



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CIVIL APPEAL NO. 13 OF 2016

KENINDIA ASSURANCE CO. LTD.....APPLICANT

VERSUS

BUSWAYS KENYA LTD.....RESPONDENT

RULING

1. On 18th May, 2016, the Applicant, Kenindia Assurance Company Limited appeared before Tuiyott, J under a certificate of urgency in respect of the Notice of Motion application dated 17th May, 2016 and obtained orders in respect of prayer No. 2 pending inter-partes hearing of the application on 7th June, 2016.

2. When the advocates appeared before me on 7th June, 2016, Mr. Maganga for the Applicant correctly indicated that the only prayers that needed the attention of this Court were number 3 and 5 in which the Applicant prays for orders as follows:

“(3) THAT the Honourable Court be pleased to grant a stay of execution of decree in BUSIA CHIEF MAGISTRATE’S CIVIL SUIT NO. 163 OF 2014 pending the hearing and determination of the Appeal filed in the High Court of Kenya at Busia.

(4)....

(5) THAT the Costs of this application be provided for.”

3. The application is supported by grounds on its face as follows:

“(a) THAT a Memorandum of Appeal has been filed in the High Court of Kenya at Busia against the Ruling of the Trial Magistrate delivered on 21.4.2016 being the Busia High Court Civil Appeal No. 13 of 2016.

(b) THAT the Appeal has good chances of success.

(c) THAT the Respondent/Decree Holder herein is a person of straw as per its evidence in Court and as such if half the decretal amount, half the costs and half the interest is paid to it, the Appeal will be rendered nugatory as it will be well nigh impossible to recover the same from the Respondent/Decree Holder if the Appeal succeeds.

(d) THAT the Appellant/Applicant is willing to furnish such security as the Honourable Court may order for the due performance of the Decree.”

Those grounds are reiterated and expounded in the supporting affidavit sworn on 17th May, 2016 by the Applicant's Legal Officer Joseph Gachigua.

4. The Respondent, Busways Kenya Limited opposed the application through grounds of opposition dated 19th May, 2016 and a replying affidavit sworn by its Busia Regional Manager, Ahmed Noah Mohamed on 3rd June, 2016.

5. In summary, the Respondent's position is that the application is brought in bad faith, defective, unmerited, scandalous, frivolous, and an abuse of the court process only meant to delay the finalization of the matter before the lower Court and the application should thus be dismissed with costs.

6. It is the Respondent's case that this application is *res judicata* as a similar application had been dismissed by the lower Court.

7. The Respondent also contends that by virtue of Section 75 of the Civil Procedure Act, the Applicant ought to have obtained leave before filing the appeal against the Magistrate's order rejecting its application of stay. It is the Respondent's position that there being no leave sought and granted by either this Court or the lower Court, there is no proper appeal thus rendering this application of no use.

8. In addressing an application like the one before this Court, the starting point is to acknowledge that the Court has discretionary power to grant stay upon certain conditions being met. The exercise of such power ought to be equitable.

9. The Court ought to strive to strike a balance between the compelling interest of the applicant and the respondent. An applicant's aim is to ensure that its appeal, if successful, should not be rendered nugatory. On its part the respondent ought not to be frustrated from enjoying the fruits of its judgment.

10. The reasoning behind the decision being appealed from has not been placed before the Court. I have however seen the Memorandum of Appeal filed in Civil Appeal No. 13 of 2016 and on the face of it one can say that the Applicant has established an arguable case.

11. Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 provides the conditions to be met by an applicant who seeks stay of execution as follows:

(a) that substantial loss may result to the applicant unless the application is granted;

(b) the application is made without delay; and

(c) the applicant has furnished such security, as the court orders, for the due performance of the decree.

12. The Applicant was categorical that the Respondent is a person of straw and may not be able to pay back any amount it receives should the appeal succeed. I do not seem to see any clear and cogent rebuttal of this assertion on the part of the Respondent.

13. Be that as it may be, what is before this Court is a monetary decree. It has been stated that it is not enough for a party to claim that unless stay is granted it would suffer substantial loss.

14. In the case of **Kenya Shell Limited v Kibiru & another [1986] KLR 410**, Gachuhi, Ag JA put across this point at page 417 as follows:

“It is not sufficient by merely stating that the sum of shs. 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that *status quo* should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other

hand, granting the stay would be denying a successful litigant of the fruits of his judgment. The applicant has not given to court sufficient materials to enable it exercise its discretion in granting the order of stay.”

15. In the case before me, the lower Court has given conditional stay. The Applicant did not comply with that and only moved to upset it towards the end of the period given to it to comply.

16. In any case, the decretal amount awarded in the lower court has not been disclosed and it cannot be said that in the event of a successful appeal the Respondent will not be in a position to repay the money. There is no allegation on the part of the Applicant that the magistrate’s court did not consider the requirements of Order 42 Rule 6 before exercising discretion.

17. The Applicant was directed by the lower Court to pay half the decretal amount, costs and interest and it has not indicated that the said order is punitive in any way.

18. Between the competing rights of the Applicant and the Respondent I find that the decision delivered by the Magistrate on 21st April, 2016 is reasonable and there is no reason for disturbing it. Consequently, the application dated 17th May, 2016 fails and the same is dismissed with costs to the Respondent.

Dated, signed and delivered at Busia this 21st day of June, 2016.

W. KORIR,

JUDGE OF THE HIGH COURT

21.6.16

Before W. Korir, J

C/Assistant – Orwasa

Mr. Ipapu for Mr. Ashioya for Respondent – present

N/A for Applicant/Appellant

Court: Ruling dated 21/6/2016 read and signed in open court.

W. KORIR

JUDGE OF THE HIGH COURT