



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

(Coram : F. Azangalala, J.)

CIVIL APPEAL NO. 162 OF 2010

BETWEEN

**INSURANCE COMPANY OF EAST
AFRICA LIMITED:.....APPELLANT
AND
JOHN KIPTUM SANGUTEI:.....RESPONDENT**

***(Being an appeal from the decision of the Resident Magistrate Hon. I. Maisiba, dated 30th July, 2010
in Eldoret Chief Magistrate's Court Civil Case No. 657 of 2008)***

RULING

Insurance Company of East Africa Limited (hereinafter “the applicant”) seeks, by its Notice of Motion dated 15th November, 2010 a stay of execution of the decree in Eldoret Chief Magistrate’s Court Civil Case No. 657 of 2008 and further that the orders of the said court made on 3rd November, 2010 be set aside. The application has been brought under the provisions of Order XLI Rule 4 of the Civil Procedure Rules, Order L Rule 1, Section 3A of the Civil Procedure Act and all enabling provisions of the Law. The main reason for the application is that should the applicant be compelled to release half the funds to the respondent, it will suffer substantial loss as the respondent does not have assets which are sufficient to satisfy the said sums in the event the respondent has to ultimately pay back.

The application is opposed and there is a replying affidavit sworn by the respondent. He has deponed, *inter alia*, that he is a man of means as evidenced by the property which was the subject of the Insurance policy issued by the applicant.

When the application came up before for hearing on 24th May, 2011 counsel agreed to file written submissions which submissions were duly in place by 25th October, 2011. Those submissions reiterated the parties’ stand-points taken in their respective affidavits.

I have considered the application, the affidavits filed by both parties and the submissions of counsel. Having done so, I take the following view of the matter. For the applicant to succeed, it had to satisfy the requirements of Order XLI Rule 4 (now Order 42 Rule 6) of the Civil Procedure Rules. The applicant, filed before the lower court, a similar application which was allowed on terms, on 3rd November, 2010. Being dissatisfied with the terms, the applicant lodged this application under consideration on 18th November, 2010. That was a mere two weeks after the order of the Lower Court. That delay in my view is not inordinate.

The respondent has argued that the applicant has shown disobedience of the order issued by the lower court by not complying with the conditions of stay. That cannot be the position because the law allows the applicant to seek stay of execution a new from the High Court (see the provisions of Order XLI Rule 4 and now order 42 Rule 6 of the Civil Procedure Rules.) The applicant has exercised that right and cannot be accused of disobedience.

The applicant has offered to deposit the entire decretal amount in a joint interest earning account in the names of the parties' advocates pending the hearing and determination of the appeal. That in my view would constitute sufficient security for the due performance of the decree in the event the appeal is successful.

With regard to substantial loss, the applicant has deponed that unless stay is ordered, the respondent will proceed with execution and its appeal will be rendered nugatory. The applicant contends that the respondent has no means from which recovery of the decretal amount may be made. In its view, that event will result in substantial loss to it. The respondent has argued to the contrary. In his view, the application is intended to deny him fruits of his judgment. He made reference to the pleadings in the lower court which indicate that he owns property worth over Kshs. 17,000,000/-. In those premises in his view, he has the means to repay the decretal amount if paid to him and the appeal eventually succeeds. In Kenya Shell Limited -Vs- Kariga [1982 – 88] I KAR 1018, the following observations were made:-

“it is usually a good rule to see if O.41 r. 4 (present Order 42 Rule 6) of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”

I have perused copies of the pleadings of the lower court which have been exhibited by the respondent. Of particular interest is paragraph 3 of the written statement of defence delivered by the applicant. It reads as follows:-

“3 The insured value taken by the plaintiff (respondent herein) in the aforesaid policy was Kshs. 5,000,000/- where as the value of the property insured was Kshs. 17,000,000/- thereby amounting to an under insurance.”

Given the applicant's own pleading in the Lower Court, it is not easy to appreciate the position it has now taken in this applicant that the respondent is not a person of means. It is not disputed that the property in the pleadings in the lower court belongs to the respondent. The decretal amount is Kshs. 280,000/-. The lower court decreed that half that amount be released to the respondent within thirty (30) days of the ruling and half be deposited in an interest bearing joint account within the same period.

On the material availed to the court, the apprehension or fear of the applicant does not appear well founded at all. A man who owns a property with Kshs. 17,000,000/- cannot be said to be impecunious. There is therefore no basis for the contention that if half the decretal amount is paid to the respondent and the appeal succeeds, he will not be able to refund.

The applicant has therefore not demonstrated that it stands to suffer substantial loss unless stay is ordered. In my view if the respondent had appealed against the conditions of stay he stood a very high

chance of succeeding as the applicant did not satisfy one of the requirements of Order XLI Rule 4(2) now Order 42 Rule 6(2) of the Civil Procedure Rules.

In all those premises, I find this application without substance. It is dismissed with costs. The order of the Lower Court is confirmed.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET
THIS 6TH DAY OF DECEMBER, 2011**

**F. AZANGALALA
JUDGE**

**Read in the presence of:
Mr. Okoth H/B for Ms. Khayo for the Applicant.**

**F. AZANGALALA
JUDGE**

6TH DECEMBER, 2011.