



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 671 of 1999

CAPITAL INSURANCE BROKERS LTDPLAINTIFF

V E R S U S

NZOIA SUGAR COMPANY LTDDEFENDANT

R U L I N G

By a judgment delivered on 31st May, 2006 (G. B. M. Kariuki, J) the following awards were made for the Plaintiff against the Defendant:-

“(i) ...the sum of KShs. 14,515,065/50 towards unpaid premiums and commissions (which) shall carry interest at court rates from the date of filing suit to the date of payment;

(ii) KShs. 5,906,375/95 towards part of the penalties;

(iii)such sum less KShs. 5,906,375/95 as shall be demanded by the Commissioner of Insurance from the plaintiff on the premiums comprised in the sum of KShs. 14,515,065/50;

(iv)costs of the suit.”

By notice of motion dated 14th June, 2006 the Defendant has sought stay of execution of decree pending appeal. For purposes of the application there is an appeal, notice of appeal having been duly lodged on 9th June, 1996. See Order 41, rule 4(4) of the Civil Procedure Rules (the Rules). There is a replying affidavit filed in response to the application.

When the application came up for hearing on 19th May, 2008 the learned counsels appearing agreed that stay should be granted and left to the court the issue of what security the Defendant ought to be required to give as a condition for the stay. The Defendant’s learned counsels were of the view that an appropriate banker’s guarantee ought to be sufficient. The reasons advanced for this view were, first, that interest was awarded on the award and therefore there is no need for deposit in a joint interest-earning account. Secondly, the decretal sum is large, and requiring a deposit of the same would be oppressive to the Defendant.

The Plaintiff’s learned counsels were of a different view. Their view was that as the Plaintiff has waited for its money for over ten (10) years, the award should be readily available to it in the event that the

intended appeal is ultimately dismissed. This can be assured only by appropriate deposit of the sum awarded. A banker's guarantee that would be appropriate would have to be an irrevocable one; since no bank is likely to give one unless there is a deposit with it of the sums involved, the Defendant may as well deposit those sums at the direction of the court. That way the intended appeal is more likely to be prosecuted expeditiously.

Learned counsels for the Defendants opined that because of the relationship existing between the Defendant and its bankers an irrevocable bank guarantee may not have to be backed by a deposit with the bank of the sums involved.

What security to require as a condition for grant of stay of execution is a matter for the discretion of the court. The court will take into account the interests of both parties. An unnecessary clog must not be attached to the judgment-debtor's exercise of his undoubted right of appeal. On the other hand, the judgment sum must be so secured as to be readily available to the decree-holder in the event that the intended appeal is ultimately dismissed.

I note that the principal sums awarded are large. They amount to KShs. 20,421,441/45. There may be an additional sum under clause (iii) of the award. Apart from that, there is interest on part of the award (KShs.14,515,065/50) at court rates from the date of filing suit. The suit was filed in 1999; so, the interest element in the decretal sum will be a large amount of money, probably larger than the principal sum of KShs. 14,515,065/50. In fact, that interest as at 21st April, 2008 has been calculated by the Plaintiff to be KShs. 15,776,486/50.

I hold that the interests of justice will be served by requiring the Defendant to provide security by way of a deposit into court of the principal sums awarded, which are a total of KShs. 20,421,441/45. I agree that as interest was awarded in the decree there is no pressing need for deposit of this sum in a joint, interest-earning account. I also hold that requiring the Defendant to deposit the decretal sum as it now stands (at over KShs. 36 million) may amount to a clog on its right of appeal.

The orders therefore that commend themselves to me are:-

1. There shall be stay of execution of decree pending disposal of the intended appeal or the further order of the court.
2. As a condition for this stay of execution, the Defendant shall within thirty (30) days of delivery of this ruling provide security by way of deposit into court of KShs. 20,421,441/45. In default, the stay of execution shall automatically lapse, and the Plaintiff may execute its decree.
3. Costs of the application shall be in the intended appeal. If no appeal is ultimately filed, the costs shall go to the Plaintiff.

Those shall be the orders of the court.

DATED AT NAIROBI THIS 20TH DAY OF MAY, 2008

H. P. G. WAWERU

J U D G E

DELIVERED ON 23RD DAY OF MAY, 2008