



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 516 OF 2017

AFRICAN MERCHANT ASSURANCE COMPANY LTD.....APPELLANT

- V E R S U S -

BETTY SHEILA KAWIRA MUGAMBI.....RESPONDENT

RULING

1) Africa Merchant Assurance Company Ltd, the appellant/ applicant herein, took out the motion dated 11.4.2018 in which it sought for.

1. spent

2. spent

3. spent

4. That there be stay of execution of the ruling in Milimani CMCC No. 7311 of 2017 pending the hearing of the appeal filed before this court.

5. That the honourable court be pleased to review the orders made on 26th January, 2018 to deposit the whole decretal sum in court as security.

6. That there be an extension of time to comply with the orders issued on 26th January 2018.

7. That the cost of this application be in the cause.

2) The motion is supported by the affidavit of Lynda Akinyi. When served with the motion, Betty Sheila Kawira Mugambi, the respondent herein, filed a replying affidavit to resist the motion. When the motion came up for interpartes hearing learned counsels made oral submissions.

3) I have considered the grounds stated on the face of the motion dated 11.4.2018 and the facts deponed in the supporting and replying affidavits. I have also taken into account the rival oral submissions of learned counsels appearing in this matter.

4) It is apparent from the prayers sought in the motion that the main order sought is the one for review of the orders issued by this court on 26.1.2018. The record shows that on the aforesaid date, this court delivered a ruling on the motion dated 28.9.2017 in which it issued an order for stay of execution of the decree issued by the trial court on condition that the appellant deposits the decretal sum of ksh.5,300,000/= in an interest earning account in the joint names of advocates and/or firms of advocates appearing in this matter within 30 days from the date of the ruling. This court has now been asked to review the aforesaid decision. It is the submission of the appellant/ applicant that in reviewing its decision this court should take into account the provisions of Section 10 of Cap. 405 Laws of Kenya which places the maximum sum to be paid by an Insurer at ksh.3,000,000/= per claim. The appellant further argued that it has demonstrated sufficient reason to warrant the review of the orders made on 26.1.2018.

5) The respondent strenuously opposed the application arguing that the same does not meet the requirements of an application for review. It was also pointed out that the motion was filed after a long delay which was not explained. It is also stated that the application was filed after the respondent had begun the process of execution of the decree.

6) The motion is premised on the provisions of Order 45 rules 1, 2 and 5 of the Civil Procedure Rules. Under the aforesaid provisions the principles to be taken into account in determining an application for review are spelt out. First, an applicant should show that he has come across a new important matter or evidence that was not in his possession during the hearing of the previous application. Secondly, that there is an error apparent on the face of record. Thirdly, that there is sufficient reasons advanced to warrant a review of the orders of court.

7) It would appear from the grounds set out on the face of the motion and from the facts deponed in the supporting affidavit that the appellant/ applicant is solely relying on the ground that there is sufficient reason to warrant issuance of an order for review. This court was beseeched to consider the provisions of Section 10 of the Insurance Act which capped compensation to be paid by Insurers per claim at ksh.3,000,000/=.

8) I have carefully re-examined the arguments presented before this court in support and against the motion dated 28.9.2017. The aforesaid motion was allowed mainly on the basis that the respondent would not be in a position to refund the decretal sum of ksh.5,300,000/= therefore the appellant would suffer substantial loss if the order for stay was denied. This court is now being told that the order directing the appellant/applicant to deposit a sum of kshs.5,300,000/= is against public policy and that the amount is way above the statutory sum capped at ksh.3,000,000/= per claim, therefore the order should be reviewed. It is the submission of the respondent that the appellant's assertion that Insurance companies are only legally authorised to pay a maximum compensation of ksh. 3 million per claim was never raised in the defence before the trial court hence it should not be raised at the appeal stage. The record shows that a declaratory judgement was entered against the appellant for ksh.5,300,000/= when the appellant failed to defend the application to strike out its defence on the basis that the same did not have any triable issues. A close look at the grounds put forward in the memorandum of appeal will also reveal that the issue does not prominently feature. It is not in dispute that the appellant was granted an order for stay of execution pending appeal on condition that it deposits a sum of ksh.5,300,000/= in an interest earning account in the joint names of advocates and or the firms of advocate appearing herein.

9) While applying for the order for stay, the appellant did not specifically state that it was only going to deposit ksh.3,000,000/= as security for the due performance of the decree. The appellant/ applicant merely stated that the decision of 30.8.2017 was granted contrary to Public Policy and Insurance Law that caps insurable interest at ksh. 3 million. Having considered the material placed before this court, I find that the appellant/applicant has failed to lay out sufficient reason to warrant this court review its decision. There is no evidence that the appellant/applicant would suffer substantial loss if the order is not reviewed. Consequently the motion dated 11.4.2018 is found to be without merit. The same is dismissed with costs to the respondent. The appellant/applicant is given 15 days from the date of this ruling to comply with the orders given by this court vide the ruling delivered on 26.1.2018.

Dated, Signed and Delivered in open court this 11th day of May, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent