REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 61 OF 2019

FIRST ASSURANCE CO LTD.....APPELLANT

VERSUS

MARGARET WANJIRU NJOROGE (Suing as Legal Representative of the Estate of

MESHACK NJOROGE KABUTI (Deceased)**.....RESPONDENT**

(Being an appeal from the ruling of the Chief Magistrate, Machakos (Hon A.G. Kibiru (Mr)

delivered on the 3rd April, 2019 in Machakos CMCC 1452 of 2010)

BETWEEN

MARGARET WANJIRU NJOROGE (Suing as Legal Representative of the Estate of

MESHACK NJOROGE KABUTI (Deceased)**.....PLAINTIFF**

VERSUS

FIRST ASSURANCE CO LTD.....DEFENDANT

RULING

1. The Appellant approached the court with the instant application vide certificate of urgency where it seeks what is indicated as an order for a stay of execution of the judgement and decree rendered between the parties in the lower Court on 3.4.2019. The appeal is from a ruling delivered in Machakos CMCC 1452 of 2010 by Hon A.G. Kibiru. The Application is supported by a Supporting Affidavit by George Magugu, who is an advocate from the firm on record for the appellant. He averred that the applicant has filed an appeal against the ruling of the trial court and that should the respondent commence the process of execution then the appeal will be rendered nugatory. A copy of the memorandum of appeal is on the court record. The deponent averred that the appellant is willing to provide reasonable security as may be ordered by the court.

2. The Application is opposed. In opposition, the Respondent deponed on 26.4.2019 a replying affidavit wherein she averred that the application is frivolous, vexatious, bad in law, untenable and a gross abuse of the court process. She averred that she is a woman of means and that the matter arose out of a road accident that occurred on 24.7.2004. She averred that she filed a suit CMCC 922 of 2008 and judgement was delivered in her favour and subsequently she filed a declaratory suit being CMCC 1452 of 2010 because the defendant in the primary suit failed to satisfy the judgement in the primary suit. It was averred that the appellant has failed to satisfy the mandatory requirements under Order 42 Rule 6 of the Civil Procedure Rules and that she opposes the application as it will greatly prejudice her.

3. The Application was canvassed by way of written submissions. Learned counsel for the appellant filed submissions on 18.6.2019 and whereas the respondent's submissions were filed on 2.7.2019.

4. Learned counsel for the applicant submitted that this court has jurisdiction to entertain the application and placed reliance on the provisions of Order 42 Rule 6 of the Civil Procedure Rules. It was submitted that the appellant is ready to deposit the full decretal amount and that the appellant will suffer substantial loss if execution proceeds. It was submitted that the application was brought without unreasonable delay because the ruling in the trial court was delivered on 3.4.2019 and the instant application was filed on 18.4.2019. Counsel

in placing reliance on the case of **Mukuma v Abuoga (1988) KLR 645** submitted that it had satisfied all the conditions precedent for the grant of the order sought. Counsel submitted that the appellant had an arguable appeal because the appeal raised questions of whether the defence raised triable issues of whether a declaratory suit could be filed in a material damage claim and that the court erred in failing to find that leave to file the suit out of time cannot be granted in a material damage claim.

5. According to the Respondent, there are conditions for grant of stay. In that regard counsel cited the provisions of Order 42 Rule 6 of the Civil Procedure Rules and submitted that the applicant has not satisfied the grounds for grant of the stay order and therefore the same should be dismissed. It was submitted that the application was brought with unreasonable delay; that substantial loss had not been demonstrated and that the affidavit in support was deponed by an advocate who is not an employee of the respondent. Reliance was placed on the case of **Regina Waithira Mwangi Girau v Boniface Nthenge (2015) eKLR** where an affidavit deponed by an advocate was struck out as it was found that an advocates ought not to swear affidavits on contentious matters. It was submitted that if the court is inclined to grant the application, then it should order that half of the decretal amount be deposited in a joint interest earning account.

6. The issue for determination is whether the Appellant is entitled to an order for stay of execution.

7. This application is brought under Order 42 Rule 6, Order 22 Rule 22 and Order 51 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. Order 22 Rule 22 is of no value to the instant application. Section 3A preserves the applicants' right to approach this court to realize their cherished right of appeal and Order 42 Rule 6 provides for stay of execution pending appeal. The conditions to be met by an Applicant in order to be entitled to an order for stay are laid out in that Rule in the following terms:

> **6.** ***(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***
>
> ***(2) No order for stay of execution shall be made under sub-rule (1) unless—***
>
> ***The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***
>
> ***Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.***

8. I have perused the filed Memorandum of Appeal in this case. I have had due regard to Section 2 of the Civil Procedure Act Cap 21 of the laws of Kenya which in the definition of a "decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—

> (a) any adjudication from which an appeal lies as an appeal from an order; or
>
> (b) any order of dismissal for default:

Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

Explanation. — A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

In the same section, decree holder, alludes to an order that "is capable of execution." In that section, a decree holder is defined as "any person in whose favour a decree has been passed or an order capable of execution has been made…" It therefore obtains that there are orders that are capable of execution while others are not.

10. In **Ndungu Kinyanjui v Kibichoi Kugeria Services & Another Civil Application No NAI 79 0f 2007** (unreported)it was observed that in the Re Sonalux case, the Court of Appeal had this to say:-

> "***This Court has repeatedly stated in previous decisions… that in an application under Rule 5 (2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to pay any sum there would be nothing arising out of that decision for this court to enforce or to restrain by injunction."***

11. The Court has no jurisdiction to stay any action unless there is a positive order of court for something to be done or enforced. Even if the application in the trial court was refused, the court has no power to stay a negative order of striking out the defence. In **Exclusive Estate Limited vs. Kenya Posts and Telecommunications Corporation and Another [2005] 1 EA 53 (CA)** it was held by the Court of Appeal that stay of execution envisaged under rule 5 (2) (b) of the Court of Appeal Rules of Kenya is the execution of a decree capable of execution in any of the methods stipulated under section 38 of the Civil Procedure Act. The Court further held that a decree holder as defined under the Civil Procedure Act means a person in whose favour a decree capable of execution has been passed. In that case the order which had been

made dismissed the suit and was a negative order in that it was not capable of execution. It was held that a negative order can only be set aside by the appellate court.

12. Section 38 of the Civil Procedure Act provides for the various modes of execution in the following words:

a. “by delivery of any property specifically decreed,

b. by attachment and sale, or by sale without attachment, of any property,

c. by attachment of debts,

d. by arrest and detention in prison of any person,

e. by appointing a receiver,

f. in such manner as the nature of the relief granted may require.”

13. The section envisages an order which is not yet implemented or executed and which is capable of execution. For the order or decree to be satisfied, the judgment creditor or an officer of the court such as a bailiff must force or compel the judgment debtor or 3rd party such as the Garnishee using any of the modes provided for under section 38 of the Civil Procedure Act to implement the order or decree.

14. In the premises there is no order of court that is capable of execution and the prayer for stay of execution cannot be allowed to stand. The appropriate application in the instant matter would be one to set aside the order striking out the defence and seeking that the appellant be allowed to defend his case and if dissatisfied then the appellant could still appeal against the decision of the trial court with the provisions of section 2 and 38 of the Civil Procedure Act in mind.

15. In light of the foregoing, the prayer for stay of execution is not merited. Consequently, the application dated 16.4.2019 lacks merit and is dismissed with costs.

Dated and delivered at **Machakos** this **6th** day of **May, 2020.**

D. K. Kemei

Judge