



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 19 OF 2017

FIDELITY SHIELD INSURANCE CO. LTD APPELLANT

VERSUS

PAMELA ATIENO WAGA RESPONDENT

(Appeal from the Judgment in Kisii CMCC No. 291 of 2012

(Hon. J.M. NJoroge - CM.)

JUDGMENT

1. A Notice of Motion dated 3rd April 2017, was filed by the appellant/applicant, **Fidelity Shield Insurance Co. Ltd**, seeking orders that there be a stay of execution of the judgment entered against it on the 21st March 2017, in **Kisii CMCC No. 291 of 2012** pending the hearing and determination of this appeal.

Inter-parties hearing of the application was slated for 9th May 2017 when the respondent despite being served with the necessary hearing notice failed to appear.

Mr. Ngethe, on behalf of the appellant was allowed by the court to proceed with the application in the absence of the respondent and/or her counsel.

2. Thereafter, this court in a ruling made on the same day allowed the application in terms of prayer (3) of the appropriate notice of motion to the extent that one half of the **decretal amount** be deposited in an interest earning bank account in the joint names of the counsel for both the appellant and respondent within the next twenty one (21) days and in default the stay order do automatically lapse.

The applicant was thus granted a conditional stay of execution pending the hearing and determination of the intended appeal.

However, the present application dated 25th May 2017 was filed by the applicant seeking basic orders that the court orders and/or clarifies the exact amount to be deposited by the appellant in an interest earning bank account in the joint names of the advocates for both the appellant and the respondent and that time be enlarged for another twenty one (21) days to enable both advocates open a joint account and deposit the amount required.

3. The application is based on the grounds contained in the notice of motion dated 25th May 2017, as fortified by the averments in the supporting affidavit dated 25th May 2017, deponed by the counsel for the appellant as well as the oral submissions by the counsel at the hearing of the application.

The respondent opposes the application on the basis of the grounds contained in a replying affidavit dated 30th May 2017, deponed by her counsel and the oral submissions made by counsel, **Mr. Juma**, at the hearing of the application.

However, Mr. Juma, indicated that the respondent would have no objection to an enlargement of time to top up the amount already deposited by the appellant.

4. Having considered the application on the basis of the supporting grounds and the submissions by both sides and with regard to prayer (2), this court may for the avoidance of doubt affirm its order of the 9th May 2017, where it clearly stated that there shall be a stay of execution on condition that one half of the decretal amount be deposited in an interest earning account in the joint names of both counsels within a period of twenty one (21) days. It has been confirmed herein that an amount of Kshs. two (2) million representing one half of the decretal amount has since been deposited by the appellant in compliance with the order of this court although belatedly i.e past the prescribed period of time. There was indication that the delay was occasioned by a stalemate between the parties over the actual amount to be deposited.

5. Whereas the appellant understood the decretal amount to mean the principal amount only, the respondent understood it to mean the principal amount together with interest and costs.

As a clarification and for the purposes of this appeal, decretal amount would mean the principal amount only i.e Kshs. four (4) million which was the respondent's claim against the appellant in the suit at the lower court. Therefore, the appellant was correct in depositing one half of such amount in terms of the court order of the 9th May 2017.

In any event, a formal decree had not been issued by the trial court to confirm the actual amount of interest payable by the appellant and therefore the decretal amount referred to by this court could not have meant the judgment (principal) amount together with interest.

Further, the draft decree served upon the appellant by the respondent was subject to approval and confirmation before it could be treated as a formal and final decree capable of being executed in accordance with the law.

6. In the circumstances, the draft decree could not at this juncture be relied upon to determine the actual amount due to the respondent from the appellant as interest.

For all the foregoing reasons prayer two (2) of the application is merited.

With regard to prayer three (3), the appellant has given a satisfactory explanation as to why one half of the decretal amount could not be deposited in a bank account within the prescribed time. The explanation was not disputed by the respondent and therefore this prayer is also merited.

In sum, the application is allowed in terms of prayers two (2) and three (3). Each party shall bear own costs.

[Delivered and signed this 1st day of August 2017].

J.R. KARANJAH

JUDGE

In the presence of

Mr. Ngethe for Appellant

Mr. Nyambati holding brief for Mr. Marwa

For the Respondent

CC Mohe