REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Case 117 of 2009

UAP PROVINCIAL INSURANCE CO...............................APPELLANT
VERSUS
SHIYANI RUDA KANJI ....RESPONDENT

RULING

The appellant has filed this appeal against the ruling of Resident Magistrate Court Case No. 52 of 2007 delivered on 29th September 2009. The appeal was filed on 29th October 2009. On that same day, the appellant filed a Notice of Motion dated the same date seeking a prayer for stay pending appeal. That application is brought under Order XLI Rule 4 of the Civil Procedure Rules. In the affidavit in support of that application, the appellant stated that if stay is not granted, the appeal would be rendered nugatory. Further that the respondent's means are unknown. The appellant is willing to comply with any order made by the court and more particularly is willing to deposit the decretal amount of the lower court judgment. As it can be seen, having reproduced the affidavit of the appellant, one is left not knowing what the case of the lower court involved. The respondent's advocate from the bar informed the court that the appellant was the respondent's insurer. The respondent was sued in respect of an accident. The appellant defended the respondent in that case. When the judgment was entered for Kshs. 350,000/=, the appellant refused to pay the amount. This led to the respondent suing the appellant for an order of declaration that the appellant should pay that amount. The respondent was successful in his prayer and that is the ruling which is the subject of this appeal. The application was opposed by the respondent who stated that the appellant knew he was a business man and to prove this he annexed a copy of certificate of registration of his business. That certificate shows that the business was registered on 29th November 2004. The respondent further stated that he would be able to refund to the appellant the decretal amount if the appeal was successful. To him, the application for stay was yet another attempt to punish him for the misunderstanding that occurred between him and the appellant. Both counsels relied on several authorities. The appellant relied on the case of **Mary Kina Vs. Menengai Oil Refineries & Ano.** Civil Case No. 60 of 2003. In that case, the Judge in considering an application for stay had this to say:-

"In my considered view, even as the results of the intended appeal are awaited, the plaintiff should be allowed to enjoy part of the fruits of the judgment herein. Depositing the entire decretal amount in court will not benefit the plaintiff in any way. I also note that she is in salaried employment and has some land whose value has not nonetheless been ascertained. She is not therefore "a person of straw" and can refund a substantial amount of the decretal amount if the "appeal succeeds in toto and sets aside the entire judgment which as I said before is highly unlikely."

Having stated that in that case, the Judge proceeded to order part of payment be made to the respondent whereas the balance was to be deposited in a joint interest earning account of both advocates. The appellant also relied on the case **New Stanley Hotel Limited Vs. Arcade Tobacconists Limited** Civil Case No. 2260 of 1982. The holding of that case in part is:-

"Before making an order staying the execution of the judgment, the court has to be satisfied that substantial loss may result to the applicant unless the order was made and that the application was made without unreasonable delay."

The respondent relied on the case **Ronald Dewayne Enock Vs. Charles Wanjama Wachira** Civil Appeal No. 58 of 2006. In that case, Justice Lenaola had this to say:-

"The appeal challenges both liability and quantum relating to the judgment in the lower court but as I have said, there is not a single piece of evidence to show what substantial loss the applicant will suffer if the stay order is not granted and even in submissions by Mr. Mwanzia for the applicant no such issue was raised. As was said by Platt J.A, in Kenya Shell Ltd Vs. Benjamin Karuya Kibiru and Another [1982 – 1988] 1 KAR 1018, where there is no evidence of substantial loss in an application for stay of execution of a decree, the application should not be granted."

Additionally, the respondent relied on the case **Jethwa Vs. Shah t/a Supreme Styles** Civil Application No. 26 of 1989.

"The burden of proof as to any particular fact is on the person who wishes the court to believe in its existence, unless it is provided by any law and the proof of that fact shall lie on any particular person. The burden was on the applicant to prove that the respondent was impecunious."

The appellant in seeking stay under Order XLI Rule 4 is obligated to satisfy this court that it will suffer substantial loss if stay is not granted. The appellant argued that if payment was made to the respondent he would not be in a position to refund the same. That argument was met with a response that the respondent was a business man and therefore was able to refund the amount. In my view, that response was satisfactory particularly because the respondent showed by evidence that he has a business. Considering the amount that is in issue, I am of the view that the interest of justice will not be met by keeping the respondent from enjoying the fruits of his judgment. Therefore, the application dated 29th October 2009 is hereby dismissed with costs being awarded to the respondent.

Dated and delivered at Meru this 28th day of May 2010.

MARY KASANGO
JUDGE