REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 161 OF 2017

GATEWAY INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

GEOFFREY KARIUKI GATHINGI..... RESPONDENT

RULING

1. The Respondent, Geoffrey Kariuki Gathingi, brought a civil action sounding in the tort of negligence against one, Alex Langat and another person. The suit arose from an alleged road traffic accident involving motor vehicle registration number KBD 886J owned by Alex Langat. The road traffic accident is said to have been on 9/10/2011 along the Nakuru-Eldoret road.

2. The Respondent was injured in the accident. He brought a suit against Alex Langat and the driver of the motor vehicle. The suit was ***Molo CMCC No. 2 of 2012***. On 26/07/2012, judgment was entered against Alex Langat and his driver jointly and severally.

3. The Respondent demanded that the Applicant satisfies the decree on account of the fact of his claim that the Applicant was the insurer of the suit motor vehicle and that by virtue of Insurance (Motor Vehicles Third Party Risks) Act (Cap 405, Laws of Kenya), the Applicant was obliged to satisfy the decree.

4. The Applicant declined to satisfy the decree. The Respondent responded by filing a declaratory suit under section 10(2) of the Insurance (Motor Vehicles Third Party Risks) Act (Cap 405, Laws of Kenya). That suit was ***Molo CMCC No. 179 of 2016***. The Applicant filed a Statement of defence to the suit. The Respondent applied for the Statement of Defence to be struck out as raising no triable issues.

5. In a ruling dated 05/12/2017, the Trial Court struck out the Applicant's Statement of Defence and proceeded to enter judgment against the Applicant.

6. The Applicant was aggrieved by the ruling striking out its Statement of Defence and entering judgment against it. It timeously filed a Memorandum of Appeal. Contemporaneously, it filed the present Application principally seeking a stay of execution of the ruling in ***Molo CMCC No. 179 of 2016***.

7. The Application is opposed. The Respondent filed a Replying Affidavit. At the Court's directions, both parties filed Written Submissions and scheduled the case of highlighting of the submissions. Neither parties highlighted.

8. The Application is brought under Order 42 Rule 6 of the Civil Procedure Rules. The conditions to be met by an Applicant in order to be entitled to an order for stay are encapsuled in that Rule in the following terms:

> 6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
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> (2) No order for stay of execution shall be made under sub-rule (1) unless—
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> > (a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

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

9. The law regarding the grant of stay of execution is well established in Kenya. Among the legion of authoritative cases establishing it, the judges of the Court of Appeal were both concise and emphatic in ***Rhoda Mukuma v John Abuoga***:

> It was laid down in **M M Butt v The Rent Restriction Tribunal, Civil Application No Nai 6 of 1979**, (following **Wilson v Church (No 2) (1879) 12 Ch 454 at p 488**) that in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard.
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> Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security.

10. In ***Antonie Ndiaye v African Virtual University [2015] eKLR*** Gikonyo J. set out the guiding principles in the determining whether to grant a stay of execution or not in these terms:

> The discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the Court should be guided by the three pre-requisites provided under Order 42 Rule 6 of the Civil Procedure Rules.

11. Hence our decisional law applying Order 42 Rule 6 of the Civil Procedure Rules has set out a four-part test which an Applicant for a stay of execution must satisfy in order to be successful. Such a party must demonstrate that:

> a. The appeal he has filed is arguable;
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> b. He is likely to suffer substantial loss unless the order is made. Differently put, he must demonstrate that the appeal will be rendered nugatory if the stay is not granted;
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> c. The application was made without unreasonable delay; and
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> d. He has given or is willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on him.

12. The Respondent claims that the Applicants have not demonstrated that they have an arguable appeal. Indeed, he positively argues that the chances of the appeal succeeding are dismal. The Respondent's argument is that the Applicant did not comply with section 10(4) of the Cap 405 and that, therefore, it cannot be said that it had any reasonable defence in the Trial Court. I have perused the Memorandum of Appeal filed in this case. I am unable to say that the grounds of appeal enumerated are in-arguable. I should point out that to be entitled to a stay of execution, one is ***not*** required to persuade the Appellate court that the filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn or vary the original verdict. The Appellants here seek to persuade the Appellate Court that the Learned Magistrate erred in making a finding that it had been served with the statutory notice under section 10(2) of Cap 405. The Applicant also claims that the purported insurance policy for the suit motor vehicle is a forgery and that, therefore, it cannot be held responsible for paying for it. As for the requirements of section 10(4) of Cap 405, the Applicant argues that it could not comply with it since no notice of intention to sue was ever served on it.

13. In my view, the arguments proffered by the Applicant on appeal are eminently arguable. They easily satisfy the first requirement for grant of stay.

14. What about substantial loss? The Applicant claimed in its affidavit that the Respondent is a man of unknown financial means. It is apprehensive that if the decretal amount is paid, the Respondent might be unable to reimburse the amounts paid. The Respondent did not respond at all to these claims. Our case law is unanimous in the position enunciated in ***National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another*** thus:

> This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove that an appeal would be rendered nugatory because a respondent because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses 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.

15. In this case, the Applicant claimed that the Respondent is a man of straw who will be unable to pay back any amounts paid to him. The Applicant argues that the evidential burden shifted to the Respondent to demonstrate that he has the resources to repay any amounts paid to him. The Respondent did not discharge this burden. I therefore easily conclude that the appeal is likely to be rendered nugatory if the order of stay is not granted.

16. As traced in the procedural history of the case above, the ruling in the Trial Court was given on 05/12/2017. The Applicant filed the present Application on 16/01/2018. There was, clearly, no inordinate delay in bringing the Application.

17. Finally, the Applicants have demonstrated that they are willing to furnish security and have so offered.

18. Consequently, I find and hold that the Applicants have satisfied the conditions for the grant of stay of execution.

19. In the circumstances, an order for stay of execution of the ruling dated 05/12/2017 will be granted on the following conditions:

a. The Applicants shall pay into a joint interest earning account in the names of the advocates for both parties, the entire decretal sum within fourteen days of the date hereof.

b. The Applicants shall file and serve the Record of Appeal within ninety days from the date hereof.

c. The Applicants shall write to the Deputy Registrar requesting her to place the Appeal before the Judge for directions within fourteen days of the filing of the Record of Appeal.

20. The failure to abide by any of the conditions above will immediately nullify the stay issued herein and execution may proceed. If the conditions are met, the stay shall be valid during the pendency of the appeal.

21. Orders accordingly.

Dated in Nairobi this 5th day of December, 2019

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JOEL NGUGI

JUDGE