



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC. APPL. NO. 423 OF 2017

BRITISH AMERICAN INSURANCE CO. LTD.....APPLICANT

- V E R S U S -

GEORGE KINUTHIA NDUNGU.....RESPONDENT

RULING

1) On 3rd August 2017, the Chief Magistrate's Court at Milimani Commercial Courts awarded the plaintiff/respondent herein judgement in the following terms:

i. Ksh.47,000/=

ii. Loss of income from 13th March, 2000 to 22nd January 2002 at an average of ksh.700/= per day (Ksh.477,400/=).

iii. Loss of income from 23rd January, 2002 at an average of ksh.700/= per day until the date of the judgement.

iv. Aggravated damages of ksh.500,000/=.

v. Interest at court rates on the above, plus costs.

2) The suit arose out of the breach of terms of an insurance policy. The defendant/applicant has now taken out the motion dated 27.09.2017 in which it sought for the following orders:

1. THAT this application be certified as urgent and the same be heard ex-parte in the first instance.

2. THAT this court be pleased to grant leave to the applicants to file an intended appeal out of time from the judgment dated 10th July 2017 but delivered on 3rd August 2017 in Nairobi Chief Magistrate's Court CMCC no. 413 of 2002 GEORGE KINUTHIA NDUNGU VS. BRITISH AMERICAN INSURANCE CO. LTD.

3. THAT pending the hearing and determination of this application or until such time as this court may order there be a stay of execution of the judgment and decree dated 10th July 2017 but delivered on 3rd August 2017 in Nairobi Chief Magistrate's Court CMCC no. 413 of 2002 GEORGE KINUTHIA NDUNGU VS. BRITISH AMERICAN INSURANCE CO. LTD.

4. THAT pending the hearing and determination of the intended appeal there be a stay of execution of the judgement dated 10th July 2017 but delivered on the 3rd August 2017 in Nairobi Chief Magistrate's Court CMCC no. 413 of 2002 GEORGE KINUTHIA NDUNGU VS. BRITISH AMERICAN INSURANCE CO. LTD.

5. THAT the costs of this application do abide the outcome of the intended appeal.

3) The aforesaid motion is supported by the affidavit of Lucy W Kamau. When served with the motion, the respondent filed a replying affidavit, where he swore to oppose the motion.

4) When the motion came up for inter partes hearing, learned

counsels appearing in this matter were invited to make written submissions. 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 motion. I have also considered the rival written submissions of learned counsels appearing in this matter.

5) The defendant/applicant avers that it only came to know of the existence of the judgment after the period required to file a notice of appeal had lapsed. The applicant submits that the said judgement was delivered on the 3rd of August 2017, without notice to the applicant. The applicant states that when their clerk was sent to peruse the court file, she initially advised that judgement was for ksh.47,000/=, a sum which did not merit an appeal. It was after receiving communication from the respondent's advocate that the applicant got to know the full sums of the judgement against it. The applicant states that by this time, the time for lodging an appeal had expired. This prompted the applicant to immediately lodge this application in a bid to pursue an appeal against the said judgement.

6) The respondent avers that there is no good and sufficient cause demonstrated by the applicant to warrant the orders sought to file the appeal out of time. The respondent submits that the applicant does not explain why it delayed in filing the appeal and it discloses lack of diligence on the part of the applicant and its advocates, which is very prejudicial to the respondent.

7) I am convinced that the defendant has given a plausible reason to enable this court extend time to file an appeal out of time.

8) The other prayer sought is that for an order of stay pending appeal. The defendant/applicant has beseeched this court to grant it an order for stay of execution of the decree pending appeal. It is its submission that it will suffer substantial loss if the order for stay is denied. The applicant is apprehensive that the respondent will commence the execution process therefore the status quo should be maintained by the stay orders sought. The defendant/applicant avers that it is ready to offer such security as may be ordered by the court.

9) The plaintiff/respondent submits that the order for stay pending appeal sought by the defendant is only intended to delay justice by precluding the plaintiff from enjoying the fruits of his legally acquired judgement from one of the largest insurance companies in the region, which makes billions in profits every year from premiums received from customers like the plaintiff/respondent.

10) I am satisfied that the defendant has established that it would suffer substantial loss. There is no doubt that the court is given unfettered discretion to determine the kind of security to be

given.

11) In the end, I find the motion to be with merit, the same is allowed as follows:

i. The defendant/applicant is given leave of 14 days to file and serve its memorandum of appeal.

ii. An order for stay of execution of the decree is given pending the filing, hearing and determination of the intended appeal on condition that the defendant/ applicant deposit the ascertained judgment sum of ksh.1,024,400/= in an interest earning account in the joint names of the advocates and or the firm of advocates appearing herein within 30 days from the date hereof.

iii. In default the motion shall be deemed as having been dismissed.

iv. Costs of the motion to abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 4th day of May, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent