REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 69 OF 2017

CIC GENERAL INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

ONESMUS MWANZIA NGOLE..... RESPONDENT

RULING

The Application

The application before the court is a Notice of Motion dated and filed on 15th June 2017, which is filed by the Appellant, seeking orders that there be a stay of the ruling and judgment entered in the Respondent's favour on 11th May 2017 in **Machakos CMCC No. 774 of 2016,** and of the decree and all consequential orders thereto pending the hearing and determination of the appeal filed herein. The Appellant also sought an order that the Court sets aside the said ruling and judgment *ex debito justitae*.

The Appellant's grounds are set out on the face of the Notice of Motion and in a supporting affidavit sworn on the same date by its Legal officer, one Erastus M.Mbaka, a further affidavit he also swore on 29th June 2017, and submissions filed on 7th August 2017 by his advocates, O.N. Makau & Mulei Advocates.

The grounds in summary are that judgment was entered in the Respondent's favour for a sum of Kshs 164,223/= with interests from 15th May 2015 until payment in full in the in the ruling delivered by the trial Court on 11th May 2017, and that the Appellant subsequently applied for stay in the lower court on 23rd May 2017.

Interim orders of stay were issued therein on 29th May 2017 but were vacated by the trial court on 14th June 2017, when the matter was fixed for mention on 19th June 2017 for a ruling date and parties directed to file submissions. The Appellant thereupon withdrew his application for stay in the lower court and filed the instant application, as he was apprehensive that the Respondent would execute the impugned orders which are the subject of the appeal pending the determination of its application for stay.

According to the Appellant, if the orders sought herein are not granted, it will be compelled to make payment in satisfaction of the impugned judgment in favour of the Respondent, who has not demonstrated that he is a man of means and capable of repaying the judgment sum should the appeal succeed. The Appellant also states that a reasonable apprehension has been raised by the conduct of the trial court that it will not obtain a fair and impartial hearing before the said court because of the seemingly pre-determined rulings, and substantial loss may result to it unless the ruling and judgment entered on 11th May 2017 is stayed.

In addition, the Appellant stated that the application was made without unreasonable delay, that it was willing to give such security as the court may order for the due performance of such decree or order as may ultimately be binding on it, and that it was in the interest of justice that the court grants this application.

The Appellant in its further affidavit deponed that Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act does not make it mandatory for it to satisfy the judgment in the primary suit as it must be read together with Section 5(b) of the Act which provides that an insurance policy must insure such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of vehicle on a road. Further, that the Respondent's claim relates to a material damage claim to the subject motor vehicle and not with death or bodily injury, and as such is clearly not within the provisions of Section 10 of the Act.

The Appellant in its submissions reiterated the grounds of his application, and relied on the grounds on which a stay of execution can be granted under Order 42 Rule 6 of the Civil Procedure Rules. On the requirement of substantial loss, the Appellant cited the decisions in **Corporate Insurance Company Limited vs Emmy Cheptoo Letting & Another, (2015) eKLR**, **Antoine Ndiaye vs African Virtual University, (2015) eKLR,** and **James Wangalwa & Another vs Agnes Naliaka Cheseto, (2012) eKLR.**

Further, the Appellant submitted that the Respondent has not adduced any reason why a stay should not be granted. That despite stating in his replying affidavit that he is the owner of N.K.Stores hardware, the Respondent did not show proof that indeed the business earnings are sufficient to refund the decretal sum. In addition, that the Respondent alleged that he was the owner of the motor vehicle registration no. KBU 935R but did not produce a current search record in respect to the motor vehicle, and neither did he supply a current valuation of the said vehicle. That the onus was therefore on the Respondent to prove that he was not a man of straw and that the appeal will not be rendered nugatory if it succeeds, as held in **Civil Application No.Nai 15 of 2002 ABN Amro Bank,N.V-Vs-Le Monde Foods Limited**

The Appellant submitted that since the Respondent had failed to discharge his burden of proof as regards his ability to pay the decretal sum, the Appellant had established substantial loss. The Appellant also distinguished the authorities relied on by the Respondent, and submitted that the same are inapplicable in the present case as the Applicant had argued the grounds of substantial loss.

On the ground of the application being made without unreasonable delay, the Appellant submitted that the application was filed on 19th May 2017, 8 days after the ruling was delivered, and therefore was well within time. On the ground of provisions of security, the Appellant submitted that they were willing to give such security as the court may order for performance of the decree or order.

Reliance was placed on the case of **Recoda Freight & Logistic Ltd –V- Elishana Angote Okeyo, (2015) eKLR** where it was held that it is the court which should decide in its discretion what kind of security if any an applicant should provide for the due performance of a decree depending on the circumstances of each case, and that it is sufficient for purposes of compliance with Order 42 Rule 6(2)(b) if an applicant gives an undertaking that he is ready to provide the security the court would in its discretion impose .

Lastly, the Appellant also submitted in great detail on the issue of not being heard fairly by the trial court, and on the imputation of bias by the said trial court.

The Response

The Respondent opposed the Appellant's application in two Replying Affidavits he swore on 21st June 2017 and 3rd July 2017, and in submissions dated 15th August 2017 filed by his Advocate, Kamolo & Associates Advocates. The Respondent deponed that the instant application is bad in law and incompetent; an abuse of the court process and an attempt to deny him the fruits of successful litigation.

Further, that the decretal sum herein was a small amount of Kshs 164,223/-, and it would not prejudice the Appellant.

The Respondent stated that he is a businessman in Machakos operating a hardware shop in the name of N.K.Stores, and therefore if the Appellant pays him the decretal sum he would be in a position to refund the same if the appeal succeeds. He annexed a copy of his trading licence**.** In the same spirit he indicated that he was the owner of M/V Registration No KBU 935 R which is the subject of this proceedings, and which was valued by the assessor at Kshs 900,000/= hence the decretal sum of Kshs 164,223/- was a very small amount that is easily payable. He also annexed a copy of the vehicle's assessment report and log book .

According to the Respondent, the application herein has no chances of success because it arises out of a declaratory suit against the Appellant who had insured the subject motor vehicle. Further, that the allegation that the policy was cancelled for non-payment cannot invalidate the policy in view of Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act unless the court cancels or avoids the said policy.

In addition, that it is mandatory for an Insurance Company to satisfy a claim under Section 10(1) of the Insurance (Motor Vehicle Third Party) Act if Statutory notice was served on it, irrespective of whether the policy was cancelled or avoided. The Respondent went on further to state that the Appellant did not annex the policy in question to demonstrate to the court what the policy covered, and that the allegations by the Appellant that material damage cannot be claimed can only be discerned from the said policy document.

The Respondent also averred that the appeal has no chances of success because the Appellant failed to comply with the law in filing its response, and the trial court allowed the Appellant to file and argue points of law which is permissible under Order 51 Rule 14 of the Civil Procedure Rules and therefore it cannot be said that it was barred from contesting the application. Further, that the circumstances of the instant case are not one where security for costs can be given, the Appellant having failed to demonstrate what loss, either substantial or otherwise it is likely to suffer should it pay the decretal amount.

Lastly, the Respondent stated that the conduct of the Appellant is questionable and he is shopping for courts which should not be allowed. Further, that the failure by the Appellant to comply with court order because of its indolence should not be construed that the trial court was not impartial.

The Respondent's submissions were that the grant of stay was discretionary, but that Order 42 Rule 6 of the Civil Procedure Rules provided for the grounds to be considered by court in granting an order for stay, and prayer 4 of the application was therefore misplaced and cannot be granted at the interlocutory stage.

On the ground of substantial loss that the Appellant will suffer if an order of stay is not granted, the Respondent submitted that no loss would be occasioned on the Appellant since the decree was a money decree, and the Respondent had demonstrated that he would refund the said money. He relied on **Kenya Shell Limited –Vs-Kibiru & Another ,(1986) KLR 410** where the court refused to grant a stay of execution and said that the same would not render an appeal nugatory as the case involved a money decree capable of being repaid. Further, that it was the Appellant's duty to demonstrate that the Respondent was a man of straw who could not pay the decretal sum.

Finally, on the issue of security, the Respondent contended that where a decree is a money decree capable of being repaid, an order for security cannot be made, and therefore the Respondent who had demonstrated ability to refund the decretal sum in case the appeal succeeds should not be deprived of the fruits of his judgment.

The Issues and Determination

I have read and carefully considered the pleadings and submissions filed. Before considering the substantive issue before the Court, I note that the Appellant sought an order that this Court sets aside the

ruling of the trial Court and judgment *ex debito justitae*.

This prayer is also the subject of the appeal filed herein, and furthermore cannot be granted at an interlocutory stage without a hearing on the merits and demerits of the Appellant's case in the lower court, and particularly on the submissions made by the parties in this regard as to the contents of, and legal effect of the policy with respect to the Respondent's motor vehicle. Likewise, the issue of whether or not the Appellant was heard fairly and impartially by the trial court is a substantive issue in the appeal, and it will be premature to address it in this application.

The only issue properly before the Court at this stage is whether the ruling and judgment entered in the Respondent's favour on 11th May 2017 in **Machakos CMCC No. 774 of 2016** and subsequent decree should be stayed pending the hearing of the appeal. Stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules, which provides as follows:

> **"6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**
>
> **(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 application has been made without unreasonable delay; and**
>
> **(*b*) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."**

For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

> (a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;
>
> (b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and
>
> (c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties.

In the present application, this Court notes that the impugned ruling and judgment were delivered in the lower court on 11th May 2017; the Memorandum of Appeal was filed herein on 19th May 2017; while this application was filed on 15th June 2017. There was therefore no inordinate delay in filing the application.

On the fulfillment of the second condition, an applicant needs to show what specific loss or prejudice he will suffer if he pays the decretal sum. The Appellant has in this respect stated that the Respondent may not be able to refund the decretal sum in the event that its appeal succeeds. The Respondent on the other hand has averred that he is a man of means and has indicated the means at his disposal that he will use to refund the decretal sum in the event the appeal succeeds.

Lastly, on the third condition, the Appellant has indicated that he is willing to furnish security.

I note that while the judgment in the lower court was delivered in favour of the Respondent, security is being offered by the Appellant to secure the said judgment, and the Respondent will not be unduly prejudiced if the stay is granted. This will also serve to protect the Appellant's interests while the appeal heard.

Accordingly, the orders that commend themselves to me arising from the foregoing are that the Appellant's Notice of Motion dated 15th June 2017 is allowed only on the following terms:

1. There shall be a stay of execution of the ruling and judgment delivered on 11th May 2017 in **Machakos CMCC No. 774 of 2016** and of the subsequent decree and consequential orders pending the hearing and determination of the appeal filed herein, only on condition that the Appellant deposits the decretal sum of Kshs 164,223/= in an interest earning account in the joint names of the Appellant's and Respondent's Advocates on record within 30 days of the date of this ruling, failing which the stay orders herein shall stand vacated.

2. The costs of the Notice of Motion shall follow the Appeal.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 30th day of October, 2017.

P. NYAMWEYA

JUDGE