



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 79 OF 2013

***(BEING AN APPEAL FROM THE RULING DELIVERED ON 13TH DAY OF JUNE 2013 IN HOLA
SRMCC NO. 3 OF 2013)***

KENYA ORIENT INSURANCE CO. LTD APPELLANT

V E R S U S

1. MOHAMED DULO DIMA ALIAS

MOH'D OMAR DIMA1ST RESPONDENT

2. MWANAMISI MAYOA BUYA ALIAS

MWANAHAMISI OMAR 2ND RESPONDENT

3. FATUMA BATULA BOCHA ALIAS

BATULI OMAR 3RD RESPONDENT

RULING

- 1. MOHAMED DULO DIMA alias MOH'D OMAR DIMA, MWANAMISI MAYOA BUYA alias MWANAHAMISI OMAR and FATUMA BATULA BOCHA alias BATULI OMAR** were injured in a motor vehicle accident. They all sued the owner of the vehicle and obtained judgment. When the owner was unable to pay the judgment amount they filed a suit for declaratory judgement against the Appellant Kenya Orient Insurance Company Limited. All those declaratory suits were filed before Hola Senior Magistrate's Court being **Civil Case Nos. 3 of 2013, 4 of 2013, 5 of 2013** respectively.
2. This Appeal is directed towards the said Magistrate's Court decision to strike out the Appellant's defence in those declaratory suits.
3. The Appellant filed in this appeal an application dated 19th June 2013 for stay pending appeal. The application is supported by two affidavits. One is by the Advocate for the Appellant and the other one is by the Appellant's Legal Officer.
4. At this early stage I wish to deal with an issue raised by the Respondents regard to those two affidavits. In respect to the affidavit of Sarah Weru the Legal Officer of the Appellant I confirm

that the same indicates the deponents residence as required under Order 19 rule 4 of the Civil Procedure Rules 2010. That Rule provides as follows-

“Every affidavit shall state the description, true place of abode and postal address of the deponent, and if the deponent is a minor shall state his age.”

The deponent in compliance to that Rule stated in her affidavit-

“I Sarah Weru of P.O. Box No. 34530-00100, NAIROBI in the Republic of Kenya wherein I also reside”

As will be seen the Appellant's Legal Officer indicated her place of residence. The Respondents objection in that regard is therefore rejected.

5. The Respondents submitted that Sarah Weru being a Legal Officer of the Appellant had failed to state that she was also authorized to swear her affidavit by the Appellant. In that regard the Respondent relied on the case **ELITE EARTH MOVERS LTD -VS- KRISHAS BEHAL & SONS (2005) I KLR** where it was stated-

“1. It is now a matter of judicial notoriety that an affidavit by a corporation whether of verification of a plaint or an application thereunder, will be struck out on the ground of being defective and incompetent if it is not authorized and signed by a person who is not only an officer of the corporation, but must also be authorized to so sign.

2. ***The deponent of the affidavit, as General Manager of the plaintiff decree holder was required under law to say in that capacity of General Manager, he is or has been authorized to sign the affidavit failing which the law will regard his affidavit as defective and incompetent.***
 3. ***The Court can excuse a failure to date an affidavit that is duly signed and filed under Order 18 rule 7 of the Civil Procedure Rules.”***
6. Weru in her affidavit in respect of that requirement deponed as follows-

“That I am the Appellant's Legal Officer and duly authorised to swear this affidavit.”
(underlining mine)

That paragraph of her affidavit I believe adequately answers the Respondents objection. The deponent clearly stated that she was authorized to swear the affidavit.

7. The Respondent also objected not only to the Appellant's motion but also to the appeal itself by arguing that since the appeal was a decision from the Homa Bay Magistrate's Court the Court that should have entertained the appeal should have been Garissa High Court and not Mombasa High Court. The Respondent objection is rejected because if indeed administratively the correct Court to entertain this appeal is Garissa High Court at most what this Court would do is to transfer this Appeal to Garissa High Court. This Court however has not been so moved. There is therefore no sufficient reason shown to this Court which can lead this Court to strike out the Appeal. It ought to be noted also that to date there is no Act of Parliament which sets out how the High Court should be organized as provided by Article 165(b) of the Constitution of Kenya, 2010. That being so, and since that Article does not limit the matters to be heard by any of the High Court stations the Respondent's objection is rejected.
8. The final objection by the Respondents was to the affidavit filed by the Appellant's learned Counsel in support of the Motion. The Advocates (Practice) Rules under the Advocates Act Cap 16 in particular Rule 9 provides that no Advocate can appear for a party before any Court or Tribunal in a matter he has reason to believe that he may be required as a witness to give evidence. It is this Rule which forbids Advocates from making depositions over matters in controversy. In this case the Appellant's Advocate mainly Ms Lai Clare deponed that the Appellant would suffer

substantial loss if stay of execution was not granted. In this regard such deposition does relate to matters in controversy and which matters could lead an Advocate to be called as a witness. That being so, the Court does hereby strike out paragraphs 11 and 13 of the affidavit of Ms Lai Clare sworn on 19th June 2013.

9. It should however be noted that Ms Lai Clare did state that she had authority of the Appellant to swear the affidavit. The Respondents objection in that regard therefore is rejected.

10. Under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 a Court

can grant stay of execution pending appeal if it is satisfied that substantial loss may result to an Applicant unless the order is granted. Such an application should be made without unreasonable delay. In hearing such an application the Court may order for the provision of security by the Applicant.

11. The Appellant through its Legal Officer deponed as follows-

“THAT the Appellant is bound to lose substantially should the orders sought not be granted and the judgment sum will be beyond the Respondent’s reach in the event that the appeal is successful.”

It is that paragraph that the Appellant seeks to rely on in support of its submissions that it will suffer substantial loss if stay is not granted. In response the Respondents stated as follows in their written submissions-

“Substantial loss is the cornerstone of grant of stay of execution. The appellant has not alleged that the respondent is a man of straw. The appellant has further not stated why the substantial loss may result or why the decretal sum will be out of the appellants reach. This Court is being called upon to speculate but a court of law will act on evidence. Clearly the burden of prove rests with the appellant and without any iota of evidence, the burden does not shift to the respondent.”

12. I dare say that the Respondents are wrong to state that the burden to

prove that they would not be able to repay the decretal sum was on the Appellant. This is what the Court of Appeal stated when presented with a similar argument in the case **NRB CIVIL APPLICATION 238 OF 2005 (UIR 144/2005) NATIONAL INDUSTRIAL CREDIT BANK LTD -VS- AQUINAS FRANCIS WASIKE & ANOTHER-**

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

The Respondents having failed to state how, if the appeal was successful they would repay Appellant the Court does find that Appellant may suffer substantial loss if stay is not granted.

13. The Court on 19th June 2013 when the Appellant’s Advocate appeared

exparte with the Motion under consideration ordered that as a condition of issuing a stay of execution the Appellant would deposit into Court the decretal sum in respect of each of the Respondents cases. The Appellant did indeed deposit into Court three cheques of Kshs. 347, 428/-

and for Kshs. 396, 928/- and for Kshs. 415,855/-. Appellant in my view has provided security for the due performance of the three decrees of the lower Court.

14. The Notice of Motion being considered was filed within six days of the

lower Court's ruling and accordingly the appellant has satisfied all the requirements of Order 42 Rule 6.

15. The Court grants the following orders-

- a. **A stay of execution in respect of Hola SRMCC No. 3 of 2013, 4 of 2013 and 5 of 2013 is granted pending the determination of this appeal on condition that the Appellant does deposit the decretal sum in respect of each decree in those cases in the joint account of both Advocates in this appeal within 30 days. In that regard the Appellant is hereby granted leave to withdraw the money deposited by it in Malindi HCCA Nos. 24 of 2013, 25 of 2013 and 26 of 2013.**
- b. **The Costs of the Notice of Motion dated 19th June 2013 shall abide with the outcome of this appeal.**
- c. **For the purpose of this appeal the Court orders that the order of appearance of the Respondents be as follows-**

MOHAMED DULO DIMA alias MOH'D OMAR DIMA shall be 1st Respondent, MWANAMISI MAYOA BUYA alias MWANAHAMISI OMAR shall be 2nd Respondent and FATUMA BATULA BOCHA alias BATULI OMAR shall be 3rd Respondent.

Dated and delivered at Mombasa this 31st day of October, 2013.

MARY KASANGO

JUDGE