



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. NO. 203 OF 2009
APA INSURANCE COMPANY LTDAPPELLANT
VERSUS
PATRICK MUSEE MASILA (alias
MUSEE MASILA)RESPONDENT

RULING

The Respondent was the plaintiff in **Kitui SRMCC No. 165 of 2005**. He obtained judgment therein against a tortfeasor for the sum of KShs. 194,855/00 plus costs and interest. The cause of action was apparently a claim for damages arising out of a road accident.

The Respondent then filed **Kitui SRMCC 461 of 2008** seeking a declaration that the Appellant herein, which is an insurance company, was liable to pay the aforesaid decree under the relevant provisions of the **Insurance (Motor Vehicles Third Party Risks) Act, Cap 405**. The Respondent got a judgment for that declaration on 10th November 2009. The Appellant then duly appealed against that decree herein. It is not clear if there was any appeal preferred against the decree in the original suit.

The Appellant has applied by **notice of motion dated 27th November 2009** for stay of execution of the decree in the declaratory suit pending disposal of the appeal. The application is brought under **Order 41, rule 4 (1)** of the **Civil Procedure Rules** (the Rules). The application is opposed by the Respondent. On 14th December 2009 the court (Lenaola, J) directed that the application be heard by way of written submissions. The Appellant filed its submissions on 11th February, 2010. The Respondent did not file any submissions. He chose to rely on his replying affidavit.

I have read the supporting and replying affidavits. I have also given due consideration to the submissions filed on behalf of the Appellant, including the authorities cited.

The court will not grant stay of execution of decree unless it is satisfied that substantial loss may result to the applicant unless the order is made. The court must also be satisfied that the application has been made without unreasonable delay. The applicant must also be prepared to give such security as the court may order for the due performance by him of such decree or order as may ultimately be binding on him. See **rule 4 (2)** of Order 41 aforesaid.

The present application was filed only a day after the appeal was lodged. The appeal itself was lodged in time. There was thus no delay in bringing the application.

Regarding substantial loss, it has been deponed in the supporting affidavit that the Respondent is not a man of ascertainable means and would be unable to refund the decretal sum in the event that the appeal succeeds.

The Respondent has not answered this allegation in any way in his replying affidavit. Instead he has gone to great lengths to show the Appellant's appeal is without merit. I must point out here that the Appellant is exercising an undoubted right of appeal. As already seen, his appeal was lodged within time. The merits or demerits of the appeal must await hearing of the appeal.

I am satisfied from the averments contained in the supporting affidavit, which averments have not been answered by the Respondent, that the Appellant stands to suffer substantial loss unless the stay sought is granted. I note that the Appellant has offered security in the form of a deposit of the decretal sum in court.

In the circumstances, I will allow the application and grant the stay of execution sought. The stay shall remain in place until the appeal is disposed of. But the same is subject to the condition that the Appellant deposits in court the decretal sum (for purposes of this order calculated at **KShs. 300,000/00**) within thirty

(30) days of delivery of this ruling. In default the stay shall lapse. Costs of the application shall be in the appeal. It is so ordered.

DATED AT MACHAKOS THIS 20TH DAY OF JULY 2010

H.P.G. WAWERU
JUDGE

DELIVERED THIS 30TH DAY OF JULY 2010