



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 144 OF 2018

DIRECT LINE ASSURANCE COMPANY LTD..... APPELLANT

VERSUS

SIMON KIPKORIR CHIRCHIR..... RESPONDENT

RULING

1. Before me is an application by way of Notice of Motion filed on 12th November, 2018 and brought primarily under Order 42 rules 6 (1) & 6(6) of the Civil Procedure Rules. The live prayer seeks an order to stay the execution of the judgment and decree issued by the Chief Magistrate's Court at Kiambu on 17th October, 2018 in **Kiambu CMCC No. 166 of 2018 Simon Kipkorir Chirchir vs Direct Line Assurance Company Limited** pending the determination of the appeal herein. The appeal emanates from a declaratory suit brought against the Appellant by the Respondent for the satisfaction of a decree issue in his favor in the primary suit.

2. The gist of the grounds in support of the motion is that the Appellant is aggrieved with the judgment appealed from and are likely to suffer substantial loss if execution is not stayed. **Isabella Nyambura** the Legal Manager, **Directline Assurance** swore a supporting affidavit on behalf of the Appellant.

She deposed in her affidavit that the Appellant's defence wherein the Appellant denied liability, and pleaded that **Wilson Mbogo** the 1st Defendant in the primary suit was not their insured, was struck out in the declaratory suit. That subsequently, judgment was entered in favour of the Respondent for Kshs. 185,500/= plus interest for Kshs. 47,686/=, hence this appeal. She stated there is no order to stay execution and the Respondent has commenced execution proceedings.

3. The deponent further contended that the appeal has high chances of success; that the Appellant stands to suffer irreparably if compelled to pay the decretal sum to the Respondent and that the appeal will be rendered nugatory as it may be impossible to recover the monies if the appeal determines in the Appellant's favour. It was stated that the Respondent will not suffer any prejudice and lastly, that the Appellant is willing to deposit the decretal sum into court as security.

4. The Respondent filed his replying affidavit on 21st November, 2018. He deposed regarding the primary suit that at the time of the accident on 18th September, 2016, the accident motor vehicle was registered in the name of **Wilson Mbogo**; that the subsequent transfer to one **Francis Thiong'o** was effected on 7th April, 2017; that a contract entered into between **Francis Thiong'o** and the Appellant on 10th June, 2016 was illegal as it contravened Section 76A of the Insurance Act. It was his position that the Appellant's Statement of Defence in the declaratory suit was properly struck out as it did not raise any triable issues. He contended that the Appellant never appealed the judgement in the primary suit and that in any case, the present appeal has little or no chance of success whatsoever. He urged the court to **dismiss the motion**.

5. The application was canvassed by way of written submissions. The Appellant submitted that it shall suffer substantial loss if compelled to pay the decretal sum. Reliance was placed on the case of **Mukoma vs Abuoga (1988) KLR 645** where it was held that substantial loss which would render an appeal nugatory has to be prevented. Also relied on was the case of **The Standard Limited vs G. N. Kagia & Co. Advocates C.A. NO. 193 OF 2003** where the court stated that the successful result of an appeal is diminished where the successful party cannot easily recover the decretal sums paid out to the losing party in the appeal.

6. Counsel argued that in any case, the Respondent herein has not presented any evidence of his ability to refund the decretal amount should the appeal succeed. He cited the decision of the Court of Appeal in the case of **National Industrial Credit Bank Limited vs Aquinas Francis Wasike & Another (UR)** to support his proposition that the Respondent was obligated, upon doubt being cast on his financial ability, to demonstrate his ability to refund the decretal sum upon the appeal succeeding. Other cases cited to support the proposition were **Tabro Transporters limited case, University of Nairobi & Another vs Peter Kiplagat Tum (2012) eKLR** and **Job Kilach vs Nation Media Group & 2 others (2006) eKLR**. In conclusion, it was contended that the instant application was made expeditiously and without undue delay and that the Appellant has expressed willingness to deposit the decretal sum into court as security.

7. The Respondent's written submissions dwell on the viability of the appeal herein and contend that the issues raised in the defence,

presumably in the decision appealed from, did not raise *bona fide* triable issues. The Respondent's view was that the appeal herein was scandalous, and an abuse of the court process and the appeal and instant application should be dismissed with costs.

8. The court has considered the material canvassed in respect of the motion by the Appellant. In order to succeed, an applicant invoking the provisions of Order 42 and 6(1) and (2) of the Civil Procedure Rules is required to satisfy three conditions. He must:-

- i) approach the court without unreasonable delay.
- ii) satisfy the court that substantial loss may result unless the order sought is granted.
- iii) furnish security for the due performance of the decree appealed from.

9. At this point, the court is not concerned with the merits or validity of the grounds of appeal. The Appellant timeously approached the court. She offers a security by way of depositing the decretal sum into court. Has she demonstrated the likelihood of suffering substantial loss if the stay of execution pending appeal is denied?

10. One of the most enduring legal authorities on the issue of substantial loss is the case of **Kenya Shell Ltd V Kibiru & Another [1986] KLR 410**.

Holdings 2,3 and 4 therein are particularly relevant. These are that:

“1.

2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.

3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.

4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.

5.....”

11. The ruling by **Platt Ag JA**, in the **Shell** case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Ag JA (as he then was) stated inter alia that:

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts...”

12. The learned Judge continued to observe that:-

“It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”
(emphasis added)

13. Earlier on, **Hancox JA** in his ruling observed that:

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would,... render the appeal nugatory.

This is shown by the following passage of Cotton L J in Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said:-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if

successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

14. The Applicants have expressed doubt that they would recover the decretal sum from the Respondent if the appeal eventually succeeds. The Respondent in his Replying affidavit merely dismissed the possibility of such eventuality. In the oft-cited case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] e KLR** the Court of Appeal stated that:

“This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example Section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

15. The Respondent’s replying affidavit is enamored with a great deal of legal argumentation which is not suited to an affidavit. Equally, the Respondents submissions do not seem to address the instant application and therefore raise matters unrelated to a motion brought under Order 42 rule 6 of the Civil Procedure Rule, but possibly to the appeal itself.

16. The words stated in **Nduhiu Gitahi and Another -Vs- Anna Wambui Warugongo [1988] 2 KAR**, citing the decision of **Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198** are apt: **“We are faced with a situation where a judgment has been given. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff.....”**

It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal.....” That too is the import of part of the court’s observations in **James Wangalwa & Another –Vs- Agnes Naliaka Cheseto [2012] eKLR** and the **Shell** case above.

17. The court has noted that the Applicants moved the court without delay and have expressed willingness to provide security. Weighing all the relevant matters, the court is persuaded to grant an order in terms of prayer 3 of the motion filed on 12.11.18 on condition that within 14 days of today’s date, the Applicant deposits the entire decretal sum into court. Costs will abide the outcome of the appeal.

DELIVERED AND SIGNED AT KIAMBU THIS 15TH DAY OF MAY 2019

C. MEOLI

JUDGE

In The Presence of:-

Mr. Olaka holding brief for Mr. Mbugua for the Appellant

Respondent absent

Court Assistant - Nancy