



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 611 OF 2019

KENYA ORIENT INSURANCE COMPANY LIMITED.....APPLICANT

VERSUS

PAUL NZUKI NDELEVA.....RESPONDENT

RULING

1. The application for determination before me is the Notice of Motion dated 23rd October 2019 which seeks two substantive orders as follows:

i. That there be stay of execution of the decree resulting from the judgment delivered by the lower court on 21st May 2019 pending the hearing and determination of the appellant's appeal.

ii. That the decretal amount of KShs.1,147,854 deposited in account number [xxxx] held at Equity Bank Corporate Bank be held as security pending the disposal of the appeal.

2. From the material placed before me, it is apparent that default judgment was entered by the lower court against the appellant for failure to file a defence within the prescribed time. Thereafter, the appellant filed an application seeking to *inter alia* have the default judgment set aside which application was dismissed by the trial court hence this appeal.

3. In the grounds anchoring the motion and in the supporting affidavit sworn on its behalf by *Ms. Morine Wangeci*, the applicant's Legal Officer, the applicant contends that if the orders sought are not granted, it will suffer substantial loss and its appeal will be rendered nugatory as the respondent has already started the execution process.

4. The applicant further averred that it had already deposited the entire decretal amount in a joint interest earning account held by counsel for both parties which this court should accept as security for the due performance of the decree.

5. The application is opposed. In his replying affidavit sworn on 22nd November 2019, the respondent claimed that the application was an abuse of the court process as in his view, it was solely aimed at delaying the realization of fruits of his judgment. He however conceded that indeed, the appellant had deposited the entire decretal sum in a joint interest earning account held by counsel for both parties.

6. On the hearing date, though both parties were represented by counsel in the morning when the court allocated time for hearing of the application, only the applicant's counsel attended the court at the time the application was scheduled for hearing. The respondent's counsel failed to attend the court and did not send any counsel to hold his brief. Hearing of the application thus proceeded *ex parte*.

7. In his oral submissions, learned counsel for the applicant *Mr. Kiplagat* urged the court to allow the application arguing that the same was filed timeously and if it was dismissed, the applicant was likely to suffer substantial loss since chances of recovering the decretal amount from the respondent are non-existent should the appeal succeed.

8. I have considered the application, the affidavits on record and the oral submissions made by *Mr. Kiplagat*. The law governing stay of execution pending disposal of an appeal is governed by *Order 42 Rule 6* of the *Civil Procedure Rules*. For an applicant to be entitled to stay orders, he must demonstrate the following three conditions, namely:

i. That the application was filed timeously;

ii. That he is likely to suffer substantial loss if stay was not granted;

iii. That he is ready and willing to offer such security as the court may order for the due performance of the decree.

9. Starting with the first condition, I note that the impugned ruling was delivered on 11th October 2019. The application was filed on 23rd October 2019 about two weeks later. I am thus satisfied that the application was filed timeously.

10. Regarding the second condition, the applicant's claim that it is likely to suffer substantial loss if the orders sought are not granted since the respondent will be incapable of refunding the decretal amount if the appeal succeeded has gone unchallenged. The respondent in his replying affidavit did not dispute this claim. Consequently, I find that the applicant has established that if stay is not granted, it is likely to suffer substantial loss.

11. Finally, on the requirement for provision of security, the applicant has exhibited a fixed deposit receipt for KShs.1,147,854 held at Equity Bank in the joint names of both counsel on record and has expressed willingness to have the same held as security for the decretal amount pending disposal of the appeal. The respondent in his replying affidavit did not counter the appellant's claim that this amount represented the entire decretal amount. In the premises, I find that the aforesaid fixed deposit constitutes sufficient security for the performance of the decree herein.

12. On the basis of the above findings, I find that the Notice of Motion dated 23rd October 2019 is merited and it is hereby allowed. The applicant is granted stay of execution as prayed on condition that the fixed deposit held at Equity Bank under account number [xxxx] by both counsel on record continues to be held as security pending disposal of the appeal.

13. The costs of this application will abide outcome of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of May 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Munyoki holding brief for Mr. Musili Mbiti for the respondent

No appearance for the applicant

Ms Carol: Court Assistant