



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 2500 OF 1997**

**KENYAN ALLIANCE INSURANCE CO. LTD.....PLAINTIFF**

**VERSUS**

**TRADE INSURANCE BROKERS LTD.....DEFENDANT**

**RULING**

In this application brought by way of Chamber Summons under Orders XXI Rule 22, IXA Rule 10, XXV Rule 10 of the civil Procedure Rules and S. 3A of the civil Procedure Act and all other enabling provisions of the law, the defendant / applicant prays:

“2. That there be a stay of execution pending the hearing and determination of this application.

3. That the summary entered against the defendant on 7th February, 2002 and all consequential orders be set aside and the applicant be granted an opportunity to be heard.”

The grounds on which the application is based are said to be that the applicant is not indebted to the plaintiff respondent and that when the application was being heard the applicants counsel was engaged in a criminal case hearing in the High Court. The application is however strongly opposed by the respondent.

By way of background information there is no doubt that the parties used to have business dealing whereby the applicant used to be an issuance business agent of the respondent. The business used of necessity to involve extension of credit to the applicant for business introduced through it. However during 1995 to 1997 he fell behind in remitting amounts due to the respondent and the respondent therefore filed the instant suit on 3rd October, 1997 for shs 2,644,360/= as a balance of the amounts then due to the respondent from the applicant. By the defence filed on 17th November, 1997 to applicant filed demand liability contending that the policies introduced by the applicant had been cancelled and as such he owed nothing to the respondent.

On 24th March 1998, the respondent filed the application for summary judgment alleging that no policies had been cancelled and that on 26th May, 1997, the statement of account between the parties stood at shs 3,461,857.45 which had been sent to the respondent and in part settlement thereof and/or in recognition of the said debt. The applicant had forwarded 3 cheques for shs 1,000,000/= 1,000,000/= and shs 500,000/= post dated to the 27th May, 1997 and post dated to 30th May, 1997 and 13th June 1997 respectively which cheques were however dishonored. On being confronted with the above fact, the applicant alleged that the debt due was much less than 3,461,857/45 but did not state the amount which was due according to him. The respondent then scrutinized the dealings between the parties and found that due was shs 2,644,360/= and filed the current suit and sought summary judgment for that amount. When the application was served on the applicant, the applicant opposed the application contending that the amount due was less than that had been claimed in the plaint and that the cheques dishonoured before the applicant had decided whether or not to accept the respondents statement. The applicant also concluded that the respondent cancelled some policies which it had had to pay in November 1997. The matter was then finally fixed for hearing on 7th February, 2002 after several adjournments but the counsel was unable to be present as he was in a murder trial. The respondent never strongly opposed the application as it was by consent before Justice Ombija (not Justice Visram) and as counsel made no attempt to inform the court to counsel to adjourn the matter.

In application to set aside ex parte orders, the courts concern is to do justice to the parties unless it shown that the applicant has by his conduct in not attending willfully intended to delay or obstruct the cause of justice. As the mater in which he was alleged relates to the liberty of a citizen, I am unable to find that in intended to delay or defeat the case of Justice although the conduct of the case would indicate this trial. The applicant has also filed a replying affidavit which should be concluded.

On account of the above, it is my considered view that the justice of the matter being an interlocutory matter whose orders are not far reaching consequences, demands that the applicant be given a chance to show cause why a claim evidenced by cheques should be heard. I therefore allow this application with costs of the application and those thrown away to respondent. A date to be taken at the registry. Orders accordingly.

Delivered and signed this 17th day of December, 2002

**G. P. Mbito**

**JUDGE**