



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL DIVISION**  
**CIVIL APPEAL NO. 65 OF 2015**

**INVESCO ASSURANCE COMPANY LIMITED..... APPELLANT**

**VERSUS**

**MWANGI KENGARA .....RESPONDENT**

**RULING**

1. This is a ruling on three applications made by the Appellant in this Appeal and Civil Appeal Nos. 63 and 64 of 2015 between the parties herein. All the three applications are similar and they were argued together in this appeal and one ruling was to be delivered in respect of all of them. This ruling, therefore applies to Civil Appeals No. 63 and 64 of 2015 as well.

2. The applications dated 20/2/2015 were brought under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules. They sought an order for stay of execution of the decrees in CMCC Misc. Appl. No. 5799, 5165 and 5798 of all 2014, respectively pending the hearing and determination of the appeals herein. The Applicant also sought an order to deposit the decretal sums in court or joint interest earning accounts.

3. The grounds for the applications were set out in the body of the Motions and Supporting Affidavits of Carolyn Shavulimo sworn on 20<sup>th</sup> February, 2014, respectively. The applicant contended that its applications to set aside exparte judgment in the lower court had been dismissed and had preferred appeals in this court; that those appeals raise weighty matters as could be seen from the Memorandum of Appeals.

4. The Applicant's case was that the Respondent had filed three (3) suits in the lower court for her costs claiming a total sum of Kshs.1,150,843/-. Judgments had been entered in those suits exparte for the said total amount, but the Applicant's application to set the same aside had been dismissed by the lower court. That the Respondent, as one of the Applicant's Advocates under retainer had through the years been paid a total sum of Kshs.20,818,336/- pursuant to a global scheme. That the Respondent had resorted to filing bills of costs against the Applicant contrary to the said global scheme and that the Respondent had failed to account for the said sum of Kshs.20,818,336/-. That the Respondent had commenced execution through Garnishee proceedings.

5. Counsel for the Applicant submitted that the Applicant was highly prejudiced in that, during taxations of the Respondent's bills of costs, the taxing master does not take into consideration the said amount so far paid to the Respondent on the basis that such an issue is only to be taken into consideration at the

enforcement suits; that by having *ex parte* judgments entered against it, the Applicant's defences have been shut out and the issue of the amount so far paid to the Respondent may never be canvassed. That no credit has so far been given to the Applicant for the sum of Kshs.20,818,336/- paid under the global scheme; counsel submitted that since there was security for the decretal sum by way of a garnishee order made in the lower court, the stay sought should be granted. Counsel therefore, urged that the orders sought be granted.

6. The applications were opposed vide the Replying Affidavits of Mercy Nduta Mwangi, sworn on 2<sup>nd</sup> March, 2014, respectively. She deponed that the amount being executed for was in respect of certificates of costs which had not been varied or set aside; that the Defendant had failed to enter appearance to the suits in the lower court even after being properly served. That judgment was entered in her favour and she was in the process of executing the same by way of Garnishee proceedings.

7. The Respondent contended that the proposed defences in the lower court were not proper defences to the certificates of costs; that the judgments were in respect of her legal fees for suits she had acted on behalf of the Applicant for approximately 10 yrs. She further contended and submitted that she is an Advocate of 19 years standing, and owns rental apartments at Umoja Innercore Plot D1 wherefrom she receives rental of Kshs.480,000/= monthly; that she makes a monthly income of Kshs.500,000/= from her law firm and she owns a residential house at Loresho valued at Kshs.80 million. She was therefore a lady of substance capable of refunding the money if paid over to her and the appeal succeeds. She submitted that to the contrary, the Applicant was in serious debts; that the applicant had just emerged from statutory management and accordingly, it would be prejudicial to her if the orders sought are granted. She urged that the applications be dismissed.

8. I have carefully considered the Affidavits on record, the bulky exhibits relied on and the submissions of Counsel. Although the applications were brought under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules, the principal prayers thereon are for stay of execution of the decrees in the named suits in the lower court pending the determination of the various appeals that have been filed. To my mind, these are simple applications for stay of execution pending appeal that are ordinarily brought under Order 42 Rule 6 of the Civil Procedure Rules.

9. An application of this sort is purely in the discretion of the court. However, judicial discretion is not to be exercised whimsically. It is to be exercised judiciously, according to rules of reason and justice not of private opinion of the judicial officer; it has to be in accordance with the law, not arbitrary, vague or fanciful but legally and in a regular manner.

10. That being the case, on what basis will this court exercise its discretion? It will be on the basis of whether the applications have been brought timeously, whether the Applicant will suffer substantial loss if the orders sought are not granted and finally, whether the Applicant has given any security for the performance of the decree or order that will ultimately be binding on it.

11. The orders appealed against were made on 3<sup>rd</sup> February, 2015. The present applications were lodged on 20<sup>th</sup> February, 2015, within a period of 17 days. I have always held the view that the term "within a reasonable time" in Order 42 Rule 6 would be any time within the time given for appealing against a lower court order, to wit, 30 days. I hold that view because, that being the period within which a loser is allowed to challenge an order or decree from a lower court, to demand for a lesser period would be unreasonable in that such a party's rights or position would not have been impaired until after the expiry of the 30 days period given for appealing. In this regard, I am satisfied that the Applications in this matter were made timeously.

12. As to security, the Applicant was candid and in Prayer 5 of the applications, it offered to have the decretal amount deposited into a joint interest bearing account in the names of Counsels for the parties. Further, it is not in dispute that the Respondent had already commenced execution. She had already obtained garnishee orders in November, 2014 in the lower courts. It is clear, therefore, that the decrees are already secured. In this regard, I am satisfied that there is security enough given by the Applicant for the performance of the decrees that may ultimately be binding on it.

13. In an application such as the ones under consideration, there are always two competing lawful interests; the decree holder's right to receive his/her fruits of a lawful judgment without undue delay and the Judgment-debtor's undoubtable right to appeal, a right to have a second opinion on his/her case.

14. In my view, these two competing interests are well balanced when the court in the exercise of its discretion considers the principle that the Applicant should not suffer substantial loss by the court failing to grant the orders sought and to consider, that the decree holder will not be unnecessarily be kept away from the fruits of his/her judgment.

15. In the instant case, the Applicant did not allege that the Respondent was a person of straw, that if the Applicant paid over the decretal amount and the appeals succeeded, it may not be able to recover the same from the Respondent. On her part, the Respondent swore that she is a person of means; she owns a property at Umoja Innercore wherefrom she receives a monthly rental of Kshs.480,000/=, that she also makes about Kshs.500,000/- per month from her law firm. In addition, she swore to her ownership of a property in Loresho valued at Kshs.80,000,000/-. In her view, she is worth over Kshs.160 million. The decretal amount is slightly over Kshs.1million. In the circumstances, will the Applicant suffer substantial loss if it paid over the decretal sum to the Respondent and the appeals succeeded? I do not think so. The Respondent has effectively showed that she is not a person of straw. She will be capable of refunding the decretal sum if it is paid over to her and the Applicant ultimately succeeds in its appeals.

16. Before penning off, there is one issue that the parties addressed and I think it is important to address it. The Applicant complained and produced documents to show that it had paid the Respondent over the years fees deposit exceeding Kshs.20million, that unless the stay was granted until the Respondent accounted for the said sum, the Applicant may never have any recompense. On the other hand, the Respondent submitted that the application before court was not one for an account by an Advocate; that such an application should be by way of an Originating Summons under Order 52 of the Civil Procedure Rules.

17. I think I agree with the Respondent. If it be true that the Applicant paid over to the Respondent the alleged sum of Kshs.20million plus and the same has not been accounted for, the law has provided for a remedy by way of accounts. The Respondent cannot be hamstrung or prevented from enjoying the fruits of legally obtained judgments on the ground that there is money that had been received but not yet accounted for by her. Let the Applicant follow the law in pursuing what it perceives to be its interests and rights.

18. The upshot is that the applications have no merit and the same are hereby dismissed with costs.

DATED and DELIVERED at Nairobi this 22<sup>nd</sup> day of May, 2015.

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**A. MABEYA**

**JUDGE**