



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 362 OF 2019

XPLICO INSURANCE COMPNAY LIMITED.....APPELLANTS/APPLICANT

VERSUS

IMPREZA COSTRUZIONI GIUSEPPE MALTAURO SPA.....RESPONDENT

(Being an appeal from the Ruling and or order made by the Hon. P. Gesora (Mr)

Chief MAGISTRATE ON THE 20TH June 2019)

RULING

1. Xplico Insurance Company Ltd, the Appellant /Applicant herein took out the motion dated 24th October 2019 in which it sought for the following orders inter alia:

(i) THAT this Honourable Court be pleased to affirm that the Bank Guarantee for the sum of ksh. 18,826,434 issued by M Oriental Bank Limited and a copy filed in court on 15th August 2019 is even in the absence of registration remains proper and valid for due performance of the decree issued in Milimani CMCC 1010 of 2018 pending the hearing and determination of this appeal.

(ii) THAT in the alternative, this Honourable Court be pleased to fix or extend time within which the Bank Guarantee is to be registered.

(iii) THAT this Honourable Court be pleased to issue such further and/or alternative orders in the interests of justice and to protect the Appeal proceedings herein.

2. The motion is supported by the affidavit of Mike G. Muriithi. When served with the motion **Impreza Construction Giuseppe Maltauro Spa**, the Respondent herein, filed the replying affidavit of Fredrick Njogu to oppose the application.

3. When the motion came up for interpartes hearing, learned counsels appearing in the matter made rival oral submissions. I have considered the grounds set out on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have further considered the rival oral submissions. It is the submission of the Appellant/Applicant that the bank guarantee is still valid and enforceable against the issuing bank and therefore remains as a proper and adequate security for the due performance of the decree.

4. The Appellant further stated that the Respondent's argument that it is entitled to execute because the bank guarantee has not been registered amounts to an introduction of a condition outside the scope of the order simply requiring the Appellant/Applicant to provide a bank guarantee.

5. It was also pointed out by the Appellant that the Respondent has failed to demonstrate the prejudice it would suffer by the delay to provide the guarantee or for non – registration of the bank guarantee. The Appellant stated that the court possesses the power and discretion to fix and or extend time within which the Bank guarantee should be registered.

6. The Respondent stated in its submissions that the Appellant has not registered the guarantee as promised in the guarantee itself. It is also argued that the Appellant has failed to give the Respondent the original guarantee and has not given any reasons for its failure.

7. The Respondent also pointed out that this court has issued orders of stay of execution on two previous occasions and it is therefore not necessary to grant similar orders. It was further stated that the prayer for stay is rejudicata.

8. The Respondent accused the Appellant for inordinate delay in moving the court for extension of time.

9. Having considered the material placed before this court together with the rival submissions it is not in dispute that the Appellant/Applicant has secured a bank guarantee from **M Oriental Bank Ltd** in compliance with the court order issued on 9th August 2019. A copy of the bank guarantee was filed in court on 15th August 2019 within the 7 days fixed by this court.

10. The Respondent is stating that it has not been served within the original guarantee and that is why it has taken steps to have the decree executed. I am persuaded by the arguments of the Appellant that the bank guarantee it supplied is still valid and enforceable despite the fact that the original has not been served upon the Respondent.

11. I am also convinced that the court retains the discretion to fix or extend time to the Respondent to cause the bank guarantee to be registered and served. It has been argued that the application for stay is rejudicata. I am not convinced by that argument because what the Appellant is seeking to stay is the further execution of the decree which the Respondent has attempted to do.

12. In the end, I find the Appellant's motion to be meritorious. The same is allowed thus giving rise to the following orders:

i) There be a stay of execution of the decree pending appeal.

ii) The Bank guarantee to be registered within a period of 7 days from the date hereof.

iii) The Appellant/Applicant to provide the Respondent with the original Bank guarantee within 10 days from the date of this ruling.

iv) Each party to meet its own costs of the motion.

Dated, signed and delivered at Nairobi this 21st of January, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent