



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 182 OF 2015**

**ERIC MACHARIA KIGUOYA.....APPELLANT/RESPONDENT**

**- V E R S U S -**

**JUBILEE INSURANCE COMPANY**

**OF KENYA LIMITED.....RESPONDENT/APPLICANT**

**RULING**

1) The subject matter of this ruling is the motion dated 7<sup>th</sup> May 2018 taken out by Jubilee Insurance Company of Kenya Limited, the Respondent/Applicant herein, in which it sought for the following orders;

*i. The application herein be certified as urgent and heard ex parte in the first instance.*

*ii. There be a stay of execution of judgment of the honourable court (Justice J. K. Serگون) rendered on 6<sup>th</sup> April 2018 pending the hearing and determination of this application.*

*iii. There be a stay of execution of the judgment of honourable court (Justice J. K. Serگون) rendered on 6<sup>th</sup> April 2018 pending the hearing and determination of the Applicant's intended appeal.*

*iv. Costs of and incidental to this application abide the results of the Applicant's appeal.*

2) The aforesaid motion is supported by the affidavit of Margaret Kipchumba. When served with the motion Eric Macharia Kiguoya the Appellant/Respondent herein, filed the replying affidavit he swore to oppose the motion. When the motion came up for interpartes, learned counsels made oral submissions.

3) Before considering the merits or otherwise of the motion, it is important to first set out in brief the history of this matter.

Eric Macharia Kiguoya filed an action before the Chief Magistrate's Court in which he sought for judgments in the sum of ksh.4,829,780/= against Jubilee Insurance being payments for commissions for procuring insurance services to Intercontinental Hotel from the Applicant who in turn filed a counter-claim against the Respondent for a refund of ksh.5,934,669/=.

4) Hon. C. O. Obulutsa learned Senior Principal Magistrate heard the suit and dismissed both the suit and the counter-claim. Being aggrieved by the dismissal order, Eric Macharia Kiguoua preferred an appeal before this court.

5) Jubilee Insurance Co. (K) Ltd filed a cross-appeal. This court heard the appeal and in its decision delivered on 6<sup>th</sup> April 2018, the Appellant's appeal was allowed while the Respondent's cross-appeal was dismissed.

6) Being dissatisfied with this court's decision, Jubilee Insurance Company (K) Ltd filed a notice of appeal seeking to impugn the decision of this court in the Court of Appeal. The Respondent has now taken out the motion dated 7<sup>th</sup> May 2018 in which it seeks for an order for stay of execution pending appeal.

7) It is the Applicants submission that it has started the process of appealing against the decision of this court in the Court of Appeal. The Applicant further pointed out that there is real and imminent possibility that the Appellant will commence execution proceedings against the Applicant to recover the decretal sum awarded by this court unless an order for stay is given.

8) It is the Applicant's submission that the appeal will be rendered nugatory and that it would suffer substantial loss to the tune of ksh.10,764,449/= together with costs plus the cross-appeal and the suit in the magistrate's court.

- 9) It is also the submission of the Applicant that since the decretal sum is a colossal figure, it is improbable that the Appellant/ Respondent is in a position to refund the amount should the appeal succeed.
- 10) The Applicant also stated that it is ready and willing to provide security for the due performance of the decree and that the application for stay was filed without unreasonable delay.
- 11) The Appellant/Respondent strenuously opposed the application arguing that the same lack merit. It is the submission of the Appellant/Respondent that he is in gainful employment in Nairobi City County and that he is not a flight risk. He also averred that he is not bankrupt and that he owns property. It is further stated by the Appellant/Respondent that the current motion was filed in bad faith to deny him the fruits of his judgment.
- 12) The principles to be considered in determining an application for stay are well settled. Those principles are stated in Order 42 rule 6 of the Civil Procedure Rules. The **first** is that the application for stay of execution must be brought without unreasonable delay. In this case, the decision sought to be impugned was delivered on 6.4.2018. I am satisfied that the motion dated 7<sup>th</sup> May 2018 was timeously filed.
- 13) The second principle is that the Applicant must show the substantial loss he would suffer if the order for stay is denied. The Applicant has clearly stated that the Appellant/Respondent may not be in a position to refund the decretal sum if the order for stay is denied. The Respondent is of the submission that he is in a position to make a refund since he owns property and that he earns a monthly salary.
- 14) I have carefully considered the rival submissions, and the question as to whether or not the Respondent has the capability of refunding the decretal sum has to be carefully determined. It is apparent from the annexures attached to the replying affidavit that the Respondent has not given the values or estimated values of his landed properties. He has also failed to state how much he receives as a monthly salary from the Nairobi City County. It is therefore difficult to positively state that the Respondent is capable of making a refund of the decretal sum should the appeal succeed. I am therefore convinced that the Applicant has shown that it would suffer substantial loss if the order for stay is denied.
- 15) The final issue is the type of security to be given for the due performance of the decree. Both parties agree that the court has unfettered discretion to make the appropriate order. It is apparent that the Appellant/Respondent was awarded ksh.4,829,780/= plus costs. He was also awarded costs in the cross in the cross-appeal which was dismissed. I am convinced that the Applicant should deposit the principal sum pending appeal.
- 16) In the end, the motion dated 7<sup>th</sup> May 2018 is found to be meritorious. Consequently an order for stay of execution is granted pending appeal on condition that the Applicant deposits the principal sum of ksh.4,829,780/= in an interest earning account in the joint names of the advocates or firms of advocates appearing in this matter within 30 days from the date of this ruling in default the motion will be treated as having been dismissed.

**Dated, Signed and Delivered in open court this 30<sup>th</sup> day of November, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondents