



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 432 of 2009**

**JUBILEE INSURANCE COMPANY LTD.....APPELLANT**

**VERSUS**

**SAMUEL KIMANI THUMBE.....RESPONDENT**

**RULING**

1. By a notice of motion dated 27<sup>th</sup> November, 2009, Jubilee Insurance Company Limited (hereinafter referred to as the appellant), seeks an order for stay of execution of the judgment and decree in CMCC No.2908 of 2005, pending the hearing and determination of the appeal, or until further orders of the court. The appellant's main ground upon which the application is anchored is the fact that the whereabouts of Samuel Kimani Thumbe, (hereinafter referred to as the respondent), is unknown and his source of income is also unknown. Therefore if the decretal sum of Kshs.509,500/= is paid to the respondent, the appellant may not be able to recover the amount if successful in its appeal. The appeal will thereby be rendered nugatory.
2. Pursuant to an order which was made on 1<sup>st</sup> December, 2009, the appellant deposited a sum of Kshs.918,938/= into court as security. The appellant further maintains that it is a reputable financial institution and the respondent would have no difficulty in recovering the decretal amount should the appeal be unsuccessful.
3. The respondent objects to the application maintaining that the appellant has come to this court with unclean hands as it has not disclosed that it was granted an order of stay of execution for 30 days in the lower court, and that that order of stay was extended on condition that the appellant deposits the decretal sum in court, but that the appellant failed to comply with the court order. It was further contended that the appellant has not explained the unreasonable delay in bringing the present application. The respondent further maintained that he was ready, able and willing to pay back the decretal sum in the event the appellant is successful in its appeal. The respondent contended that the facts giving rise to the cause of action, relates to insurance business transactions between the respondent and the appellant which involves large sums of money.
4. I have considered this application and the submissions before me. It is not disputed that the appellant was granted an order for stay of execution in the lower court and that it failed to comply with the terms. The principles governing applications for stay of execution pending appeal is well laid out under Order XLI Rule 4(2) of the Civil Procedure Rules, which states that an order for stay of execution pending appeal can only issue on the following conditions:
  - (i) Where the court is satisfied that substantial loss will result to the applicant unless the order of stay of execution is issued, and
  - (ii) The application has been made without unreasonable delay, and
  - (iii) The applicant has provided or is ready to provide such security as the court may order for the due performance of the decree.
5. In this case, the appellant's main ground is that it is likely to suffer substantial loss because the respondent may not be able to refund the decretal sum if paid to it. The decretal sum currently stands at about Kshs.918,938/=. The respondent has not revealed to this court what he does for a living or his main source of income. It cannot therefore be stated that the appellant's apprehension is unreasonable. Nevertheless, this court has a responsibility to balance the interests of both parties.
6. The respondent has a judgment in his favour, delay in executing that judgment means that the value of the judgment will

depreciate because of inflation. I would accordingly order that half the decretal sum shall be paid to the respondent and that an order of stay of execution shall issue with regard to half the decretal sum. I further direct that the respondent shall be paid half the decretal sum from the amount deposited in court, and that the balance of the amount deposited in court after payment to the respondent shall be deposited into an interest earning account in the joint names of the parties' advocates and held as security until the appeal is finalized. Costs of this application shall be costs in the appeal.

Those shall be the orders of this court.

**Dated and delivered this 16<sup>th</sup> day of February, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Sani for the appellant

Advocate for the respondent absent

Eric - Court clerk