



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO. 34 OF 2016**

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

**VERSUS**

**WILLIAM MURIITHI KIMARU ..... RESPONDENT/RESPONDENT**

**RULING**

The Appellant's Notice of Motion dated 22nd August 2016 is for stay of execution of the order of the Court below pending the hearing and determination of this appeal. A similar application was made on 20th July 2016. In the latter the Appellant had also applied for extension of time within which to comply with a consent order which required her to pay Kshs.1,200,000/= to the Respondent within 30 days of the order and to deposit a further sum of Kshs.5,470,260/= within 45 days of the order. The terms were granted pending the hearing and disposal of the appeal. The order is dated 24th May 2016.

The Notice of Motion dated 20th July 2016 was based on the ground that the Appellant had paid the Kshs.1,200,000/= and had taken all steps towards opening a bank account to deposit the Kshs.5,470,260/= but had been prevented from doing so by the omission of the Respondent's Counsel to avail a minute. It was also contended that the Respondent stood to suffer no prejudice. In the present application which really is for extension of the time limited by this Court in the ruling dated 28th July 2016, the gist is that the Appellant did not comply because the Respondent's Advocate engaged her in negotiations to settle the matter but which negotiations did not materialize. It was submitted that the Appellant has now deposited the entire amount as agreed.

This was however disputed by Counsel for the Respondent who submitted that whereas the Appellant has now deposited the Kshs.5,470,260/= only Kshs.900,000/= out of the Kshs.1,200,000/= has been paid. He also denied that he engaged the Appellant in any negotiations and submitted that the only reason the Appellant made a step towards complying with the order was because auctioneers moved in to execute and that, nine days after the lapse of the fourteen days the Court had given them. In his response Counsel for the Appellant submitted that even the Kshs.1,200,000/= is now fully paid but had no proof save for his client's word for it.

It is not disputed that the Appellant did not comply with the terms of the consent order even after this Court granted her an extension of fourteen days. There is also no evidence on her part to prove that the Kshs.1,200,000/= that she was required to pay to the Respondent within thirty days of 24th May 2016 has been fully paid. If it was fully paid nothing would have been easier than to tender proof of the payment. The e-mails that are alleged to be evidence of the Respondent's Counsel engaging the Appellant in negotiations do not disclose such negotiations. In my view, this is a classic case of a party using the Court process to frustrate her adversary from enjoying the fruits of his judgment. It is an abuse of the Court process and it is dismissed with costs to the Respondent and should the Respondent wish to execute he is at liberty to do so.

It is so ordered.

**Signed, dated and delivered at Kisumu this 6th day of October 2016**

**E. N. MAINA**

**JUDGE**

**In the presence of:-**

Miss Kagoya for the Appellant/Applicant

N/A for the Respondent/Respondent

CC: Serah