



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL MISCELLANEOUS APPLICATION NO. 251 OF 2013

MAKAU KAITHU MUSOMBA &

ZIPPORAH KOKI MUIVA (Both suing as

next of kin to and on behalf of the estate of

JOSEPH GAITHO MAKAU (Deceased)..... RESPONDENT

VERSUS

CORPORATE INSURANCE CO. LTD..... APPLICANT

R U L I N G

1. By an application dated 8th October 2013 the applicant seeks an order for stay of execution of the judgment entered on the 7th May 2013 in Machakos CMCC No. 42 of 2009 and all consequential orders, decrees pending hearing and determination of the appeal filed.
2. The application is based on the grounds that the appeal lodged against the judgment is arguable and has high chances of succeeding; unless orders sought are granted the appeal will be rendered nugatory and that the applicant will suffer substantial loss if the order sought is not granted.
3. In an affidavit in support of the application the Chief Legal Officer of the applicant, **Nancy Shikuku** depones that in the judgment in Machakos CMCC 42 of 2009, a declaration had been made by the court that the applicant was liable to satisfy the judgment in Machakos CMCC No. 461 of 2004 for a sum of Ksh.2,226,530 together with interest and costs. The applicant was however aggrieved since the court failed to consider substantive issues of law and facts raised in the pleadings, during hearing and in submissions.
4. An application was filed and the court ordered stay of execution on condition that the applicant pays the respondent half the decretal sum and the other half be deposited in the form of insurance bond. But, since the respondent did not tender evidence of earnings or known occupation, the applicant is apprehensive that if Ksh.1,113,265 is released to the respondent and the appeal succeeds it will be rendered nugatory. The applicant is however willing to deposit the security required by the court.
5. In a response thereto, the respondent stated that the applicant disobeyed the court order to pay half of the decretal sum to them as ordered. No appeal has been filed against the ruling delivered on the 27th September 2013. The applicant has not explained failure to comply with the court order therefore the court cannot aid an illegality.
6. In a supplementary affidavit sworn, it is deponed that the applicant was not in contempt of the court order but had only moved the court seeking redress permitted by the law.
7. The application was canvassed by way of submissions which I have taken into consideration. Conditions for granting the order sought are stipulated in Order 42 Rule 6(1)(2) of the Civil

Procedure Rules that provides thus :

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.***

It has been demonstrated that an application for stay was made to the lower court from which the appeal is being made. It was granted and conditions set which the applicant could not meet hence the application being made to this court. The law allows this court to consider the application and grant orders it deems just. This court will therefore consider whether;

- i) The application has been made without unreasonable delay.
 - ii) Whether substantial loss may result if the order is not granted.
 - iii) Whether the applicant can deposit some security.
8. The judgment in the lower court was delivered on the 7th May 2013. An application for stay of judgment was filed in the Chief Magistrate’s Court. A ruling thereof was delivered on the 27th May 2013. A conditional stay order was issued to be complied with within 14 days. The instant application was filed 12 days later. In the case of the ***Standard Chartered Bank Ltd. Versus Florence Mueni Kyalo (2000)eKLR*** the court of Appeal stated that 32 days in taking out the motion is long but not inordinate. The applicant had acted fast in lodging its earlier appeal, clearly showing that it was keen in pursuing its appeal.
 9. The application having been made 12 days after the delivery of the ruling there was no delay on the part of the applicant. Having acted soon thereafter was an illustration of seriousness on the part of the applicant of the intention to pursue the appeal. The application was therefore within time.
 10. It has been argued that if the appeal succeeds and the respondents are not able to refund the sum decreed if paid then the applicant will suffer irreparable loss. Substantial loss was considered in the case of ***Rhoda Mukuma versus John Abouga 1988 KLR 645*** where the court of Appeal held that:

“...substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be presented by preserving the status quo because such loss will render the appeal nugatory.”

I have perused a copy of the memorandum of appeal filed. It raises pertinent issues. If the appeal succeeds and the sum paid out is not refunded then the applicant shall indeed suffer irreparable loss. I say so because in their averments the respondents have not demonstrated how they are likely to make a refund in event the appeal succeeds.

11. As provided by the law the applicant has offered to give security for the due performance of the decree. It is therefore ordered that there be stay of execution of the judgment delivered on the 7th

May 2013 in Machakos CMCC. No.42 of 2009 pending hearing and determination of the Appeal on condition that the applicant deposits the decretal sum in court within 14 days. In default, execution to issue.
12.It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 3RD day of APRIL, 2014.

L.N. MUTENDE

JUDGE