

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO.6 OF 2002

UNITED INSURANCE CO. LTD. APPELLANT

VERSUS

MABENGO CHOGA KONGA RESPONDENT

R U L I N G

The application before the court is brought under Order 41 rule 4, Civil Procedure Rules.

The Applicant seeks an order for stay of execution pending appeal.

The subject matter is execution of a decree in the lower court suit amounting to Shs.533,855/- being damages, interest and costs awarded in the lower court in Traffic Road accident claim. The grounds upon which the stay is sought is that the appeal is meritorious and has high chances of success, that the appellant will suffer irreparable loss if execution is not stayed and the success of the appeal will be rendered nugatory. What the rule requires is that sufficient cause be shown and that the court shall not make any order unless it is satisfied that substantial loss may result to the applicant and that no unreasonable delay is occasioned and that such security as the court orders for the due performance of such decree or order that may ultimately be binding on the applicant, has been given by the applicant. In his argument the counsel for applicant has endeavored to show that there is an appeal with overwhelming chances of success. He says that the appellant were not liable as they did not insure the vehicle which caused the accident and that they had filed a defence showing that there was triable issues but instead the lower court proceeded to enter summary judgment against the appellant. Regarding the issue of substantial loss it was argued that releasing and parting with the control of such a large sum of money was "irreparable" loss in the event appeal was successful. However they did not proceed to show that the Respondent is a man of no means who may not be able to repay the money in the event of success on appeal. On the issue of delay the counsel stated that he had firstly applied in the lower court and was granted limited stay. The stay was limited to 45 days. Counsel for Respondent argues that the 45 days expired and there was delay until auctioneers were at the door. That is when they decided to come to High Court. Because of the delay the auctioneers costs have been incurred and the appellant should be ordered to pay.

The counsel submitted that the decretal amount should be deposited in a joint interest earning account while the appeal is pending.

The application was strongly opposed by Mogaka counsel for the Respondent who argued that the giving of security is mandatory and the appellant had failed to prove that the Respondent would be unable to repay the money if appeal was successful.

After considering all the material laid before the court I say the appellant appears to have an arguable appeal and he is willing to deposit decretal amount in joint account with counsel for the Respondent. I am prepared to accept that amount as security. However without evidence I am unable to say that the respondent is a person who can repay the decretal amount if the appeal was successful. He is acting as a trustee of the deceased estate. In the circumstances I order that the Applicant shall deposit Shs.533,855/- in an interest earning joint account in the names of the Respondent firm of advocates and Appellant's firm of advocates not to be withdrawn until after the outcome of the appeal or further order. The deposit shall be paid within the next 7 days. The stay of execution is therefore granted subject to the said deposit being made. The appellant shall pay the charges of auctioneers so far incurred to be agreed upon or taxed.

Dated at Mombasa this 15th Day of April, 2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE