



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CIVIL APPEAL NO.65 OF 2009

(Appeal arising from original BGM CM CC NO.448 of 2006)

MADISON INSURANCE COMPANY LTD :..... APPELLANT

~VRS~

ALI ABUBAKAR ALI :..... RESPONDENT

RULING

The Applicant Madison Insurance Company Ltd in its application dated 23/10/2009 seeks for stay of execution in CMCC No.448 of 2008 pending hearing and determination of this appeal.

The Applicant had filed a similar application in the Chief Magistrate's Court which was dismissed. The grounds are that the Applicant was dissatisfied with the judgment of the lower court against which he has appealed. The appeal may be rendered nugatory if the said orders are not granted. The Respondent is likely to execute any time. The Applicant is willing to deposit the decretal amount as security for judgment.

The application was opposed on grounds that the Applicant has failed to show that he is likely to suffer any substantial loss if the orders are not granted. The Respondent is capable of refunding the decretal amount in the event that the appeal succeeds.

I have considered the grounds and the reply of both parties and the arguments of the counsels for the parties. This application is brought under Order XLI rule IV which calls for the Applicant to satisfy the court that:

- a) The application is brought without undue delay.**
- b) That the Applicant is likely to suffer substantial loss in the event that the orders sought are not granted.**

c) That the Applicant has offered security for due performance of the decree.

The ruling of the Resident Magistrate for refusal of orders for stay pending appeal was delivered on 22/10/2009 while this application was filed the following day. There was therefore no delay in filing this application.

The Applicant offers to deposit the decretal amount in interest earning account in the names of both counsels for the parties. The Applicant is therefore ready to give security for the Plaintiff's judgment.

On the issue of the condition of substantial loss likely to be suffered, the Applicant has not shown how he will be affected by the refusal of the orders. The mere mention on paragraph 9 of the supporting affidavit that execution is likely to be carried out is not sufficient to show substantial loss. The Applicant has not even suggested that if the Respondent is paid the decretal amount, that he is incapable to refund the money. The Respondent in his replying affidavit has said that he is capable of refunding the money an averment which has not been challenged. The decretal amount is only Ksh.241,000/= and together with costs may still be less than Ksh.300,000/=. The pleadings of the magistrate court show that the Respondent was able to take out several education policies for his children. Such a person is not a man of straw and has the capacity to refund such a meager sum. This condition of substantial loss is the backbone condition to granting an application of this nature. I find that the Applicant has failed to satisfy the requirement. It has been held in several Court of Appeal decisions that a money decree ought not to be frustrated by orders for stay pending appeal. The reason is that it is easier to deal with a case of money refund than of execution of orders relating to real property transfers and other complex issues.

It is my finding that the Applicant has failed to convince this court that it deserves the orders sought. I hereby dismiss the application with costs.

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F. N. MUCHEMI
JUDGE

Ruling dated and delivered on the 10th day of March, 2011 in the presence of Mr. Situma for Mr. Onyando for the Respondent and Mr. Khakula for the Applicant.

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F. N. MUCHEMI
JUDGE