

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 324 OF 2019

AFRICA MERCHANT ASSURANCE CO LTD.....APPLICANT/APPELLANT

VERSUS

MAMA RAEL MEMORIAL FOUNDATION

(SUING THROUGH ITS REGISTERED TRUSTEES).....RESPONDENT

RULING

This is an application dated 14th and filed on 17th June, 2019 seeking an order to restrain the respondents from attaching, selling, transferring, wasting or damaging, disposing, attaching or in any way interfering with the appellant's property pending the determination of the appeal. It is brought under Order 42 rule 6, Order 9 rule 9 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act. It is supported by grounds set out on the face of the application and an affidavit sworn by its legal officer.

The application is opposed and there are grounds of opposition filed on behalf of the respondents, together with a replying affidavit sworn by the Chairman and trustee of the respondent. I also have on record the submissions filed by the respondent which I have noted.

The application is coached in a way that suggests the order sought is an injunction. However the cited provisions relate to stay of execution. The ruling giving rise to this application was delivered on 23rd May, 2019 in an application for summary judgment. After the delivery of the said ruling a Memorandum of Appeal was filed on 17th June, 2019 on the same date that this application was filed. Going by the required conditions under Order 42 rules 6, this application was filed timeously.

The genesis of the claim was that the appellant herein issued a performance bond in favour of a contractor who undertook some construction works on behalf of the respondent. That contractor defaulted and the respondent moved to enforce the said bond. A defence was filed on behalf of the appellant on 2nd November, 2018. The application for summary judgment was filed on 28th November, 2018.

I have looked at the statement of defence aforesaid which runs into 12 relevant paragraphs. In the determination of the lower court, the trial court observed that there are no triable issues raised and proceeded to allow the application for summary judgment. By filing the defence, the appellant was determined to have its day in court. However weak a party's defence may be, that opportunity should never be denied. From the defence I have referred to, the issues raised cannot be said to be frivolous or that it raised no triable issues. If anything, several issues stand out which should be subjected to interrogation by way of trial and cross-examination.

It will be wrong to lock out a party who has challenged a claim unless such a party intends to delay a fair and just determination of the case. No such allegation has been raised and the appellant may not be accused of abusing the court process by claiming to have its day in court.

Another aspect pleaded is that, the goods proclaimed are tools of trade which if attached and sold will end up grounding the operations of the appellant. This has not been seriously contested by the respondent. While recognising the judgment in favour of the respondent, the appellant has the right of appeal, and in this particular case has offered to post security, and stated that, the money deposited in court following the previous order, is available for that purpose.

Courts exist to do justice for the parties. Taking into consideration the totality of material placed before me, the appellant has achieved the threshold required to be entitled to the orders sought.

The application having been filed timeously, substantial loss having been proved to be imminent if the order for stay is not granted, and security having been offered, this application is allowed provided that, the appellant shall deposit the sum of Ksh.5 million in an interest earning account, in the joint names of the advocates on record for the parties within 30 days from the date of this ruling to secure the stay of execution in this matter. The costs shall abide by the decision of the appeal.

A right to apply by either party is reserved.

Dated, signed and delivered at Nairobi this 5th Day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE