



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 457 OF 2017

U.A.P INSURANCE COMPANY LIMITED.....APPELLANT

- V E R S U S -

MASHWA BREWERIES LIMITED.....RESPONDENT

RULING

1) The background of the notice of motion dated 25th August 2017 is as follows:

Mashwa Breweries Limited, the Respondent herein, filed a compensatory Suit before the Chief Magistrate Court at Nairobi, Civil Case No.1970 of 2017 against the UAP Insurance Company Limited, the appellant herein for breach of an insurance policy contract No.104/1/011551/2009, where the respondent's property alleged to be under the insurance of the appellant was vandalized and destroyed causing the respondent to suffer loss and damage in the sum of Ksh.13,707,596.62/-.

2) Hon. P. Ngare Gesora, learned Chief Magistrate entered judgment for the plaintiff/respondent against the defendant /appellant for the sum of ksh.16,677,451.92 plus costs of the suit and interest.

3) The appellant took out the notice of motion dated 15th May 2017, and sought court seeking to set aside the default judgment dated 5th July 2015. The learned Chief Magistrate, on 17/8/2017 set aside the exparte judgment and all the consequential orders. The defendant/ appellant was granted leave to file and serve its defence. The defendant/appellant was further ordered to deposit half of the decretal amount in court to safeguard the plaintiff/respondent interest. The plaintiff/respondent was also granted thrown away costs of Ksh.50,000/= . The orders were to be complied with within 14 days in default, then exparte judgement stands. The appellant/applicant has now taken out the notice of motion dated 25th August 2017 in which it sought for the following orders:

- 1. That this application be certified as urgent and its service be dispensed with at first instance.***
- 2. That the appellant's notice of motion application seeking inter alia orders of stay of execution be admitted for hearing during the current recess of this honourable court.***
- 3. The costs of this application be in the appeal.***

4) The motion is supported by the affidavit of Joseph Rwamba Mwai. When served, the respondent filed the replying affidavit of Samuel Kimani Macharia. I have considered the facts on the face of the motion as well as the respondent's submissions. The appellant/ applicant had not filed its submissions at the time of writing this ruling.

5) The appellant/applicant avers that it is dissatisfied with the ruling of the subordinate court in so far as it imposes unfair and unreasonable pre conditions for the appellant to exercise its constitutional rights to defend itself. That the deadline set by the subordinate court for the appellant to deposit half of the decretal sum of kshs.8,499,409.96/- will expire on 30th August 2017, thereafter the respondent will proceed to execute the decree obtained pursuant to the default judgement.

6) The applicant avers that this application is in order to safeguard its appeal filed before this honourable court as well as its constitutional right to defend itself against the suit filed by the respondent in the subordinate court that was given a default judgment. The applicant further avers that if the respondent is allowed to execute the default judgement, the appellant's appeal will be rendered useless.

7) The respondent on the other hand avers that the applicant motion premised on Order 42 rule 6(2) does not meet the basic threshold for the grant of an order for stay of execution. That the applicant has not demonstrated that it stands to suffer substantial loss if the order for stay is denied. It is also argued that the applicant has not demonstrated its willingness and ability to comply with the trial court orders. The respondent further avers that staying the proceedings in the lower court is unnecessary given that leave to defend has already been granted, and the intended appeal does not touch on the merits of the case. That the applicant's reluctance to comply with the trial court orders demonstrates clearly that the applicant may struggle to compensate the respondent in the event the matter is decided in the respondents favour. Finally, it is the respondent's submission that the applicant is in the business of collecting money as premiums, therefore its refusal to honour its contractual obligations is untenable.

8) The principles to be considered in determining an application for stay are well stated under Order 42 of the Civil Procedure Rules. First, an applicant must show the substantial loss it would suffer if the order for stay is denied. Secondly, the application for stay should be filed without unreasonable delay. Thirdly that the court should consider the provision of security for the due performance of the decree.

9) On the first principle, the appellant/applicant is of the view that it would suffer substantial loss if the order for stay is denied because, the deadline set by the subordinate court for the appellant to deposit half of the decretal sum of kshs.8,499,409.96 will expire on 30th August 2017, thereafter the respondent may execute the decree. The respondent on the other hand states that the applicant has not demonstrated that it stands to suffer substantial loss if the orders by the trial court remain in place. It is not in dispute that if the order for stay is denied, the respondent will execute the decree. That in my view will render the appeal superfluous. I am satisfied that the applicant will suffer substantial loss.

10) The second principle is that the application should be filed without unreasonable delay. It is apparent on record, that this appeal was filed on 28.08.2017 while the motion was filed on 28.08.2017. I am satisfied that the motion was timeously filed.

11) The third principle is the provision of security for the due performance of the decree. It is apparent that the trial court has given the appellant conditional leave to defend the suit. It was ordered to deposit half the judgement sum. The appellant is before this court seeking to challenge the order. In the circumstances of this case it will be unfair to impose any condition against the appellant because it may prevent it from pursuing its constitutional right to pursue this appeal.

12) In the end, the order for stay is granted to last for 120 days . The appellant to prepare, file and serve the Record of Appeal within 21 days. Mention on 22/1/2018 for admission and directions.

Dated, Signed and Delivered in open court this 20th day of December, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent