



REPUBLIC OF KENYA

HIGH COURT AT MOMBASA

Civil Appeal 66 of 2010

**FIRST ASSURANCE COMPANY LIMITED.....APPELLANT/APPLICANT**

**-VERSUS-**

**ALI ISMAIL KIBWANA.....RESPONDENT**

## **RULING**

The appellant came before the Court by Notice of Motion dated **6<sup>th</sup> September, 2010** and brought under Order XLI, Rule 4 of the earlier edition of the Civil Procedure Rules, and ss.1A, 1B and 3A of the Civil Procedure Act (Cap.21, Laws of Kenya). The application has one main prayer, that:

***“there be a stay of the proceedings and/or Judgment delivered on 21<sup>st</sup> October, 2009 in CMCC No. 2515 of 2008, Ali Ismail Kibwana v. Blueshield Insurance Company Limited & First Assurance Company Limited pending the hearing and determination of this appeal.”***

The application rests on the following grounds:

- (i) the applicant has preferred an appeal against the ruling of **17<sup>th</sup> March, 2010** and if stay orders are not granted, the said appeal will be rendered nugatory;
- (ii) if stay orders are not granted, the applicant will suffer substantial loss;
- (iii) the applicant has an arguable appeal with high chances of success;
- (iv) it is in the interest of justice that stay is granted, as no prejudice will be suffered by the respondent,
- (v) the applicant is ready and willing to deposit the decretal amount in Court or in an interest-earning account in the joint names of the parties’ Advocates herein, as security for the performance of the decree in the event the appeal is not successful.

**Edward Maghanga**, the Mombasa Branch Assistant Manager of the applicant, swore an affidavit dated **6<sup>th</sup> September, 2010**, in support of the application; and to this, **Ali Ismail Kibwana**, the respondent, swore a lengthy replying affidavit dated **17<sup>th</sup> September, 2010**.

The respondent depones that he had filed a Chamber Summons application dated **8<sup>th</sup> July, 2009** within the ambit of CMCC No. 2515 of 2008, seeking the striking out of the defences filed by the two

defendants; and to the said application, the appellant/applicant neither filed grounds of opposition, nor swore a replying affidavit – and the Court, eventually, allowed the defendants to make a reply restricted to **points of law** (on **17<sup>th</sup> September, 2009**). On that basis, the Court rendered its Ruling, which was in favour of the respondent herein. The applicant then obtained stay of execution for 30 days, but following the expiry of that period the applicant filed an application on **17<sup>th</sup> December, 2009** – and this came after the respondent had already begun execution proceedings. The said application was dismissed with costs, in a Ruling of **17<sup>th</sup> March, 2010** – particularly on the ground that the applicant “**never prosecuted**” the same. The deponent averred that it was upon the dismissal of the application, that the applicant filed the appeal against the Ruling of the trial Magistrate delivered on **17<sup>th</sup> March, 2010** together with an application for stay pending appeal dated **7<sup>th</sup> April, 2010**. But, the deponent avers, “**again the appellant/applicant did not file any written submissions in support of the said application.**” The Court’s Ruling was delivered on **29<sup>th</sup> July, 2010**, dismissing the appellant’s application with costs. However, stay of execution was granted for 30 days; and after that period elapsed, the respondent’s Advocates asked the applicant for payment cheques; and they secured the re-issue of warrants of attachment and sale against the applicant herein. Thereafter a proclamation was made on the applicant’s property: and so the applicant now comes seeking stay of the Judgment of **21<sup>st</sup> October, 2009**.

The deponent avers that the appeal which the applicant has filed is not against the original Judgment of **21<sup>st</sup> October, 2009**, but against the Ruling of **17<sup>th</sup> March, 2010** – and that Ruling was in respect of an unprosecuted application. The deponent believes to be true the advice of his Advocates, that the applicant’s said appeal was filed out of time, and without the leave of the Court.

The deponent deposed that he is in a position to make repayment of decretal sums due at this stage, in the event of the applicant’s case succeeding on appeal.

Learned counsel for the applicant urged that his client stood to suffer irreparable damage if the respondent proceeded with execution of the decree extracted from the Judgment which had turned in favour of the respondent. Counsel urged that even though the decretal sum had already been taken out of the applicant’s operations, “**if the undoubtedly large sum of money is paid to the respondent before the appeal is determined, the applicant would suffer substantial loss.**” To support this argument, counsel cited *Mukuma v. Abuoga* [1988] KLR 645, which he urged to hold that “**substantial loss is the cornerstone of jurisdiction under Rule 5(2) (b) [of the Court of Appeal Rules]**”; he submitted that “**substantial loss should be prevented as it would render an appeal nugatory.**”

Counsel submitted that “**it would not be in accordance with the overriding objectives of the Court to require the applicant to pay such a large sum of money at this stage after we have found that the intended appeal is not frivolous.**”

Learned counsel submitted that the applicant has an arguable appeal with a high chance of success. He urged that a novel question of law, in respect of which the trial Court had been in error, was involved: “**The appeal [emanates] from a declaratory suit seeking to declare the applicant, by virtue of the Insurance (Motor Vehicles Third Party Risks) Act (Cap. 405, Laws of Kenya), liable to pay the decretal sum awarded in another matter involving a person insured by the applicant. The applicant was not a party to the primary suit and therefore wishes to adjust the decree and/or order of the Court in respect of the apportionment of liability.**”

Counsel submitted that it was not the applicant’s object to interfere with the award in question; save that it would seek from the Court “**a declaratory Judgment to adjust the holding, jointly or severally, [apportioning] respective percentages of liability...**”

Counsel submitted that the applicant has already deposited the decretal sum in Court, and so the respondent is secured, in the event the appeal is dismissed: and “**therefore the respondent will suffer no prejudice by [the Court] granting a stay to the applicant.**”

Counsel submitted that it was the applicant’s intention to adduce more evidence at the hearing of the

appeal, to show that other matters emanating from the same accident were settled by the parties after the apportionment of liability.

For the respondent, it was urged that the applicant is, in effect, ***“seeking to stay the proceedings and/or Judgment delivered on 21<sup>st</sup> October, 2009 (which Judgment it has not appealed against or sought a review of) through the back door as in actual fact what has been appealed from is the Ruling of 17<sup>th</sup> March, 2010.”***

Counsel submitted that when the application of **17<sup>th</sup> December, 2009** [by the applicant herein] came up for *inter partes* hearing, there was agreement for each side to file written submissions; but it is only the respondent herein who filed written submissions; this was followed by the Court’s Ruling of **17<sup>th</sup> March, 2010** dismissing the Notice of Motion of **17<sup>th</sup> December, 2009**. Counsel urged that the applicant cannot now challenge the Ruling of **21<sup>st</sup> October, 2009** by way of appeal. In the Magistrate’s Court, the applicant had filed an application for stay of execution pending appeal – but the same was dismissed.

Learned counsel urged that litigation must come to an end: the respondent had obtained Judgment on **22<sup>nd</sup> April, 2008**, this Judgment being entered jointly and severally against the three defendants; the Judgment has not been challenged by way of review or appeal by any of the defendants; the respondent then filed the enforcement suit against the applicant herein and Blue Shield Insurance Co. Ltd., and obtained Judgment on **21<sup>st</sup> October, 2009**; and this Judgment has not been appealed against.

Counsel contended that the real issues in contention were *res judicata*: ***“having obtained proper Judgment both in the primary suit and the enforcement suit, and those Judgments have not been challenged, it is only fair and just that the respondent who is the decree-holder is allowed to enjoy the fruits of those Judgments.”***

Counsel submitted that the applicant should not invoke the overall objectives of the law: because *“the same are not meant to cover mistakes or lapses of counsel or negligent acts, dilatory tactics or acts constituting abuse of Court process”*: ***Kenya Commercial Bank Limited v. Kenya Planters Co-operative Union, Civil Application No. 85 of 2010 (Ct. of App.)***.

The applicant’s main prayer bears an uncertain tone: that there be a stay of the proceedings ***and/or*** Judgment delivered on **21<sup>st</sup> October, 2009**. The application comes ***one year*** since the said Judgment was rendered, and after a number of applications had been dismissed, following the rendering of the Judgment.

There is obvious dilatoriness in the various motions so far made by the applicant: and this goes to negative the case for an exercise of judicial discretion in their favour.

The Court is not readily convinced of the legal point now presented as vital, which must occasion the success of an intended appeal; in short, it is this Court’s perception that no cogent case has been made for allowing the Notice of Motion of **6<sup>th</sup> September, 2010**. Consequently, the application is dismissed, with costs to the respondent.

***Orders accordingly.***

**SIGNED at NAIROBI .....**

**J.B. OJWANG  
JUDGE**

**DATED and DELIVERED at MOMBASA this 28<sup>th</sup> day of October, 2011.**

**H.M. OKWENGU  
JUDGE**