



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

Civil Appeal 813 of 2006

SUPERPLAST MANUFACTURERS LTD.....APPELLANT

VERSUS

JOEL ODHIAMBO OLOO.....RESPONDENT

RULING

This is an application by the appellant brought under Order L Rule 1, Order XLI Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking an order for stay of execution of the judgment delivered on 25th October 2006 in Nairobi CMCC NO. 9917 of 2005 (Milimani) pending the hearing and determination of the appeal herein filed.

The Applicant says that its appeal has merit, is arguable and has very high chances of success and that the same will be rendered nugatory if the stay is not granted. In support of the application R.N. Kitheka the Manager Legal Department of the Applicant's insured, Keninda Insurance Company has sworn an affidavit giving grounds for the application and that the Respondent lacks financial ability to repay the money.

The Applicant submitted that the Respondent lacks financial ability to repay the money in the event the appeal succeeds which application has high chances of success.

The application is opposed by the Respondent who has filed a Replying Affidavit. The Respondent submits that the Applicant has not satisfied the conditions for granting a stay under order XLI Rule 4 (2) of the Civil Procedure Rules. He further submits that the Appellant has not established that he will suffer substantial loss and that he has not proved that he has arguable appeal. The Respondent further submitted that inability to repay the money alone is not enough to warrant a stay. Use of financial ability should not be allowed to deny the poor access to justice. Lastly he concluded that the affidavit in support of the application is sworn by the manager of the insurer and not the applicant himself and hence a stranger to the application.

It is now strite that for Applicant to succeed in an application under Order XLI Rule 4 (2) of the Civil procedure Rules, it must show not only that its appeal or intended appeal is arguable but also that its appeal or intended appeal if successful will be tendered nugatory unless it is granted a stay. The party who has a decree in its favour is entitled to the fruits of his litigation unless circumstances exist which justify denying him the immediate realization thereof.

But as submitted by counsel for the Respondent the affidavit in support of the application is sworn not

by the Applicant himself but by R.N. Kitheka the Manager – Legal Department of the Applicants insurer Kenindia Assurance Company who is a stranger to the application and therefore the said affidavit is defective and renders the whole application incompetent.

Ordinarily the insurers do take a keen interest in accidents involving their insured but limited only to providing legal assistance during the hearing of the claim but cannot actively participate as parties to the suit. Legally the insurers only come in after the insured has been sued and damages awarded as provided for under Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 which states:

“If after a policy of insurance has been effected, judgment in respect of any such liability as required to be covered under paragraph (b) of Section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided, or cancelled the policy the insurer shall, subject to the provisions of this section pay the persons entitled to the benefits of the judgment any sum payable thereunder in respect of liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on the judgment.”

Having declared the affidavit in support of the application defective it follows therefore that the Applicant’s Notice of Motion herein is incompetent and the same is struck out with costs.

The applicant is at liberty to file a competent application.

Dated and delivered at Nairobi this 24th day of September 2007.

J.L.A. OSIEMO

JUDGE