



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO. 198 OF 2013**

**FRANCIS MIUTHEE T/A BELL MART..... APPELLANT**

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

**KENYA ORIENT INSURANCE LIMITED.....RESPONDENT**

**RULING**

1. Kenya Orient Insurance Co. Ltd, the respondent/applicant, took out the motion dated 3<sup>rd</sup> June 2016, in which it sought for *inter alia* an order for stay of execution pending appeal. The motion is supported by the affidavit of Terry Maina. When served, Francis Muchee T/A Bell Matt, filed a replying affidavit he swore to oppose the motion. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the application disposed of by written submissions.

2. I have considered the grounds stated on the face of the motion and the facts deponed in the supporting and replying affidavits. I have also considered the rival submissions. It is the submission of the respondent/applicant that it has filed a notice of appeal expressing its intention to challenge on appeal before the Court of Appeal the judgement of this court delivered on 20<sup>th</sup> May 2016. The respondent/applicant has argued that unless the order for stay is given then it would suffer substantial loss. It further stated that it is willing to provide security for the due performance of the decree. The respondent urged this court not to grant the order arguing that the decree being a money decree, no order for stay can be granted since he is able to refund the same when needed. The Respondent also stated that he has assets which can be attached in case of default. He was of the opinion that there is no evidence that the respondent will suffer substantial loss.

3. There is no dispute that this court delivered its ruling on 20.5.2016 in which this court set aside the order of the trial court which had set aside the *exparte* judgment entered on 20.6.2012 by substituting it with an order dismissing the motion dated 25.9.2012. The consequence of the judgment on appeal is that unless the order for stay is given, the appellant/respondent will cause the decree to be executed to recover the decretal sum of ksh.2,782,500/=.

4. The appellant/respondent has said that he will give security in form of assets which can be attached if he fails to refund the money if the appeal is successful.

5. The principles to be considered in determining an application for stay are well settled. First an applicant must show the substantial loss it would suffer if the order for stay is denied. In this motion, the respondent/applicant is saying that it will be required to settle a total sum of ksh.3,024,440/= being the decretal sum which amount is colossal and beyond the amount secured. According to the respondent/applicant, that amounts a substantial loss. The appellant/respondent has pledged to provide a collateral to be attached if he fails to make a refund. It is clear to me that the appellant/respondent does not have the financial capacity to refund the decretal sum in form of cash should the appeal succeed. In my view, the respondent/applicant has shown the substantial prejudice it may be subjected to in trying to recover the decretal sum from the appellant/respondent.

6. The second principle to consider is whether the application was filed without unreasonable delay. It is clear from the record that this court's decision was delivered on 20.5.2016 while the motion for stay was

filed on 9.6.2016. I am convinced the motion was timeously filed.

7. The third principle to consider is on security. The respondent/ applicant has proposed to deposit the decretal sum.

8. In the end, I am satisfied that the motion dated 3<sup>rd</sup> June 2016 is well founded. It is allowed in terms of prayer 4 on condition that the respondent/applicant deposits the balance of the decretal sum of 1,344,440/= in an interest earning account in the joint names of learned advocates and or firms of advocates appearing in this matter within a period of 30 days. In default the motion will be deemed to have been dismissed.

Dated, Signed and Delivered in open court this 24<sup>th</sup> day of March, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent