



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 516 OF 2017

AFRICA MERCHANT ASSURANCE CO.LTD.....APPELLANT/APPLICANT

-VERSUS-

BETTY SHEILA KAWIRA MUGAMBI.....RESPONDENT

RULING

1. The appellant/applicant herein took out the motion dated 26th July, 2018 in which it sought for the following orders *inter alia*:

i. Spent.

ii. THAT there be a stay of execution of the judgment, decree and all other consequential orders arising from MILIMANI CMCC NO. 7311 OF 2017 pending the hearing and determination of the application and appeal.

iii. THAT this Honourable Court be pleased to issue an order declaring the attachment as illegal/irregular.

iv. THAT this Honourable Court be pleased to vary its orders of 26th January, 2018 and 11th May, 2018 by allowing the Appellant to issue a bank guarantee as conditional stay pending appeal.

v. THAT this Honourable Court be pleased to further extend the period for depositing the security for another 30 days.

vi. THAT there be a stay of the appeal pending its conclusion as per prayers 4 and 5 above.

vii. THAT the costs of the application be in the cause.

2. The aforesaid motion is supported by the grounds set out on the face of the motion and the affidavit of **Patricia Gichane** sworn on 26th July, 2018. The Respondent filed the replying affidavit she swore on 31st October, 2018 to oppose the application.

3. I have considered the grounds set out on the face of the motion and the facts deponed in the affidavits filed in support and against the motion plus the oral arguments made by the respective parties.

4. This court begins by first considering the prayer seeking to have **the attachments be declared illegal or otherwise irregular**. It is not in dispute that the Respondent has in place a judgment and decree in her favour. The question that arises therefore is whether the steps taken by the Respondent towards execution of the decree are lawful. The record confirms that the Appellant filed two (2) applications seeking for stay of execution and in determining the same, this court set out conditions for the Appellant. It appears the Appellant did not comply with the conditions set for the order for stay hence respondent was prompted to execute the decree.

5. The Appellant has argued that the respondent has acted unlawfully while executing the decree but I has failed to demonstrate the manner in which the Respondent has acted illegally and in the absence of an explanation, the court is inclined to find that the Respondent's actions in executing the decree are valid.

6. The other prayer the appellant has sought is for an order for **stay of execution pending appeal**. The Appellant submitted that execution is imminent and would subsequently impede its operations.

7. The Respondent on her part contended that the prayer for stay was previously granted on condition that the Appellant deposits the decretal sum in a joint interest earning account and which condition was not complied with.

8. This court notes that prayer for stay of execution pending the appeal was previously sought vide two (2) applications by the Appellant and that orders were granted on 26th January, 2018 and 11th May, 2018 respectively. The Appellant was ordered to deposit the decretal sum for the due performance of the decree as a condition.

9. It is further the submission of the Respondent that the Appellant has not filed an appeal despite the court in its ruling of 26th January, 2018 granting the Appellant 15 days within which to comply and a further 30 days from the date of the ruling delivered on 11th May, 2018. In that respect, the Respondent submitted that since there is no appeal in place, the fresh motion is a futile attempt to further delay the conclusion of this matter.

10. It is apparent from the court record that there is no evidence that the appeal has been filed therefore I am convinced by the Respondent's argument that no appeal has been preferred.

11. In view of the fact that this subject was previously raised and sufficiently addressed vide the rulings above-mentioned, the court has come to the conclusion that the order for a stay of execution is merely repetitive and therefore there is no need to grant the same. In any case, the Appellant has given no explanation for its failure to meet the conditions set for the grant of the order for stay of execution or its failure to lodge the appeal.

12. The Appellant in turn seeks to have **the orders of 26th January, 2018 and 11th May, 2018 varied** by allowing it to instead issue a bank guarantee. The motion is premised on Order 45, Rules 1, 2 and 5 of the Civil Procedure Rules the same provision under which the application dated 11th April, 2018 was brought and determined on 11th May, 2018. I find no merit in the motion, consequently the same is dismissed just like the motion dated 11.4.2018.

13. In conclusion, this court finds that the Appellant has made no effort to comply with previous orders and conditions and neither has it provided any special or exceptional circumstances that would persuade this court to grant the orders sought. This court thus declines to vary the orders already in place.

14. In the end, this court finds that the motion lacks merit, it is dismissed with costs to the Respondent.

Dated, Signed and Delivered at Nairobi this 7th day of December, 2018.

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J.K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

..... for the 1st and 2nd Defendants/Respondents