



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 389 of 2007

- 1. THOMAS MUOKA MUTHOKA**
- 2. BONIFACE MUTUA MUTHOKA**

(Suing as legal representatives of the estate of

JOSEPH MAILU MUTHOKA, Deceased..... PLAINTIFFS

VERSUS

**INSURANCE COMPANY OF EAST
AFRICADEFENDANT**

R U L I N G

This is an application by the Defendant/Judgment-Debtor (by notice of motion dated 17th April, 2008) for stay of execution of decree pending appeal. It is brought under Order 41, rule 4 of the Civil Procedure Rules (the Rules). Under subrule (2) of that rule, the Judgement-Debtor must satisfy the court that it stands to suffer substantial loss unless stay is granted, and further, that the application has been brought without unreasonable delay. The Judgement-Debtor must also give such security as the court may order for the due performance by it of any decree or order that may ultimately be binding upon it. There is a supporting affidavit sworn one SUSAN AKINYI WAKIAGA, the Senior Assistant Manager of the Judgement-Debtor attached to its legal affairs and recoveries section.

The Plaintiffs/Decree-Holders have opposed the application as set out in the replying affidavit sworn by the 1st Plaintiff and filed on 23rd April 2008. The grounds of opposition emerging therefrom are;-

1. That the notice of appeal is incompetent for failure of service of the same upon the Plaintiffs' advocates within the prescribed period; there is thus no appeal.
2. That the 1st Plaintiff being a doctor by profession is in a position to repay the decretal sum if need be.

3. That even the estate of the Deceased (upon whose death the decretal damages were awarded in the judgement suit) will be in a position to repay the decretal sum.
4. That no substantial loss has been demonstrated.
5. That there is no just or proper cause to grant the stay of execution sought.

I have considered the submissions of the learned counsels appearing and the cases cited. In the suit herein the Plaintiffs sought a declaration that the Defendant, an insurance company, is obligated to pay the decretal sum in **Nairobi HCCC No. 1456 of 2005** amounting to KShs. 6, 268,139/00 together with further interest from 21st July, 2006 until payment in full.

Following an application by the Plaintiffs, the Defendant's defence was struck out and judgement entered as prayed in the plaint. That was on 5th March 2008. The Defendant then lodged notice of appeal on 14th March 2008. Subrule (4) of rule 4 aforesaid provides that for purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when, under the rules of that Court, notice of appeal has been given.

Rule 74 of the Court of Appeal Rules is the rule that provides for notices of appeal in civil appeals. The Plaintiffs' complaint is that the notice of appeal was not served upon their advocates "**within the prescribed period**". Service of the notice of appeal is an issue that is separate from lodgement of the notice. Service is provided for in Rule 76 of the Court of Appeal Rules. Whereas service of the notice of appeal, or lack of it, may impact upon the competence of an appeal, for the purposes of rule 4 of Order 41 of the Civil Procedure Rules, notice of appeal is given to this court upon lodgement of the notice of appeal. It is not given upon service of the notice of appeal upon the respondent. The wordings of Rule 74(1) and (2) of the Court of Appeal Rules are clear enough:-

"74. (1) Any person who desires to appeal to the Court
shall give notice in writing, which shall be lodged in
duplicate with the registrar of the superior court.

(2) Every such notice shall, subject to rules 82 and 94,
be so lodged within fourteen days of the date of the
decision against which it is desired to appeal".

In any event, it was not stated when the notice of appeal was served. I hold that notice of appeal having been duly lodged, there is an appeal for purposes of the present application.

The application was filed on 17th April, 2008. It is not the Plaintiffs' case that the application was made with unreasonable delay. I am satisfied that the application was made without unreasonable delay.

The main ground of opposition is that the Defendant has not demonstrated any substantial loss that it is likely to suffer if stay is not granted. It is pleaded as follows in paragraph 6 of the supporting affidavit.

"6... The decretal amount is for a substantial sum of KShs. 7, 910,535/80 and if the Plaintiffs are to execute for the same it is unlikely that the same shall be recovered from them...."

The same plea is repeated in paragraph 8 in the following words –

".... I verily believe that unless the decree is stayed, the Defendant herein will suffer substantial loss because the Plaintiffs may not be in a position to refund the monies paid should the appeal succeed".

There is no shred of evidence offered why it is unlikely that the decretal sum shall be recovered from the Plaintiffs, or why they may not be in a position to refund the same should the intended appeal succeed. The Defendant was obliged to provide such evidence. It is not sufficient merely to assert, without evidence, that the Plaintiffs may not be in a position to refund the decretal sum.

In answer to the Defendant's unsubstantiated claims the Plaintiffs have asserted that the 1st Plaintiff is a doctor by profession and in a position to repay the decretal sum if need be. They have also asserted that the Deceased's estate has properties and, further, that it expects to come into funds. These assertions are uncontroverted.

I am not satisfied, upon the material placed before the court, that the Defendant stands to suffer substantial loss unless stay of execution is granted. It is not usual for one to suffer substantial loss merely by paying a money decree, and stay ought not to be granted unless there is evidence that such substantial loss may be suffered. There is no such evidence here.

The application lacks merit and must be refused. It is hereby dismissed with costs. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF JUNE 2008.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 13TH DAY OF JUNE 2008