REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Miscellaneous Application 32 of 2008

OTIENO RAGOT & CO ADVOCATES ..... APPLICANT

VERSUS

BLUE SHIELD INSURANCE CO LTD.....RESPONDENT

RULING

The application by the applicant dated 20th April 2009 is made under Order 41 Rule 4 of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act. It is essentially for a stay of execution of the order made by this court on the 27th February 2009, to the effect that monies paid to the applicant by the respondent be deposited in an interest earning bank account in the joint names of the parties respective advocates.

The application is based on the grounds contained in the body of the appropriate notice of motion as supported by the facts contained in the supporting affidavit deposed by Jude T. Ragot date 20th April 2009.

The respondent opposes the application on the basis of the facts contained in its replying affidavit deponed by its Acting head of legal department, David Kirimi, date 18th June 2009.

M/s Sewe, learned counsel, argued the application on behalf of the applicant while M/s Mamburi, learned Counsel, represented the respondent.

This court has duly considered the application in the light of the supporting grounds and the arguments in favour and opposition thereto and would state that the principles for the grant of stay of execution pending appeal are well settled under Order 41 Rule 4 of the Civil Procedure Rules.

Order 41 Rule (2) provides that:-

"No order for stay of execution shall be made under sub-rule (1) unless-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant"

Beginning with the time within which this application was filed, it is apparent that there has been unreasonable delay on the part of the applicant.

The order sought to be stayed was made on 27th February 2009 yet the application was filed in court on 18th May 2009. This translates to a delay of approximately two and a half (2½) months.

The delay is however excusable considering that the notice of appeal was lodged in court on the 2nd March 2009 and that it is possible that there could have been some delays in the obtaining of the court proceedings and ruling on the part of the applicant firm of advocates.

With regard to substantial loss, it is evident that the loss contemplated by the applicant is that it would deposit an amount of money capable of crippling its business operation and therefore cause hardship to all that depend on it.

The applicant contends that a sum of Kshs. 1.3. Million is of such a magnitude as would sink a law firm of its caliber and stature. It's business operation would come to a stand still and render the intended appeal nugatory. If it is to be understood correctly, the applicant is simply saying that it is unable to raise the amount and if it does raise it then this would be at the expense of its business operations which would be severely prejudiced.

The applicant implies that its position is that of being between a rock and a hard stone i.e. it either deposits the money or have its business crippled along with the intended appeal.

Such circumstances would definitely elicit the sympathy of the court. However, it was incumbent upon the applicant to effectively demonstrate that it stands to suffer the contemplated substantial loss if stay of execution is not granted.

This court does not think that the applicant has discharged its obligation. It has not produced any books or records of accounts to show its financial status and demonstrate that it would most likely be swept out of business if the money is deposited as ordered.

It is not sufficient to merely alleged that its business would be crippled without showing how this would happen.

In any event, the money is simply being deposited into an interest earning bank account in the joint names of the parties advocates. It is not like the money will be lost or be out of complete reach of the applicant. It would just be a question of time before the intended appeal is heard and the fate of the money be known.

This court is disinclined to hold that a sum of Kshs. 1.3 Million is of such a magnitude as to cripple the applicant's operation. The underlying factors herein do not seem likely to create or cause hardship to the applicant than would serve the cause of justice if stay is refused. (See, The Hon A. G. & Another =vs= African Commuter Services Ltd NBI Civil Application No. 53 of 2009 C/A.)

It has always been said that substantial loss is the cornerstone of applications such as this one. This is what has to be presented because it would render an appeal nugatory (See, Mukuma =vs= Abuoga 1988 KLR 645)

Herein, the applicant has failed to establish that it shall suffer substantial loss unless stay is granted.

Consequently, the application is without merit and is dismissed with costs.

Dated, signed and delivered at Kisumu this 9th day of October 2009.

J. R. KARANJA

JUDGE

JRK/aao