



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NO. 260 OF 2009**

**GATEWAY INSURANCE CO. LTD.....APPELLANT/APPLICANT
VERSUS
WILLIAM MUTISYA MUIDNI.....RESPONDENT**

RULING

The application dated 17th December 2009 is brought pursuant to **Order 41 Rule 4(6)** of the **CPR**. Gateway Insurance Company Ltd, the appellant/applicant, seeks an order of temporary injunction to restrain the respondent from disposing, delineating, dissipating or in any way dealing with the decretal sum paid to him through his advocate, Mongeri & Co. Advocates on 11th December 2009, amounting to Kshs.371,352/- in settlement of the decree in Nakuru RMCC No. 826 of 2009 pending hearing and determination of the appeal. Secondly, the appellant prays that the said sum be deposited in court pending the hearing of the appeal and in the alternative, the court do order the said sum to be deposited in an interest earning account in the joint names of the advocates of the parties herein, pending the hearing of the appeal.

The appellant was aggrieved by the ruling of the lower court delivered on 30th November 2009 in which the appellant's defence was struck out and judgment entered in favour of the respondent.

The motion is supported by the grounds found on the face of the application and the supporting affidavit sworn by Jacqueline Tindi, the legal officer of the applicant.

The applicant had filed a defence in RMCC No. 826 of 2009 denying liability on grounds that the respondent was not a person covered under the policy of insurance between itself and its insured, Francis Mwangi.

By an application dated 2nd September 2009, the respondent sought to have the defence struck out. The ruling was scheduled for 9th November 2009 but it was adjourned to be delivered on notice. The same was delivered on 30th November, 2009 when the defence was struck out. The applicant contends that no notice was issued to the applicant or its advocate. Thereafter, the applicant lodged this appeal. About 4th December 2009, the respondent proclaimed the appellant's goods which included office equipment and furniture and the applicant filed an application for stay of execution of the decree on 8th December 2009 but the lower court declined to grant any order.

On 10th December 2009, the applicant again lodged another application for stay of execution before the High Court but there was no judge on duty. On 11th December 2009, the judge declined to handle certificates of urgency and to prevent any disruption of the appellant's business due to the attachment, the appellant decided to issue a cheque of the entire decretal sum to counsel for the respondent. It is the appellant's contention that the appeal has high chances of success; that the decretal sum is large and the respondent is unlikely to be able to refund it should the appeal succeed; and that they will suffer irreparable loss and that is why it preferred this application.

The application was opposed, and Shadrack Waithaka, the respondent herein, filed a replying affidavit dated 16th March 2010. He deposed that after he obtained judgment he was paid his entitlement by his advocate by cheque (SW1) for Kshs.950,000/-; That this application is overtaken by events; That earlier on, both the lower court and the High Court denied the appellant an order of stay. It is the respondent's contention that the appeal is not arguable as the appellant failed to attend the application for striking out the defence and no new matter has been raised to warrant the stay.

Mr. Mongeri, counsel for the respondent urged the court to peruse the lower court file because the appellant had failed to state the full facts in his application. According to him, this application is an abuse of the court process as the appellant has filed three applications seeking the same orders. In the lower court, the application was dismissed and there is an application dated 10th December, 2009 which has been abandoned and this application is therefore *res judicata*.

I have perused the lower court file and I do note that the appellant did file an application dated 8th December 2009, seeking stay of execution of the court's orders of 30th November 2009, but the same was dismissed for none attendance. The appellant then filed a memorandum of appeal and a notice of motion dated 10th December 2009, which was due for hearing on 14th December 2009, but was stood over generally when the applicant did not appear. On 17th December 2009, this court certified the application urgent but declined to grant stay orders because the decretal sum had been paid. During the pendency of that application, the applicant filed the application under consideration. So the application dated 10th December 2009 is still hanging in balance. This application is indeed an abuse of court process. There are pending applications which the applicant is yet to prosecute and he has gone ahead to file others.

I have considered the principles to be satisfied before an order of stay can be granted; (i) that the application has been made without unreasonable delay; (ii) substantial loss may result to the appellant unless the order is made and (iii) such security as the court may order.

This application was made timeously after about 14 days. I find that it was made without unreasonable delay. However, this is a peculiar scenario because the decretal sum has already been paid to the respondent who depones that he has already received and invested it. It was paid to him when there was no stay order in place and this court cannot be heard to recall the money from the respondent. I do agree with Mr. Mongeri's submission that this application has actually been overtaken by events and there will be no need to consider whether there is security for due performance or whether the appellant will suffer substantial loss. The option open for the appellant is to proceed with the appeal and if successful, claim from the respondent.

The result is that I find no merit in the notice of motion dated 17th December 2009 and it is hereby dismissed with costs to the respondent.

DATED and DELIVERED this 1st day of November, 2010.

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R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Mongeri for the respondent

N/A for the applicant

Kennedy; Court Clerk