



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CORAM: F. AZANGALALA J.

CIVIL APPEAL NO. 17 OF 2008

BETWEEN

AFRICAN MERCHANT ASSURANCE CO. LTD.....APPELLANT

A N D

ROBERT OMONDI ONYANGO.....1ST RESPONDENT
ELIZABETH ANYANGO ODONGO.....2ND RESPONDENT

(Being an appeal from the Judgment of the Resident Magistrate –

I. Maisiba dated 6th February, 2008 at Eldoret in Civil Case No. 882 of 2006)

RULING

I have before me an application by way of Notice of Motion dated 16th December, 2010, by **African**

Merchant Assurance Company Limited (hereinafter “**the applicant**”). The application is expressed to be brought under the provisions of Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and Sections 1a, 3A and 63 (e) of the Civil Procedure Act and all other enabling provisions of the Law. The main order sought is stay of execution pending the hearing and determination of an intended appeal to the Court of Appeal.

The main reason for the application is that unless the stay is ordered, the appeal shall be rendered nugatory and the applicant shall suffer irreparable loss and damage. That contention is made because, in the applicant’s view, the respondents are men of straw and if the decretal amount is paid out to them, they will not be in a position to refund the same in the event the appeal succeeds.

The application is supported by an affidavit sworn by one **Daphine Kemunto**, the applicant’s Legal Officer. In the affidavit, it is deposed, *inter alia*, that the applicant has given notice of appeal in respect of the judgment entered against it and that the intended appeal has high chances of success; that the respondents are men of straw and if the decretal sum is paid out to them, they will be unable to refund the same should the appeal succeed; that the applicants had in compliance with an earlier order of stay deposited the entire decretal amount in a joint interest earning account and that the respondents shall not be prejudiced in any way if the order of stay is made.

The application is opposed and there is a replying affidavit sworn by **Robert Omondi Onyango**, the 1st respondent. In that affidavit, it is deposed, *inter alia*, that the deponent is a bus conductor with Barcelona matatu plying through the Eldoret –Kisumu-Kisii road and is therefore capable of refunding half (½) the decretal amount if the appeal eventually succeeds. In the respondent’s view, they will be greatly prejudiced if the application is allowed as prayed.

Counsel in their oral submissions before me recited their respective clients’ averments in their affidavits and urged the stand-points stated in those affidavits.

I have considered the application, the said affidavits and counsel’s submissions. I have also given due consideration to the authorities cited to me. Having done so, I take the following view of matter. For the applicant to succeed in this application, it had to satisfy three conditions: Firstly, it must establish sufficient cause, secondly, it must demonstrate that substantial loss would result to it unless the stay is ordered and thirdly, that it has security to meet the decree in the event the decretal amount has ultimately to be paid. The application must of course be made without unreasonable delay.

With regard to delay, I note that the judgment intended to be challenged was delivered on 22nd November, 2010. This application was lodged on 17th December, 2010. The delay involved was therefore of less than a month. I do not consider that delay as inordinate.

With regard to the demonstration of substantial loss; the applicant has deposed that the respondents are men of straw and if the decretal amount is paid out to them, they will not be in a position to refund the same should the appeal succeed. In answer to that averment, the 1st respondent deposed that he is a bus conductor with a matatu firm plying the Eldoret Kisumu Kisii road and is capable of refunding ½ the decretal amount if paid to him and the appeal eventually succeeds.

The 1st respondent was awarded a total of Kshs 230,460/= in the original suit. He was also awarded costs of the declaratory suit. The sum is therefore in all likelihood more than Kshs 250,000/= as of now. Half the sum is Kshs 175,000/=. The sum may seem small but if paid over to the 1st respondent, and he has eventually to refund the same, he will not find it small. He has said he is a bus conductor but apart from the mere say so, he has exhibited no evidence of the same. He has not even attempted to indicate how

much he earns as such conductor. In the premises, he has not availed any material before the court from which a determination of his credit-worthiness and can be made. The 2nd respondent has of course not challenged the averment that she is a woman of straw.

In the premises, I am satisfied that substantial loss may result to the applicant unless the order of stay is granted.

With regard to Security, the applicant has deponed that it had, in compliance with an earlier order made herein, deposited the entire decretal decretal sum in a joint interest earning account in the Co-operative Bank. That in my view is sufficient security.

Having demonstrated the conditions set in order 42 Rule 6(2) of the Civil Procedure rules, the applicant has thereby demonstrated sufficient cause. In the end, there shall be a stay of execution of the decree pending the hearing and determination of the intended appeal to the Court of Appeal on the terms ordered by Ibrahim J on 28th May, 2008.

I grant the respondents liberty to apply in the event the intended appeal is not prosecuted with dispatch.

Costs shall be borne by the applicants.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 10TH DAY OF MAY 2011.

F. AZANGALALA

JUDGE

Read in the presence of:-

- (i) M/s Njiru for the applicant and
- (ii) Mr. Omboto for the respondent.

F. AZANGALALA

JUDGE