



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Appeal Case 59 of 2008

BENSON KARIUKI:.....:APPLICANT

VERSUS

FELISTUS LENA MUEMA:.....:DEFENDANT

RULING

1. The Application dated 27.3.2008 is premised on Order XLI Rule 4 of the Civil Procedure Rules. The Applicant, Benson Kariuki seeks orders of stay of execution pending appeal and a further order that the costs thereof do abide the outcome of the Appeal. Temporary orders were granted by Visram, J. on 2.4.2008 on condition that the entire decretal sum be deposited in court which was done on 7.4.2008.
2. In an Affidavit sworn in Support of the Application on 27.3.2008 by one Philomena Theuri, Deputy General Manager –Claims at Direct Line Assurance Co. Ltd, it is the Applicant’s case that the Appellant has a strong and arguable appeal because the ownership of motor vehicle Registration no, KAS 998V was contested and he was not its owner. Further that the damages awarded were excessive and were also awarded in excess of the court’s jurisdiction. That the Respondent was a vegetable seller at Kyamathiaka in Kitui and would be unable to repay the decretal sum if the Appeal fails and the Applicant will thereby suffer irreparable loss. Security has been offered should this court so order.
3. The Respondent on her part swore a Replying Affidavit on 25.7.2008 and she depones that the Application is brought in bad faith and is intended to deny her the fruits of a judgment lawfully obtained. That the Appeal has no chance of success as the issue of ownership of the motor vehicle subject of the accident was exhaustively canvassed at the trial and conclusively determined. That the fact of Philomena Theuri confirming that she was an officer of Directline Assurance Company Ltd who had insured the motor vehicle was clear evidence that the Appellant indeed had an insurable interest in the motor vehicle aforesaid. Further, that Philomena Theuri had no capacity or knowledge of the Applicant’s personal circumstances and no irreparable loss on the part of the Applicant had been shown.
4. I have heard the submissions by advocates appearing and have perused the following authorities submitted by the advocate for the Respondent:-
 - i. HCC.A 72/2005 (Machakos) – Richard Irungu Nderitu & Another vs Mueni Kisoo where *Onyancha, J.* dismissed an application similar to the present one because no evidence of substantial loss to be otherwise suffered was exhibited.
 - ii. HCC.A 187 and 188/2006(Machakos)-Kiwanjani Hardware Ltd vs Daniel Ndaka

& Another where *Sitati, J.* dismissed a similar application inter-alia for reasons that the deponent of the Supporting Affidavit was an advocate for the Applicant and had no personal knowledge of the pecuniary means of the Respondent and therefore was unable to show what substantial loss the Applicant would suffer if no order of stay was granted.

5. I have given anxious consideration to the issue at hand and would begin by setting out the fettered discretion granted to this court by Order XLI Rule 4(2) of the Civil Procedure Rules which provides as follows:-

“No order for stay of execution shall be made under subrule (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.”

6. In the present Application it is not in issue that the Application was brought timeously and security in the way of deposit of the entire decretal sum has been offered and given. What is in issue is whether there is any evidence that unless the stay order is granted the Applicant will suffer substantial loss. It has been said time and time again that substantial loss is the cornerstone of any application for stay pending appeal and that the issue is one to be addressed through clear evidence. In that regard, it is said by Philomena Theuri that *“she is well versed with the facts of this case and duly authorized by the appellant to swear [the] affidavit”* in support. Further that *“from the respondent’s testimony in chief in the subordinate court, she sells vegetables at a market called “Kyamathiaka in Kitui” and will therefore be hard put to repay the decretal sum if the Appeal succeeds.*

7. I should settle the dispute of the competence or otherwise of Philomena Theuri to swear the Supporting Affidavit. Whereas I generally take the view that neither an advocate nor an officer of an insurance company are the best persons to depone to certain issues in contest, where they do so from matters in the record of the court, I see why not. I have previously, as did *Sitati, J.* in *Kiwanjani (supra)* taken a dim view of an insurance company manager or advocate stating from the blues that the Respondent is a person of straw but gives no basis for that statement. In this case, reliance on the evidence of the Respondent before the trial court cannot be seen in the same light. In fact the Respondent has not denied that she is a vegetable seller at the market aforesaid and to that extent it is deemed that she is indeed one. If that be so, the decretal sum in issue is substantial enough and may not be repaid if the Appeal succeeds.

8. The Applicant has also raised serious issues that will be determined in the Appeal including the ownership of the motor vehicle that caused the accident and also the jurisdiction of the trial court vis-à-vis the award in damages that was made. These matters will need the intervention of this court in its appellate jurisdiction. Clearly, if the Appeal succeeds I see that unless the order is granted the Applicant will suffer substantial loss.

9. Lastly, since the whole decretal sum is already secured in court, no prejudice would be caused to the Respondent and discretion in all regards will favour the Applicant.

10. In the event the Application dated 27.3.2008 is granted on condition that the decretal sum remains deposited in court and in the alternative parties may agree to lift that deposit and place it in a joint interest earning account in the names of the party’s advocates at their own instance.

11. Costs shall abide the Appeal.

12. Orders accordingly.

Dated and delivered at **Machakos** this **29th** day of **October 2008**.

Isaac Lenaola

Judge

In the presence of: Mr Musyoka h/b for Mr. Mulu for

Respondent

No appearance for Applicant

Isaac Lenaola

Judge