



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL APPEAL NO 99 OF 2018**

**MASUMALI MEGHJI INSURANCE.....APPELLANT**

**VERSUS**

**AAR INSURANCE KENYA LIMITED.....RESPONDENT**

*(Being an appeal from the ruling and decree of the subordinate court, Hon. Makori CM, made on 18<sup>th</sup> May, 2018 in Mombasa CMCC No. of 2017)*

**RULING**

1. The Appellant was Defendant in the CMCC. No. 1139 of 2017 (MSA) wherein the Plaintiff sued claiming for a liquidated sum arising from a contractual arrangement between themselves being payment for provision of medical services. The case was summarily decided and the appellant (Applicant) ordered to satisfy the full Decretal amount awarded being Kshs. 12,555,291.30 plus costs and interest thereon.

2. The Appellant/Applicant being dissatisfied with the ruling of the learned trial magistrate, Honourable Makori, C.M delivered on 18<sup>th</sup> May, 2018, has appealed against the same and applied for a stay of execution. The learned trial magistrate granted a stay of execution for 30 days. By computation of time this lapsed on 19<sup>th</sup> June, 2018. This application dated the 7<sup>th</sup> June, 2018 was filed in court on 12<sup>th</sup> June, 2018 when it was placed before Honourable Justice P. J. Otieno, J who declined to order ex-parte orders and directed that the matter be served for hearing on a date fixed on priority basis. The matter was fixed for hearing on 5<sup>th</sup> July, 2018 whereby the same did not proceed and the court ordered that there be no execution pending hearing the application on merit.

3. In the meantime the respondent instructed an auctioneer on 27<sup>th</sup> July, 2018 to attach the goods belonging to the appellant whereby they were proclaimed on the same date application for warrants of attachment having been lodged on 24<sup>th</sup> July, 2018

4 The application (Notice of Motion) dated the 7<sup>th</sup> June, 2018 seeks for the following orders:-

(a) spent:

(b) spent :

(c) There be stay of execution of the ruling and decree of Honourable court ( Hon. Makori, C.M) made on 18<sup>th</sup> May, 2018 in **Mombasa CMCC No. 1139 of 2017, AAR Insurance Kenya Limited Vrs Masumali Meghji Insurance Brokers Limited** pending the hearing and determination of the appeal filed herewith.

(d) Costs of the application to abide the appeal.

The same is supported by ten (10) grounds and the affidavit of HAFSA SAID, a Financial Controller of the applicant in which he deposes on 12 paragraphs. The salient grounds thereof are that;

(1) The stay granted for 30 days would expire on 17<sup>th</sup> June, 2018 (spent).

(2) The applicant would suffer irreversible loss if execution were to take place and the whole amount became due and payable that it would close the Appellant's business.

(3) The respondent would be adequately compensated with an award of costs and interest if the appeal failed.

The affidavit repeats the same grounds and expands on the same, annexing the lower court pleadings.

5. The application was opposed by the Respondent which has filed an eleven (11) paragraph Replying Affidavit, the salient paragraphs therein being:-

(a) Paragraph 6;

***“That the appellant has not adduced any ground that warrants the stay of execution as the contents of paragraph 7 pleads inability to pay as a lump sum as compared to substantial loss”.***

A perusal of paragraph 7 clearly demonstrates that the appeal does not raise any triable issues and has no chance of success.

(b) Paragraph 7 gives details of means the Respondent has that can satisfy any costs should the appeal succeed.

6. The Appellant has filed its submissions and its case is that it has demonstrated that its application for stay has satisfied the three requirements namely;

**(a) That there will be substantial loss if stay is not granted and execution proceeds;**

**(b) that there has been no unreasonable delay in Making the application.**

**(c) that security has been offered for due performance of the decree.**

Supported with case law, the appellant opines that it is a brokerage business where it earns commission which trickles in slowly, hence it cannot pay a lump sum to satisfy the decree if so ordered, as it would trigger winding up and business would close. Further, according to counsel, it is enough for his client to claim that it will furnish security. He concludes that by that submissions he has laid a case for the grant of stay of execution of decree.

7. The Respondent has refuted these claims and the import of his submissions is that a definition of substantial loss takes the trajectory against the Respondent whom when paid the decretal sum and the appeal succeeds, he will be unable to refund the money. This is demonstrated by citations of

**- NETSOL (K) LTD –V- FILMCO AGENCIES LTD (2012) e KLR;**

**- MASISI MWITA –V- DAMARIS WANYIKA NJERI (2016) e KLR AND OTHERS.**

Counsel accuses the Appellant that instead, it is the one that has admitted impecunity if it is called upon to satisfy decree hence it has failed the first test.

In its affidavit, the Respondent has instead stated that it has a strong ability to refund the decretal sum if the appeal succeeds. Counsel contents that the other grounds be ignored since the applicant has failed to demonstrate substantial loss.

8. What this court has to consider is what the dispute before the trial court was and the supporting evidence thereof.

The case was a simple money claim or a delayed payment of Ksh 12,555,291.30, which was allegedly withheld by the appellant.

From the record of appeal filed in court at page 4 is the plaint where a glance at paragraphs 6,7,8 and 9 summarise the cases for respondent whereas the same is rebutted by the defence at page 31 at paragraph 7,8,and 9 thereof.

According to the Defendant, there were two policies, being medical and assets, where the letter was underwritten by Fidelity Insurance and it is claiming the balance was paid there and it is yet to be recovered from the Mombasa County Assembly. This is refuted in the reply to defence at page 33 of the record and buttred by a letter dated 19<sup>th</sup> October, 2015 from Mombasa County Assembly claiming full payment and which to date, upon perusal of the record has not been refuted by either a contract signed between the parties or otherwise (See pages 15,16,17,18,19,20,21,22,23,24,25 and 26) which resolves the payment as regards medical insurance which is the claim in the plaint.

9. The memorandum of appeal does not seek to terminate the suit but rather to take to trial issues of Fidelity Insurance responsible for assets insurance. With these evidence authorized by the parties, it is unlikely that they will testify differently. It is my view that to this extent, an appeal based on these facts is frivolous and is unlikely to succeed.

The trial magistrate was confronted with the same documents and had this to say at page 4 of his ruling:

Paragraph 4:

***“Applying the test laid above, what remains in this matter is whether there is a defence worth to proceed to a full trial. The issue being whether the County Assembly paid the Defendants. Annexures 1,2 and 3 show that the County Assembly paid the Defendant in the months of February, March, April and June, a total of Kshs. 26,271,535.30 less withholding tax. Annexure No. 4 confirms payment for the provisions of medical Insurance to its client, Mombasa County Assembly. In view of such***

**payment. There will be nothing to go for trial “on”.**

It was on this basis that the trial magistrate stuck out the defence and entered judgment for the amount claimed.

I find and hold likewise, that there is nothing on the main cause of action to go for trial on that issue even if the appeal were to be allowed other than aspects to go for trial in which case it would affect the Respondent .

The appeal has therefore slim chances of success and this disentitles the applicant the orders sought.

I accordingly dismiss the application dated the 7<sup>th</sup> June, 2018 and discharge the earlier orders of stay granted on 5<sup>th</sup> July, 2018.

10. I now turn to the Application by way of Notice of Motion dated 2<sup>nd</sup> August, 2018, where the applicant is seeking to have the Respondent punished for contempt of court wherein the following are cited for punishment.

**- the Managing Director**

**- Head of legal and**

**- the Respondents advocate, Mr. Mbichire Martin**

They have been cited to show cause why they should not be punished for contempt of court.

11. I am informed that the Honorable court, on 5<sup>th</sup> July, 2018 ordered that there should be no execution pending the determination of the application dated 7<sup>th</sup> June, 2018. But on 27<sup>th</sup> July, 2018, the Respondents undertook the first process of attachment by proclaiming the applicant's goods. The applicant displayed the proceedings of 5<sup>th</sup> July, 2018, the Decree signed on 19<sup>th</sup> July, 2018, application for warrants received on 24<sup>th</sup> July, 2018 in the name of Mbichire and Co. Advocates, warrants of attachment sent to Makini Auctioneers in which it is said that the Plaintiff/Respondent pointed out the Application dated 25<sup>th</sup> September, 2018, warrants issued on 25<sup>th</sup> July 2018 and the actual proclamation dated 27<sup>th</sup> July, 2018.

12. It is now statutory and trite law that knowledge of a court order is sufficient notice to restrain a Decree Holder from carrying out execution proceedings. It is clear from the documents listed in (11) above that the senior officers of the plaintiff, and their advocates were aware of the court orders as the advocate attended court through proxy and executed the order of court by filing his reply on behalf of the client and on his own behalf in opposition of the application.

I have read through the pleadings and the submissions and come to the conclusion that the respondents are contemptuous and ought to be punished in accordance with the law.

This remedy exists out for the benefit of the parties but the dignity of the court which requires that all parties called upon do submit to its authority. It is not even for the person executing its functions it is worth noting that if parties are let to flagrantly disobey court orders, there would be a vacuum which can only be filled with a banana republic-a free for the mighty. The question then becomes, where will the meek and weak run to for their disputes to be resolved?

13. I therefore find that the application dated 2<sup>nd</sup> August, 2018 has merit and the same is allowed with the following orders;

(a) Declaration that all actions taken towards execution of Decree after 5<sup>th</sup> July, 2018 are a nullity and the same are set aside except the Decree and certificate of costs.

(b) The Plaintiff /Respondents shall pay the auctioneers costs, if any are claimed.

(c) The managing Director of the plaintiff, the financial Controller and the Head of Legal, be and are hereby fined Kshs. 100,000/= to be paid forth with.

(d) The plaintiff/Respondent's advocate, Mr. Mbichire be and is hereby fined Ksh 50,000 to be paid forthwith.

(e) In default, parties to arraigned in court on 20<sup>th</sup> October, 2018 to show why they cannot be sentenced to serve prison terms.

Orders accordingly.

**Ruling delivered, dated and signed this 19<sup>th</sup> day of October, 2018.**

**LADY JUSTICE D. O. CHEPKWONY**

In the presence of:

No appearance for the Applicant

Adala, counsel holding brief for Mr. Mbichire, counsel for the Respondent

C/clerk- Beja Nduke