



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 164 OF 2000**

**TOIYOI INVESTMENTS LTD.....PLAINTIFF**

**VERSUS**

**UCHUMI SUPERMARKET LTD.....1<sup>ST</sup> DEFENDANT**

**KENINDIA INSURANCE CO. LTD.....2<sup>ND</sup> DEFENDANT**

**RULING**

I wish to apologise for the long delay in writing this ruling.

1. By a notice of motion dated 16.10.2016, the applicant (**UCHUMI SUPERMARKETS LTD**) seeks that there be stay of execution of the decree in this suit, particularly execution against the 2<sup>nd</sup> interested party pending hearing and determination of appeal against the ruling delivered on 5<sup>th</sup> September 2018 dismissing the 2<sup>nd</sup> Interested Party's application to be enjoined to the suit and for stay orders.

(2) All orders directed at **M/S KIRIIYU MERCHATNS AUCTIONEERS** and any other auctioneer to execute against the 2<sup>nd</sup> Interested Party's assets be stayed pending the ruling. The application is premised on grounds that the 2<sup>nd</sup> interested Party/Applicant has lodged an appeal against the ruling of 5<sup>th</sup> September 2018 and warrants have been issued and served with an order for police escort and facilitate the attachment.

It is the applicant's contention that it will be prejudiced as they will have been condemned unheard through a consent which was recorded in their absence. That in any event the appeal shall be rendered nugatory if the orders are not granted and the appeal succeeds.

The Applicant is willing to abide by such reasonable terms as the court may order.

2. In the supporting affidavit sworn by **JOSEPH MWAI** (the applicant's Senior Legal Officer), he maintains that they have been condemned unheard and are keen on pursuing the appeal. He reiterated the apprehension of adverse activities by the auctioneers. He explains that the delay in the matter is because they were waiting the outcome of **Eld. HCCC No 14 of 2016 UAP Insurance Co. Ltd V Uchumi Supermarkets Ltd** where they had sought to be enjoined and had obtained interim stay orders. However the application for joinder and stay was eventually dismissed on 11<sup>th</sup> August 2017 and another one was dismissed in September 2018.

3. In a replying affidavit sworn by **DR. KEN NYAUNDI** on behalf of the 1<sup>st</sup> Interested party (**i.e KENINDA INSURANCE CO. LTD**) he deposes that the application is a blatant abuse of the court process and is meant to deny the 1<sup>st</sup> Interested Party the fruits of their judgment which is more than 18 years old. Further the application seeks to unwind the clock on the consent entered into between the Decree Holder and the judgment debtor on 13<sup>th</sup> Nov. 2013 – a period of 5 years ago where **UAP**, subsequent to communication between them and **UCHUMI SUPERMARKETS**, granted security to the court by way of a letter of irrevocable undertaking from a sum of Ksh.100,000,000/ on which security the court permitted a stay of execution for this matter to proceed to the Court of Appeal.

4. Further that it was an express term of the consent that if the Court of Appeal were to make a finding against **Uchumi Supermarket**, **UAP Insurance** would meet the terms of the guarantee. It is on the basis of the foregoing that the Interested Party argues that the application has not a scintilla of hope. And that in any event the dispute is between **UCHUMI SUPERMAKETS** and their insurer **UAP Insurance** and has no relationship with the 2<sup>nd</sup> Interested Party at all, which dispute is the subject of **HCCC No. – 14 of 2018 – UP Provincial Insurance Ltd VS Uchumi Supermarket**. That there is no arguable application as not even a memorandum of appeal has been exhibited.

5. This court's attention is drawn to the fact that the plaintiff herein (**TOIYOI**) attempted to be enjoined in **HCCC No. 14 of 2015** but their prayer was rejected. Moreover the firm of **KIBICHIY & CO. ADVOCATES** had all along acted for both the Defendant (**i.e UCHUMI SUPERMARKETS**) and the proposed 2<sup>nd</sup> Interested Party (**UAP INS**) and it is disingenuous to now claim that the proposed 2<sup>nd</sup> IP was not aware of the judgment requiring to be satisfied when it issued the guarantee.

6. The deponent further points out that **TOIYOI INVESTMENTS LTD** have already received part payments from the proposed 2<sup>nd</sup> Interested Party rendering this a partly performed decree with an unpaid balance of Ksh.21,276,317/-, and cannot therefore be stayed.

7. The applicant's refrain that it is because it will be affected adversely is contested on ground that it was a foreseeable result when the unconditional guarantee was given and it must be assumed that the sums now claimed were already set apart by the applicant. That in any event, the applicant has not offered any security for due performance, nor is it alleged that **KENINDIA ASSURANCE CO. LTD** (the 1<sup>st</sup> IP) shall not be capable of refunding the amount of Kshs.21,276,317 should the intended appeal succeed.

8. At the hearing of this application **MISS SITIENEI** on behalf of the 2<sup>nd</sup> Interested Party reiterated the same sentiments expressed in the supporting affidavit saying the application meets the grounds set out under Order 42 of the CPR saying there was no undue delay.

9. Further that the applicant is likely to suffer substantial loss – saying this has already been felt because **TOIYOI** has already executed against it in the sum of Ksh.25,046,622/- and forced them to pay Ksh.1.5m as auctioneer's charges.

10. As far as they are concerned, the consent was an illegality which should be stemmed by an order of stay pending hearing of the appeal.

11. **MR KAGIMA** who appeared on behalf of **MR MOGAMBI** for the Interested Party opposed the prayers saying the applicant has not demonstrated that the 1<sup>st</sup> Interested Party is not capable of refunding the money should the appeal succeed. He points out that **KENINDIA** is a big company which is fully liquid and with assets enough to refund the money should the appeal succeed.

12. In any event what is sought to be stayed is an order which dismissed the application to be enjoined – so there is nothing to stay.

13. Mrs Sitienei's rejoinder is that there is nothing to prove that the 1<sup>st</sup> IP is liquid.

Basically what the application seeks is an order for stay pending appeal. The stay relates to the ruling delivered by this court on 5<sup>th</sup> September dismissing the prayer by **UAP Insurance** to be enjoined as the 1<sup>st</sup> IP, and also for setting aside or varying of the consent order. The applicable provision is Order 42 Rule 6(2) which provides;

“No order for stay of execution shall be made under sub rule (1) unless –

**a) The court is satisfied that substantial loss may result to the applicant.... And the application has been made without unreasonable delay; and**

**b) Such security as the court orders for due performance of such decree or order as may ultimately be binding...has been given by the applicant.”**

The Court of Appeal put to rest the issue in their decision **CO-OPERATIVE BANK OF KENYA LTD v BANKING INSURANCE & FINANCE UNION (Kenya) [2015] eKLR** that;

**“...that the two principles must be satisfied by an applicant who appears for stay...there is an arguable appeal would be rendered nugatory...was not granted.”**

14. What is the content of the appeal? Unfortunately no memorandum of appeal has been filed to enable this court decipher its arguability. This was critical so as to test whether what the Interested Party states in its written submission is correct, to the effect that the decree is not a subject of the appeal, and the only appealable ground is the refusal to join to join the applicants as a party and the order for costs.

This court is left to guess on what the applicant is appealing against thus making it impossible to determine whether there is an arguable appeal, the views held by the High Court in **RAYMOND M. OMBOGA V AUGUSTINE PYAN MARANGA Kisii HCCA No. 15 of 2010** which stated that a court cannot order stay of a decree which is not the subject of an appeal with regard to joinder, echo thus, “...The order dismissing the application is in the nature of a negative order and is incapable of execution, same perhaps for costs.”

15. The unfolding scenario is that although there is a positive order capable of being stayed i.e the consent, there is nothing on record to confirm that it forms part of what is being appealed against. The other part of the ruling is on all fours with the afore-going for joinder simply means the applicant stays in the situation it was before coming to court.

16. As to whether the applicant shall suffer substantial loss – the court is urged to consider the part payment the applicant has already made to the plaintiff (**Toiyoi**) as an indication of what it stands to suffer of course this is a money decree involving a lot of money, but the burden lies on the applicant to demonstrate that the execution will create a state of affairs that will irreparably affect or negate the utmost existence of the applicant's status. I can do no better than draw from the case of **KENYA SHELL LTD V BENJAMIN KARUGA (1986) KLR 410**, that it must be shown clearly that the benefitting party seeking to enjoy fruits of judgment is of such straw – like stating that were the sums to be paid out, there would never even be any hope of recovering the same. Alongside that, it must be demonstrated that paying out that sum will penalize the operations of the applicant.

17. In this I echo Odunga (J)'s sentiments in **JOSEPH GACHIE t/a JOSKA METAL WORKS VS SIMON NDEIT MUEMA [2012] Eklr** that;

*“It is not sufficient merely to state that the decretal amount is a lot of money and the applicant would suffer if the money is paid ....the applicant shows the damages it will suffer if the order for stay is not granted. Since by granting stay the court would be denying a successful litigants the fruits of judgment...”*

18. Even if part payment has been made to **TOIYOI**, it has not been said nor demonstrated that any further payments will render the company destitute or result in collapse of the applicant’s business.”

19. Consequently the application lacks merit and is dismissed with costs to the 1<sup>st</sup> Interested Party.

**DELIVERED, SIGNED AND DATED THIS 2<sup>ND</sup> DAY OF MAY 2019 AT ELDORET.**

**H. A. OMONDI**

**JUDGE.**