

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. 08 OF 2019

KENYAN ALLIANCE INSURANCE CO. LTD.....APPELLANT

=VRS=

CLEPHAS NYAMONGO.....RESPONDENT

{Being an appeal from the Order of Hon. B. M. Kimtai – PM Keroka

issued on 19th march 2019 in Keroka PMCC No. 107 of 2018}

RULING

By its Notice of Motion filed herein on 20th March 2019 the appellant seeks an order for stay of execution of the orders in Keroka PMCC No. 107 of 2018 pending the hearing and determination of this appeal. The gist of the application is that should stay be refused and the appeal succeeds then the appellant/applicant shall suffer substantial loss as the respondent's ability to refund the decretal sum is unknown.

The application is vehemently opposed on grounds inter alia firstly that it is resjudicata and secondly that the applicant has not satisfied the conditions for stay of execution as no substantial loss has been demonstrated on resjudicata. It is argued that this court dismissed a similar application by the applicant in Nyamira High Court HCCC 1 of 2019 in which this same applicant sought a stay of execution pending hearing and determination of a disclaimer suit which it proposed to file.

On the issue of substantial loss, it is argued that the applicant has not demonstrated that the respondent would not be in a position to refund the decretal amount were this application to be refused and the appeal is successful. This court is urged to find that the application is no more than an abuse of the process of this court and is merely intended to avoid, frustrate and delay the respondent from enjoying the fruits of his judgement.

This application was canvassed by way of written submissions. In HCCC No. 1 of 2019 the appellant/applicant herein sought a stay of the proceedings in two cases Keroka SPMCC No. 239 of 2017 and Keroka SPMCC No. 107 of 2018 pending hearing and determination of a disclaimer suit which it intended to file to avoid the judgement obtained against its insured in those suits. That application was however dismissed after the respondent herein successfully argued a preliminary objection that the intended disclaimer suit was time barred. This court found that staying the suits when the intended disclaimer suit was time barred would be aiding an indolent party.

By the instant application the applicant seeks to stay execution of the ruling of the lower court in Keroka PMCC 107 of 2018 pending this appeal. I have perused the record herein carefully and I could not find either the order or ruling appealed from. However, a cursory glance of the certificate of urgency and the Notice of Motion annexed to the supporting affidavit of Anthony Kariuki sworn on 20th March 2019 reveal the orders sought were a stay of execution pending the hearing and determination of the application; setting aside of the entire proceedings in the lower court and the judgement dated 25th October 2018 and an order for leave to the defendant/applicant (appellant herein) to defend the proceedings. More importantly in the same application the applicant/appellant sought an order to lift the warrants of attachment on the ground that **“it does not hold the legal capacity to satisfy the judgement arising from Keroka SPMCC No. 239 of 2017.”** It is clear from the face of that Notice of Motion that the appellant/applicant was seeking the same prayers it unsuccessfully sought in Nyamira HCCC 1 of 2019. The issue of whether or not the appellant/applicant has the legal capacity to satisfy the judgement in the lower court was considered by this court and it found that the protection provided by **Section 10 (4) of the Insurance (Motor Vehicle Third Party Risks) Act** could not avail to the appellant/applicant as its suit was not brought within the three months stipulated in **Section 10 (4) of the Act**. That self-same argument is in around about way being used in this application to seek a stay of execution. The provisions of **Section 1 A and 1 B of the Civil Procedure Act** militate against this kind of conduct. I am not persuaded that this court would be exercising its discretion judiciously if it ignored the above fact and proceeded to allow the application merely because the respondent has not demonstrated that he would be in a position to refund the decretal sum were this appeal to succeed. The effect of granting the orders sought in this application would be the same as was sought in Nyamira HCCC 1 of 2019 which this court dismissed. The same would be to unfairly delay the respondent from enjoying the fruit of his judgement. I find no merit in the application and it is dismissed with costs to the respondent. It is so ordered.

Signed, dated and delivered in open court this 18th day of July 2019.

E. N. MAINA

JUDGE