



REPUBLIC OF KENYA

High Court at Mombasa

Civil Appeal 112 of 2012

ALI SHUBER HABSBY *alias* HABSHI NASSIRAPPELLANT

VERSUS

MEMBEYU BULE

***alias* MEMBETU BULE.....RESPONDENT**

RULING

1. This is the Appellant's notice of motion dated 2nd March, 2012 seeking stay of proceedings in the lower court pending appeal. The Applicant filed an appeal on 22nd June 2011 against the Ruling of Honourable Aminga, Resident Magistrate, Kwale dated 25th May, 2011, in PMCC Number 183 of 2009. The learned Magistrate's ruling declined to grant the Defendant leave to amend his defence.
2. This application is supported by the affidavit of Lillian Waweru, the Legal Manager of Directline Assurance Company Limited, the insurers of motor vehicle registration number KAU 835 J at whose instance the claim in the lower court was defended. When the matter first came up under certificate, the court granted an interim order staying the lower court proceedings pending the *interpartes* hearing of the application. The applicant fears that the appeal will be rendered nugatory if the hearing of the suit proceeds.
3. The Respondent on 12th April 2012 filed her Replying Affidavit. She states, inter *alia*, that: the Applicant's similar application in the lower court was dismissed; that the Applicant merely wishes to delay the hearing of the case in the lower court; that there is no basis established by the Applicant for granting stay of proceedings.
4. The parties filed written submissions to dispose of the application. It is not seriously in dispute that the principles for grant of stay pending appeal are:
 - a) That the appeal is not frivolous and is arguable, and
 - b) That the appeal will be rendered nugatory unless the application is allowed

5. The Applicant argues that the Respondent closed her case in the lower court on 3rd March, 2010 and that it was not until 7th April, 2011 that the Applicant filed the application for amendment. The amendment application lacked merit as seeking to reopen the Respondent's case which would be prejudicial to it.

6. After carefully considering the parties' submissions, I may point out that I am not required at this stage, to consider the merits of the amendment application; only the application for stay.

Order 42 Rule 6 (2) Civil Procedure Rules provides as follows:

"2. No order stay for stay of execution shall be made under subrule (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.

7. Under Order 42 Rule 6(3) the court even has power to order stay without a formal application. In this case, I have perused the Memorandum of Appeal and am satisfied that the appeal is triable and not frivolous.

Further, I am satisfied that should the hearing in the lower court continue whilst the appeal is pending, any outcome there would make nonsense of the appeal. If for example on appeal it was found that the Defendant was entitled to amend the defence, and the proceedings in the lower court proceed without such an amendment, the Defendant would have been seriously prejudiced and the substratum of the appeal would fall away.

8. In the circumstances, I will allow the application on the following conditions:

a) The Applicant shall pursue the appeal with utmost despatch and take all reasonable steps to ensure that:

i) the appeal has been admitted

ii) the Record of Appeal is duly prepared and filed

iii) all steps for issuance of directions on the hearing of the appeal are made.

2. The foregoing steps shall be taken or achieved within sixty (60) days from the date hereof failing which the stay granted herein may, at the discretion of the court, be vacated.

3. In accordance with the parties' consent recorded as an order on 5th September, 2012, this Ruling shall and is hereby adopted in respect of file HCCA 111/2011.

Orders accordingly.

Dated, signed this 18th day of October, 2012

**R.M. MWONGO
JUDGE**

Read in open court

Coram:

Judge: E.Muriithi, on 22nd Day of October, 2012

Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a).....
- b).....
- c).....
- d).....