



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Civil Appeal 34 of 2009**

**BLUE SHIELD INSURANCE CO. LTD. .... APPELLANT/APPLICANT**

**VERSUS**

**MUNYITHYA MAENDE NDAVI ..... RESPONDENT/ RESPONDENT**

***(Being an appeal from the Judgment of Honourable Ochenja dated 18<sup>th</sup> March 2009 in***

***Mwingi Senior Resident Magistrate Civil Case No. 306 of 2009)***

**RULING**

1. Before me is an Application for stay of execution pending appeal. It is dated 24/3/2009 and is brought under Order XLI Rule 5 and Order XLVIII Rules 1 and 2 of the Civil Procedure Rules.

2. In his Supporting Affidavit David Kirimi, acting Head of the Claims Department with Blue Shield Insurance Company Ltd depones as follows:-

That on 18/3/2009, the subordinate court sitting in **RMCC 306/2009 (Mwingi)** struck out the Appellant's Statement of Defence on the basis that it was an abuse of court process. That the appeal challenges that decision and since there is a good appeal at hand, substantial loss will be occasioned if the decree is executed as the Respondent is a man of straw and may not be able to repay the decretal sum. That the Respondent is also an elderly man and was unable to recall his age during trial and the advocate for the Appellant added that since the decretal sum is already deposited in court, there was sufficient security in place. Lastly that the Application was brought timeously.

3. The Respondent responded to the Application by filing a Replying Affidavit not sworn by himself in spite of the challenge made to his capacity to execute any document. The Replying Affidavit was sworn on 27/3/2009 by Makau Kamolo, advocate and in that Affidavit it is deponed that judgment was properly entered in the subordinate court and that under section 10 of The Insurance Motor Vehicle (Third Party) Risks Act Chapter 405 Laws of Kenya there cannot be a valid defence to a declaratory suit. In any event, the conditions for grant of an order of stay pending appeal has not been met and the same should be dismissed with costs.

4. From the record, it is clear that what was before the learned Principal Magistrate in **Mwingi SRMCC 59/2007** was a suit in which the Respondent had sued one Hassan Dawood Abdulla and Bashir Mohammad Issak seeking damages for injuries allegedly sustained when he was hit by m/v reg. No. KAT 475E. Judgment was entered in his favour and when the Defendants failed to honour the judgment, he filed the declaratory suit aforesaid and he obtained favourable orders with the consequence that the

Applicant was obligated to settle the decretal sum in the primary suit. The question before me is whether the Applicant deserves the orders he seeks.

5. I note that on 31/3/2009 advocates for the parties consented to the entire sum of Kshs.504,595/= being deposited in court until this Ruling. That is a good beginning because no prejudice would be caused to any party.

6. Secondly, I think that substantial loss would be occasioned to the Applicant if no stay order is granted. I say this with respect because issues have been raised about the Respondent's means and capacity on account of old age. Those issues have neither been responded to nor challenged. Substantial loss is the cornerstone of any application for stay of execution as was held in **Kenya Shell Ltd vs Kibiru (1986) KLR 410**. Once the issue is uncontested then the Applicant is on safe ground.

7. In **Halai & Another vs Thornton & Turpin (1963) Ltd (1990) KLR 365** it was further held as follows with regard to discretion under Order XLI Rule 4 (1);

**“The Superior Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish sufficient cause, secondly the court must be testified that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”**

8. Before me, it has not been denied that the Application was brought with haste and that the decretal sum is safely in the hands of the court. What reason would stop this court from granting the orders sought? I submit none and I will therefore exercise discretion and grant prayer 2 of the Application dated 24/3/2009. Prayer 3 thereof is misplaced and is struck off.

9. Costs shall abide the appeal.

10. Orders accordingly.

Dated and delivered at Machakos this 26<sup>th</sup> day of May 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Mulyungi h/b Mr Orege**

**Mr Kamolo h/b for Mr Wambua**

ISAAC LENAOLA

JUDGE