



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Appeal 36 of 2008

BLUESHIELD INSURANCE CO. LTD.....APPELLANT

VERSUS

SHEILA WILLIAM MKASI.....RESPONDENT

RULING

The appellant, Blueshield Insurance Company Limited, has lodged the Notice of Motion dated 3rd July 2008 seeking mainly a stay of execution of the order of the Lower Court dated 14th February 2008. By that order the Learned Magistrate dismissed the appellant's application dated 16th November 2007 which application primarily sought to set aside a default judgment. The effect of the order was to pave way for execution of the decree which had issued pursuant to the default judgment.

The application is expressed to be brought under the provisions of Order XLI Rule 4 of the Civil Procedure Rules, Section 3A and 63 (e) of the Civil Procedure Act and all other enabling provisions of the Law. The application is based on three main grounds namely: that (i) the applicant is likely to suffer substantial loss unless the stay is ordered; (ii) that the applicant is willing to abide by the orders of the court regarding security and (iii) that the appeal shall be rendered nugatory if execution is not stayed.

The application is supported by an affidavit sworn by one Christopher Oisera, the applicant's Claim's Officer – Coast Region. The affidavit elaborates the above grounds of the application. The application is opposed and the respondent has filed a replying affidavit. The substance of the opposition is that the applicant does not have an appeal with any chances of success and that the respondent stands to suffer more than the applicant if stay is ordered.

The grounds upon which an order of stay of execution of decree can be sought are stated in Order XLI Rule 4 of the Civil Procedure Rules. They are as follows:

- (i) Demonstration of sufficient cause.
- (ii) Establishment that substantial loss may result unless stay is granted.
- (iii) Evidence that the application has been lodged without unreasonable delay.
- (iv) Furnishing of security.

The applicant asserts that its appeal is meritorious and is not frivolous. I note that it sought to set aside a default judgment without success. It also alleges repudiation of the policy. I do not have to consider each and every ground of the appeal. It is sufficient to say that having considered the Memorandum of Appeal and the supporting affidavit, I cannot say that the appeal is frivolous. I therefore find that the applicant has shown sufficient cause.

Regarding delay, it is noted that the ruling of the Lower Court was delivered on 14th February 2008. The applicant lodged an application in the Lower Court on 6th March 2008. Ruling thereon was delivered on 19th June 2008. This application was then lodged on 3rd July 2008. The delay involved is of 14 days. In my view that delay cannot be said to be inordinate.

The applicant had also to show that substantial loss may be occasioned to it if the order of stay is not granted. With regard to that aspect of the application, the applicant's Coast Claims Officer swore that the applicant would suffer irreparable loss, damage and financial distress. The sum involved is about Kshs. 127,000.00. I fail to see how payment of this sum can cause financial distress to the applicant which is "a major underwriter of insurance policies in the country."

I also do not see how payment of the said sum will render the applicant's appeal nugatory. The applicant has not demonstrated that the said sum cannot be recovered from the respondent if the appeal eventually succeeds. It is clear therefore that the applicant has not demonstrated that it stands to suffer substantial loss if the order of stay is not granted.

All the prerequisites for the grant of an order of stay of execution have to be satisfied by the applicant before the grant of stay can be ordered. The applicant has failed in one. Consequently, the application must fail. Accordingly, it is dismissed with costs.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OCTOBER 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Mulongo for the Respondent and Hamza holding brief for Egunza for the Applicant.

F. AZANGALALA

JUDGE

9TH OCTOBER 2008