



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA IN NAIROBI**

**MISC. APP. NO. 59 OF 2018**

**NICHOLAS KIOKO MWANGANGI.....RESPONDENT**

**VERSUS**

**EPCO BUILDERS LTD.....APPELLANT**

**RULING**

1. The Notice of Motion dated 22<sup>nd</sup> August, 2018 was taken out by the Appellant herein, EPCO Builders Ltd, pursuant to Sections 3A and 63 of the Civil Procedure Act and Order 22 of the Civil Procedure Rules, whereof they sought the following orders:

***i. Spent***

***ii. That this Honourable Court be pleased to stay the execution of the consent judgment entered on 6<sup>th</sup> March, 2018 in the High Court pending the hearing and determination of this application.***

***iii. That this Honourable Court be pleased to set aside the consent judgment entered on 6<sup>th</sup> March, 2018 in the High Court pending the hearing and determination of this application.***

***iv. That this Honourable Court be pleased to grant leave to amend the said consent to include the whole decretal amount of Kshs. 142,000 be deposited in court.***

***v. That the costs occasioned in this application be provided for.***

2. A brief background is that the appeal is premised on the judgment and decree issued by the Honourable Senior Principal Magistrate E.K. Usui in Nairobi CMCC No. 2350 of 2014 in favour of the Respondent in the amount of Kshs. 142,000 on 21<sup>th</sup> July, 2018. The parties proceeded and entered consent in this court on 6<sup>th</sup> March, 2018 whereby half of the decretal amount Kshs, 71,000 was to be paid to the decree holder within 21 days and the balance was to be deposited into an interest earning account under the joint names of the advocates within 30 days. On 24<sup>th</sup> March, 2018, the insured gave instructions for the filing of an application to set aside the consent judgment on the grounds that the claim was a fraudulent claim, hence this application.

3. The Motion is supported by the affidavit of Bernard Owino, a Human Resource Officer with the Appellant. The respondent filed grounds of opposition to resist the motion..

4. The Appellant argued that the insured being dissatisfied with the consent judgment, they were appealing against both liability and quantum of damages awarded. He explained the delay in filing this application as being occasioned by his unavailability to grant consent as he had travelled to Uganda and could not be reached. He argued that the Respondent stood to suffer no prejudice or damages in the event the application was allowed. He averred that the appeal had high chances of success and that it is ready to deposit the entire decretal amount as being security for the due performance of the decree. However, it challenged the Respondent's ability to repay the decretal amount in the event the appeal turns successful.

5. The Respondent argued that the application had been made 5 months after the consent had been recorded and that sufficient cause for the delay had not been provided. He argued that the fraud was neither raised nor proved during the trial and that new issues could not be raised in appeal. He urged the court to dismiss the application with costs.

6. 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. This court finds that there are two issues for determination namely:

***i. Whether to grant a stay of execution of the consent judgment entered on 6<sup>th</sup> March, 2018***

*ii. Whether to set aside the consent judgment entered on 6th March, 2018*

7. On the issue of stay for execution, this court is guided by Order 42 Rule 6 (2) which provides the principles applicable as being substantial loss will be suffered, no unreasonable delay and the provision of security for the due performance.

8. In the instant case, the Appellant has indicated that it is willing to provide security for the due performance of the decree. It has challenged the Respondent's ability to refund the decretal amount in the event the appeal is successful by stating that his means were unknown.

9. The Respondent has stated that the delay in instituting this application was occasioned by his unavailability. This court finds that the explanation is not satisfactory since he cannot be said to be the only person authorised by the insured to sign pertinent documents. The court has to wonder whether he was away during the 5 months period which took the appellant to lodge the appeal. Consequently, the delay is found to be inordinate and hence inexcusable as the explanation provided was not adequate.

10. The application for stay is found to be without merit. The prayer for setting aside the judgment does not therefore issue as it was grounded on the success of the application for stay of execution.

11. In the end, the motion dated 22.8.2018 is found to be without merit. It is dismissed with costs to the respondent.

**Dated, Signed and Delivered in open court this 9<sup>th</sup> day of November, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... For the Appellant

.....For the Respondent