



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 356 OF 2017

UAP INSURANCE COMPANY LIMITED.....APPLICANT

VERSUS

ANGIDA ENGINEERING WORKS LIMITED....RESPONDENT

RULING

1. The application dated 14th July, 2017 seeks orders **that a stay of execution of the ruling delivered on 16th June, 2017 and the judgment delivered and decree subsequently specifically issued in favour of the Respondent, [the original Defendant] against the Appellant/Applicant [the original Third Party] in Milimani Chief Magistrate's Court Civil Suit No. 4155 of 2013, Martin Mwangi John v Angida Engineering works Limited and UAP Insurance Company Limited, and all consequential orders therefrom be granted pending hearing and final determination of this appeal**

2. It is stated in the grounds and the affidavit in support of the application that the Applicant's that *ex parte* judgment was entered against the Applicant, UAP Insurance Company. It is deposed that the Appellant was not given an opportunity to participate in the proceedings and their application to set aside the *ex parte* judgment was dismissed. According to the Applicant, it has a good defence as there was no valid insurance cover. That the applicant also had a good reason for failure to enter appearance and file a defence within the prescribed time. It is averred that the Applicant stands to suffer substantial loss and their appeal which has high chances of success rendered nugatory. The Applicant is willing to deposit security for the due performance of the decree.

3. The application is opposed. It is stated in the replying affidavit that the application does not meet the threshold for the grant of a stay in a monetary decree. That the ability of the Respondent to refund the decretal sum is not in question and therefore the Applicant will not suffer irreparable harm. It is further asserted that the Applicant has been indolent and was only awoken from slumber by the execution proceedings.

4. The application was canvassed through written submissions. I have considered the said submissions.

5. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

“No order for stay of execution shall be made under sub-rule (1) unless –

(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.”

6. The ruling appealed from was delivered on 16th June, 2017. The application at hand was filed on 14th July, 2017. There was no inordinate delay.

7. Although the Applicant has stated that substantial loss will be suffered, there is no allegation that the Respondent is not capable of refunding the decretal sum in the event that the appeal is successful. There was therefore no reason for the Respondent to demonstrate its capability to refund the decretal sum. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another:**

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation

that an appeal would be rendered nugatory 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 the lack of them. Once an applicant expresses a reasonable fear that 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 – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

8. The Appellant has offered security for the due performance of the decree.

9. To balance the interests of both parties herein, I allow the application on condition that the Applicant do deposit the decretal sum in a joint interest earning account of the counsels for both parties herein or in court within 30 days from the date hereof. Costs in cause.

Date, signed and delivered at Nairobi this 12th day of July, 2018

B. THURANIRA JADEN

JUDGE