



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISUMU

Civil Appeal 1 of 2010

BARACK O. OBUOGO APPELLANT

-VERSUS-

TERESA JEPKOGEI (*suing as the legal representative of the estate of*
JOHN K. BITOK **RESPONDENT**

RULING

Before court is an application brought by way of Chamber Summons dated 9th January 2010 pursuant to Order XLI Rule 4(1) of the Civil Procedure Rules Sections 1A and 1B of the Civil Procedure Act. The application is supported by the affidavit of **Richard B. O. Onsongo** Advocate also dated 9th of January 2010 and on the grounds on the face of the application.

Substantially, the application seeks to stay the order and ruling delivered by Learned Chief Magistrate, Kisumu on the 28th of December, 2009 and the judgment the court delivered on the 4th of November, 2009 and the decree thereon pending hearing and determination of the appeal herein.

The application was vehemently opposed by the respondent through a replying affidavit date 19th January, 2010.

The applicant's counsel contends that the lower court having found that there were good reasons to set aside the *ex parte* judgment, it had no reason whatsoever to impose the condition it did as the said condition was onerous, unfair and unreasonable to the applicant. Counsel relied on two authorities namely: **BLUE SHIELD INSURANCE COMPANY LIMITED -VS- SAMUEL KAMAU MUHINDI, (2009) EKLK & BALOZI HOUSING CO-OPERATIVE SOCIETY LIMITED -VS- SAMUEL WAIGANJO THUO, t/a WAIGANJO & ASSOCIATES, (2009) EKLK.**

In opposing the application, the respondent's counsel contended that no appeal has been filed against the judgment of the lower court. Further that the applicant has not shown that he has an arguable appeal. Counsel also contended that the discretion of the lower court was properly exercised and that the applicant has not demonstrated that he will suffer any loss, as the money was not given to the respondent but the same is to be placed in a joint account. Counsel further challenged the affidavit in support of the application for being defective having been sworn by counsel on record. The counsel for the respondent relied on **MAGUNGA GENERAL STORES -VS- PEPCO DISTRIBUTORS LTD - NRB CIVIL APPEAL NO. 24 OF 1986 & VIRGINIA WANGUI NGUU -VRS- STEPHEN KAHUKI KAMAU & MINNIE WATIRI GHUKI - NRB HCCC NO. 1823 OF 2002.**

I have considered submissions by learned counsel for the parties and the authorities cited.

The brief facts of the case from the pleadings before me are that the respondent filed suit namely: **KISUMU CMCC NO. 215 OF 2009** on the 11th of June, 2009. The applicant was duly served with the plaint and summons. The applicant handed the plaint and summons to his insurers this being a matter involving a motor vehicle. The applicant's insurers promised to defend the matter. The applicant's insurers M/s Africa Merchant Assurance Company Limited (AMACO) instructed their Advocate through a letter to enter appearance and file a defence. The said letter is said to have been posted to the Advocates in mid August, 2009. The Advocate did not receive the instructing letter and therefore he neither entered appearance nor filed a defence as a result judgment was entered in default and the suit proceeded by way of formal proof giving rise to a judgment of a sum of over Ksh 2,000,000/= being awarded. Thereafter the applicant applied to set aside the judgment under order 1XA Rule 10 and 11 of the Civil Procedure Rules. After due consideration, the Learned Magistrate set aside the judgment on condition that:-

"1. The full decretal sum herein i.e Ksh 2,052,668 is deposited in a joint account in the names of the counsels appearing within 14 days of the delivery of this ruling.

2. That the defendant/applicant meets the plaintiff/respondent's costs agreed or assessed) occasioned by the

application.

In default of any of the above condition, the application will stand dismissed and the plaintiff/respondent will be at liberty to execute.”

It is the above ruling that is the subject or the intended appeal.

For consideration before court is whether or not to grant a stay pending the intended appeal. Order XL1 Rule 4(1) gives the court the power to grant a stay as may seem just on two conditions as set out in sub-section (2) namely; that the court has to be satisfied that substantial loss is likely to be incurred unless the order is made and the application was made without undue delay, secondly such security as the court orders in the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

Having considered this matter, I am satisfied that the applicant is likely to suffer substantial loss unless this order is made. I also take note that the application was promptly made as required by the law. I will at this stage not consider the need for any security in the circumstances of this case. I therefore grant prayer (b) of the application dated 9th January, 2010. Costs in the cause.

Dated and delivered on 26.02.2010.

**ALI-ARONI
JUDGE**

In the presence of:

..... **present for Appellant**

.....**present for Respondent**

Coram:

Ali-Aroni, Judge.

Mr. Onsongo Advocate for the Appellant

Z. K. Yego Law Offices

Mr. George Diang’a Court Clerk.