



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.248 OF 1997

S.M THIGA t/a NEWSPAPER SERVICES.....PLAINTIFF

VERSUS

PHOENIX OF E.A ASSURANCE COMPANY LIMITED.....DEFENDANT

RULING

1. Before this Court is the Notice of Motion dated 30th May, 2018, in which the Defendant/Applicant seeks the following orders:-

(1) [Spent]

(2) [Spent]

(3) **THAT** the Honourable court be pleased to order a stay of any further proceedings in this matter pending the hearing and determination of the Appeal.

(4) **THAT** the costs of this application be provided for.

2. The application, which was brought under **Order 42 Rule 6(1) and 6(6), Order 22 Rule 22(1) and Order 51 of the Civil Procedure rules, Sections 1A, 1B and 3A of the Civil Procedure Act** and all enabling provisions of the law, was supported by the affidavit of **MS LILLIAN SIMIYU** the legal officer of the Defendant Company

3. The Plaintiff/Respondents filed their Grounds of Opposition to the Application dated 30th May, 2018. Given that the Plaintiff/Respondent did not file a Replying Affidavit, the factual averments in the supporting affidavit dated 30-5-2018 are not controverted.

4. The background to this application is as set out below

The plaintiff had a fleet of vehicles which had been insured by the Defendants. In the year 1998 one of the Plaintiff's vehicles was involved in an accident and the plaintiff lodged a claim with the insurance company. This claim was not honoured. As a result the present suit was filed. The suit which had initially been filed at Sheria House Law Court was later transferred to the High Court.

On **8th August 2008, Hon. Lady Justice Jessie Lessitt** delivered a ruling, dismissing with costs the Defendant/ Applicant's Chamber summons seeking to strike out the amended plaint dated 11th March, 2005. The defendant/applicant appealed against that Ruling Vide Civil Appeal No.244 of 2010, the grounds of Appeal being set out in the Record of Appeal dated 14th September, 2010. That appeal is still pending determination.

5. In spite of the pending appeal the matter proceeded for hearing and on 2nd September, 2016, the **Hon. Lady Justice Olga Sewe** delivered her judgment in which she awarded the plaintiff the sum of Kshs.1,000,000/= plus costs.

6. The Defendant/Applicant filed an appeal against the judgment of 2nd September, 2016 vide Civil Appeal No.6 of 2018, the grounds of which are set out in the Record of Appeal dated 20th December, 2017. The said Record of Appeal was filed in court on 10th January, 2018 and the same was served upon the Plaintiffs Advocates on 15th January 2018.

7. The Plaintiff/Respondent also filed a cross appeal against the same judgment on 2nd September 2016 vide their Notice of Appeal dated 7th February, 2018. Both the appeal filed by the Defendant/Applicant and the cross-appeal filed by the Plaintiff/Respondent have gone through

Case Management, parties have been directed to file their written submissions and the matter is due for mention before the Court of Appeal on 11th July, 2018. The Defendant/Applicant submits that the appeals both are arguable and have merit and as such it is in the interest of justice that the present proceedings be stayed pending the determination of the said appeals.

8. The application was disposed of by way of oral arguments made before the court on 25th June, 2018. **MR. SHAH** counsel for the Defendant/Applicant submitted that the two pending appeals could change the entire outcome of the matter. That if the proceedings are not stayed as prayed, the Deputy Registrar may proceed with taxation and will be obliged to re-tax the costs if the outcome changes. Counsel urged that the applicants were conscious of saving precious judicial time. Counsel cited **Order 62 r 6(1) of the Civil Procedure Rules** and submitted that adequate grounds have been advanced to merit the order of stay; that both parties have filed appeals and there is the expectation that the said appeals will be determined expeditiously.

9. The delay in bringing the application was explained as being due to a change of tact by the Plaintiff/Respondent. Counsel clarified that the Defendant/applicant is not seeking a stay of execution under **Order 42 rule 6** but is only seeking a stay of the proceedings until both appeals have been heard and determined. The court was urged to exercise its unlimited jurisdiction to grant a stay under **Order 42 rule 6(6)** of the Civil Procedure Rules and to allow the present application.

10. **MS WAMBUA** for the Plaintiff/Respondent opposed the application, relying entirely upon the Grounds of Opposition dated 19th June, 2018. Counsel reiterated that the legal grounds upon which a stay of proceedings may be granted are as set out in **Order 42 Rule 6** of the Civil Procedure Rules. An appeal it was submitted does not operate as a stay of execution or proceedings of any matter. A stay is a discretionary order granted by the Court only in cases where it has been demonstrated that such stay is merited.

11. Counsel for the Plaintiff/Respondent went on to expound on the legal principles upon which a stay of proceedings may be granted:

- (i) It must be demonstrated that the applicant stands to suffer substantial loss if the stay prayed for is not granted.
- (ii) That the application for stay has been filed expeditiously without undue delay.
- (iii) The party seeking a stay must offer security which is binding on it.

12. Counsel for the Plaintiff/Respondent suggested that the application only be allowed on condition that the Defendant/Applicant deposit the entire decretal sum plus costs.

ANALYSIS AND DETERMINATION

(iv) I have considered the oral submissions of both counsel in this matter. The application has been brought under **Order 62 Rule 6(6) of the Civil Procedure Rules** which provides that no appeal or second appeal shall operate as stay of execution except in so far as the court appealed from may order. **Order 42 Rule 6(1)** provides that:-

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

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the applicant has been made without unreasonable delay and

(b) Such security as the court orders for the due performance of such decree or orders as may ultimately be building on him has been given by the applicant”.

13. The key question is whether the Defendant/Applicant stands to suffer any substantial loss if the stay requested is not granted. There has been no claim much less proof of any substantial loss which the Defendant/Applicant risks suffering should the stay sought not be granted. In support of the application for stay of proceedings counsel for the Defendant/Applicant only cited the fact that if the appeals are successful the Deputy Registrar may be compelled to re-tax the costs. This cannot by any means be deemed to amount to substantial loss on either the Defendant/applicant or on the court. It can at best be termed as a minor inconvenience. As stated earlier the mere fact that there are two appeals pending before the Court of Appeal, does not constitute valid ground on which an order of stay can be premised.

14. This is a matter which was filed way back in 1997. It is noteworthy that even after **Hon. Lady Justice Jessie Lesitt** delivered her ruling of **8th August, 2018**, the matter still proceeded to a full hearing. Thereafter **Hon. Lady Justice Olga Sewe** delivered a judgment on **16th September, 2016**. It was not until May, 2018, almost two (2) years after the delivery of that judgment that the Defendant/applicant filed this present application. There has in my view been unreasonable delay in filing the present application. No convincing reason has been advanced for that delay.

15. Judgment having been delivered in favour of the Plaintiff was back in May 2016, a stay of proceedings means that the Plaintiff will be unable to realize the judgment made in its favour. I find that no valid reason exists to deny the Plaintiff the fruits of its judgment.

16. In the circumstances, I find that the conditions meriting a stay as set out in **Order 42 Rule 6(1)** have not been met. In the premises, I disallow the present application for stay and award costs of this application to the Plaintiff/ Respondent.

Dated in Nairobi this 27th day of July, 2018.

.....

Justice Maureen A. Odero

Ruling delivered at the Nairobi High Court this 27th day of July , 2018.

.....

JUDGE