Counsel, or in any other manner as may be ordered by the Court;

[f] That the costs of this application be in the cause.

[2] The application is premised on the grounds that the Appellant, being dissatisfied with the Court's decision in **Eldoret CMCC No. 986 of 2015**, has lodged this appeal, **being Eldoret High Court Civil Appeal No. 12 of 2018**, challenging the findings of the Learned Trial Magistrate on both liability and quantum; and that the Appellant is ready and willing to deposit the sum of **Kshs. 3,000,000/=** as security in a joint interest earning account in the names of both Counsel on record herein, or in any other manner as may be ordered by the Court.

[3] According to the Appellant, the pertinent policy is limited to **Kshs. 3,000,000/=** only, by dint of **Section 5(b)** of the **Insurance (Motor Vehicles Third Party Risks) Act, Chapter 405** of the **Laws of Kenya**; and yet the lower court granted stay of execution on **20 April 2018** on condition that the Appellant deposits 70% of **Kshs. 4,320,498/=**, being the decretal sum in **Eldoret CMCC No. 986 of 2015**, in a joint interest earning account; and that 30% of the aforesaid sum, amounting to **Kshs. 1,296,149.40**, be released to the Respondents herein within 30 days from the date of that Ruling, failing which execution would issue. It was averred therefore that, since the decretal sum is beyond the Appellant's policy limit of **Kshs. 3,000,000/=** the amount payable as security pending appeal should not be more than the aforesaid amount. The application is supported by the affidavit of **Obed Kariuki Ireri** annexed thereto, which was sworn on **4 May 2018**, to which was annexed a copy of the impugned Ruling dated **20 April 2018**.

[4] The application was resisted by the Respondents on the basis of the averments set out in the Replying Affidavit sworn by **Moses Caleb Ochango** on **5 May 2018**. Therein, the Respondents largely reiterated the genesis of this appeal. I note too that **Mr. Ochango** also made depositions therein about matters that are argumentative in nature, and which would therefore belong to the realms of submissions on matters of law rather than the factual averments that are envisaged by **Order 19** of the **Civil Procedure Rules**. In particular, all those averments in

connection with the duties of an insurer under **Section 10** of the **Insurance (Motor Vehicles Third Party Risks) Act, Chapter 405 of the Laws of Kenya** and the import of **Order 42 Rule 6** of the **Civil Procedure Rules** as presented in paragraphs 17 and 18 of the Replying Affidavit, are, in my respectful view, misplaced, if not altogether misconceived; for in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** this point was aptly expressed by the Court of Appeal thus:

"Affidavits are not the proper vehicle by which parties should make legal arguments. Affidavits should be confined to facts within the deponent's knowledge and which he can prove. One's opinion as to what the law is, or ought to be, is not the proper subject of affidavits and it is imperative that those who draw affidavits, in the context of litigation especially, bear this in mind and so reserve matters of law to written submissions..." (per Kiage, JA)

[5] The contention of the Respondents is that the subordinate court's decree computed the decretal sum due as at **5 March 2018** to be **Kshs. 6,488,750**, and that this computation has not disputed by the Appellant. Accordingly, it was their argument that it is not the Appellant's place to direct or dictate how much of the decretal sum ought to be deposited herein as security for the due performance of the decree should the appeal be dismissed. It was further averred that the Respondents are in a position to refund any amount that shall be paid to them pursuant to the orders of the Trial Magistrate; and therefore that no prejudice will be suffered by the Appellant in the unlikely event that the appeal is successful.

[6] **Order 42 Rule 6 of the Civil Procedure Rules** provides that:

"(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 thereof 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 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] Accordingly, in an application of this nature, it is imperative for an applicant to satisfy the Court that:

[a] he stands to suffer substantial loss unless the order is made;

[b] that the application has been made without unreasonable delay, and

[c] that such security as the court orders for the due performance of such decree has been given.

[8] The rationale for the aforesaid conditions has been considered in various cases such as **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2) [2002] KLR 63**, in which it was held that:

"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

[9] Accordingly, having given due consideration to the application dated **4 May 2018**, the grounds relied on in support thereof as well as the respective affidavits and the submissions made herein by Learned Counsel, it is manifest that the background facts are not in contest. Indeed, the lower Court has already granted stay of execution which is due to lapse on **28 May 2018**, and the parties appear to be in agreement that there be stay pending appeal. What is disputed is the quantum of security to be furnished by the Appellant.

[10] While the Appellant's posturing is that it should not be required to pay more than the policy limit of **Kshs. 3,000,000/=**, the Respondents were of the view that the Appellant should deposit the whole decretal sum. Thus, balancing the competing interests of both parties, the question to pose is whether the Appellant has demonstrated that the Respondents are persons of straw, whose means are such that they would not refund any sums paid to them in partial satisfaction of the decree as was ordered by the lower court.

[11] In my careful consideration of the averments set out in the Supporting Affidavit, I found no indication as to the Respondents' means, or lack. Nowhere in the Supporting Affidavit has the Appellant even alluded to the Respondents' lack of ability to refund the 30% of the decretal sum, amounting to **Kshs. 1,296,149.40**, that is the subject of the impugned Ruling of the lower court. Hence, I would adopt the expressions of the Court in **Lalji Bhimji Sanghani Builders and Contractors vs. Nairobi Golf Hotels Kenya Limited HCCC No. 1990 of 1995**, that:

"...for an applicant to satisfy this condition, he must persuade the Court that the decree holder is a man of straw from whom

it will be well nigh impossible, or at least very difficult to obtain back the decretal amount in the event of the intended appeal succeeding. Such persuasion must spring from affidavit or other evidence on record. A bold statement from the bar or indeed in an affidavit by the judgment debtor that he will suffer substantial loss unless stay of execution is ordered unbacked by evidence of the matters I have alluded to carries no weight of persuasion in the mind of a judge."

[12] Similarly, in Pamela Akinyi Opundo vs. Barclays Bank of Kenya Ltd [2011] eKLR, it was held that:

"Unless there is evidence to show that the respondent cannot be trusted with the money in question and that he/she is likely to squander the same before the appeal is heard and determined, thereby rendering the appeal nugatory, there is no reason why a litigant should be denied the fruits of his litigation. An appeal cannot be rendered nugatory in a monetary decree if payment is made, and it is not just to deny a successful party the benefit of judgment merely because he is poor. In an application for stay of execution pending appeal, the burden lies upon the applicant to prove that the respondent will not be able to refund to the defendants any sums paid in satisfaction of the decree. It is only when the applicant tables evidence to show that the respondent will not be able to refund the same can it be said with any comfort that the appeal will be rendered nugatory."

[13] In the premises, there is absolutely no reason why the Appellant should not comply with the orders issued by the Learned Trial Magistrate. To my mind, there is nothing prejudicial or oppressive in the terms given by the lower court. The submission that the Trial Magistrate erred in awarding sums in excess of **Kshs. 3,000,000/=** and the response thereto by Counsel for the Respondents, including the authority cited by Counsel for the Respondent, are matters that must, of necessity await canvassing in the appeal itself; and therefore it would, in my view, be pre-emptive to delve into those issues at this early stage.

[14] Thus the orders that commend themselves to the Court are as follows:

[a] That there be stay of execution in respect of the Judgment and Decree issued in **Eldoret CMCC No. 986 of 2015** pending the hearing and determination of this appeal;

[b] That security for the due performance of the Decree be furnished in the manner ordered by the Learned Trial Magistrate in the Ruling dated **20 April 2018**; namely, that 70% of the decretal sum due as at **5 March 2018**, (the decretal sum being **Kshs. 6,488,750**) be deposited in an interest earning account in the joint names of Counsel for the parties herein within 14 days of the date hereof; and that the remaining 30%, in the sum of **Kshs. 1,296,149.40** be paid out forthwith to the Respondents; and at any rate not later than 14 days from the date hereof, failing which the stay order shall automatically lapse;

[c] that the costs of the application shall abide the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 22ND DAY OF MAY, 2018

OLGA SEWE

JUDGE