REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 65 OF 2015

ZIPORRAH KARIMI MBIJIWE.....PLAINTIFF/RESPONDENT

VERSUS

GENERAL ACCIDENT ASSURANCE.....DEFENDANT/APPLICANT

RULING

1. On 13th July 2018, this court delivered its judgment in favour of the plaintiff and against the defendant whereof this court issued a declaratory order which is to the effect that the defendant has an obligation to settle the decretal sums arising out Nairobi H.C.C.C no. 101 of 2007. The defendant being aggrieved by this court's decision filed a notice of appeal to signal its intention to challenge the decision in the Court of Appeal.

2. The defendant/applicant has now taken out two notices of motion, one is dated 20/12/2018 and the other is 25th March 2019. In the aforesaid motions the defendant is basically seeking for an order for stay of execution of the decree pending appeal. The motions are supported by the affidavits of Symon Lariak. The plaintiff filed a replying affidavit she swore to oppose the motion.

3. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the applications. I have further considered the rival oral submission.

4. It is the submission of the defendant/applicant that on 22nd March 2019, the plaintiff/respondent proclaimed its attachable assets and she is now threatening to cart away and sell them after the lapse of 7 days.

5. It was stated that unless the order for stay is granted the respondent will sell the applicants attachable assets in satisfaction of the decree which is being contested before the Court of Appeal thus rendering the appeal nugatory.

6. It is also argued that the respondent has no known assets or means known to the applicant and her financial position is not known to the applicant hence if the decretal sum is paid to the respondent and the appeal succeeds there is a likelihood that the plaintiff/respondent may not be in a position to make a refund thus the defendant/applicant will suffer substantial loss. The applicant offered to provide a bank guarantee as security for the due performance of the decree. The defendant further stated that it is ready to deposit the decretal sum in an interest earning account.

7. The plaintiff/respondent strenuously opposed the motion. The plaintiff/respondent confirmed that she had proclaimed the defendant/applicant's assets when it became apparent that the judgment had not been stayed. She also argued that she is aware that a notice of appeal had been filed but there is no serious action taken to file the appeal itself. The plaintiff pointed out the fact that the defendant filed two separate applications seeking for similar orders.

8. The respondent further argued that there was a considerable delay of more than six months to lodge the current application. It was also pointed out that the motion filed on 20th December 2018 was not served.

9. The principles to be considered in an application for stay pending appeal are well settled. **First**, an applicant must show the substantial loss it would suffer if the order for stay is denied. **Secondly**, that the application for stay was timeously filed without unreasonable delay. **Thirdly** that the court to determine the form of security. On the issue as to whether or not the defendant/applicant will suffer substantial loss. The applicant stated that the respondent has no capacity to refund the decretal sum if paid and the appeal succeeds. This assertion was not controverted by the respondent. I am convinced that the applicant has shown she will suffer substantial loss if the order for stay is refused, in that it will be extremely difficult to make a refund of the money paid. The first principle is the cornership of such an application.

10. It is the submission of the defendant/respondent that the motion was not timeoulsy filed as required under the Civil Procedure Rules. The

plaintiff/applicant is of the submission that the defendant failed to file the application expeditiously hence the order should not be granted. The record shows that this court delivered its judgement on 13th July 2018 and the defendant/applicant filed its first motion dated 20th December 2018 about 5½ months from the date of judgment.

11. The defendant/applicant avers that it is the mistake of its advocate to delay to file the application for stay. There is no affidavit on the part of the aforesaid advocate to explain the reasons for the delay. The defendant further avers that the delay is not unreasonable.

12. I have looked at the record and it is clear that this court issued an exparte order for stay to last for 30 days at the time of delivery of judgment on 13.7.2018 pending the filing of a formal application.

13. It would appear the defendant/applicant did not file a formal application until 20/12/2018 when it filed the motion of the same date. On the basis of the aforesaid motion, Lady Justice Njuguna, the duty judge issued an exparte order on 29.1.2019 to last for 30 days. The learned judge directed the defendant/ applicant to take hearing dates at the registry. It would appear the defendant/applicant did not list the motion dated 2/12/2018 for hearing as directed but instead opted to file a fresh application dated 25.2.2019. Lady Justice Njuguna again granted a temporary order for stay on the basis of the aforesaid motion and proceeded to fix the motion for interpartes hearing on 8/4/2019.

14. The motion was placed before Lady Justice Githua on 8/4/2019 who in turn extended the interim orders and directed the motion to be listed before this court for interpartes hearing on 7/5/2019. On the aforesaid date this court adjourned the interpartes hearing of the motion to 30.5.19 and extended the interim orders to last until then.

15. In my humble view, the delay of 5½ months was not explained.

The defendant/applicant simply blamed its advocate but did not give reasons as to why the advocate failed to act. The delay in the circumstances is unreasonable and inexcusable. The defendant/applicant failed to explain why it chose to file two separate applications seeking for similar orders. The conduct of the defendant/applicant amounts to an abuse of the court processes.

16. There is no evidence that the defendant/applicant ever disclosed the existence of the first application when it filed the subsequent application. Pursuant to the provisions of Order 42 rule 6 of the Civil Procedure Rules, the applications are found to have been filed after an unreasonable delay and in abuse of the court process. Having dismissed the motion thus court does not feel obliged to consider the provision of security for the due performance.

17. In the end the motions dated 20.12.2018 and 25.3.2019 are dismissed with costs to the plaintiff/respondent.

Dated, signed and delivered at Nairobi this 18th day of July, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant