



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.23 OF 2014

JUBILEE INSURANCE

COMPANY LTD.....APPELLANT/APPLICANT

VERSUS

GRACE ANYONA MBINDA.....RESPONDENT

(Being an Appeal from the Ruling made by the Ag. Chief Magistrate Hon. S. Soita at Kerichio in CMCC No. 314 of 2013)

RULING

1. This is the Notice of Motion dated 2nd April, 2015 brought under **Order 42 Rule 6 (1)** and **6** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**.
2. The Applicant is seeking Orders that;
 - i. *There be stay of execution of the aforesaid Judgment/Decree of 12th August, 2014 in Kericho CMCC 314 of 2013 pending the hearing and determination of the appeal herein.*
 - ii. *The Appellant/Applicant herein be allowed either to deposit the entire decretal amount in a joint interest earning account/or that the Appellant provides a Bank Guarantee for the entire decretal amount and the same be deemed sufficient as security pending the hearing and determination of the appeal herein.*
 - iii. *The costs of this application be provided for.*
3. The Application is premised on the grounds appearing on the face of the application.

A summary of the grounds is as follows:

- *The Appellant/Applicant has filed an appeal against the Judgment/Decree of 12th August, 2014 in Kericho CMCC No.314 of 2013.*
- *The appeal has high chances of success.*
- *The Applicant has been asked to pay the Respondent half the decretal amount and deposit the other half in a joint interest earning account operated by both counsels on*

record within thirty (30) days.

- The Respondent has no known property within the courts jurisdiction and may not repay the colossal sum herein if the appeal succeeds.

- The applicant has moved to court timeously.

4. The application is also supported by the affidavit of Collins Nyaema a Legal Officer of the Appellant/Applicant. He reiterates the grounds, on the face of the application.

5. The Respondent has filed a Replying Affidavit in which she avers that the appeal raised no arguable grounds and has no chances of success.

- She further avers that the application was filed after undue delay and expiry of thirty (30) days.

*- That the subject matter which is the insurance contract between her and the Appellant/Applicant is not in doubt. It therefore follows that she should be paid half the decretal amount as was held in the case of **Mohan Meakin (K) Ltd Vs. Mutunga Kiundi Court of Appeal (Nrb) No.252 of 2000.***

- She at paragraph 7 states that she has a steady income as she is in regular employment, has businesses, motor vehicles and assets.

- She says the subject motor vehicle is lying as junk at a garage and continues to attract storage charges.

6. Both Counsels made oral submissions premised on the annexures and affidavits filed.

*- Mr. Wekhomba for the Appellant/ Applicant referred the Court to the case of **Kenya Orient Bus Co. Ltd Vs. Paul Mathenge Gichuki & Anor. HCCA No.40 of 14 (Msa).***

He submitted further on the case of **Mohan Meakin (K) Ltd Vs. Mutunga Kiundu** saying the said case was distinguishable from the present one because in the Mohan Meakin case liability was not disputed while in the present one it was disputed.

7. The issue that falls for determination is whether the Appellant/Applicant has brought itself within the confines of **Order 42 Rule 6** of the **Civil Procedure Rules**.

8. **Order 42 Rule (6) (1)** of the **Civil Procedure Rules** provides;

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and

to make such order thereon as may to it seem just, and any person aggrieved by an order

of stay made by the court from whose decision the appeal is preferred may apply to the

appellate court to have such order set aside.”

Order 42 Rule (6) (2) of the Civil Procedure Rules provides;

No order for stay of execution shall be made under subrule (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.

9. **Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules** clearly lays down what the court should look at when dealing with this kind of application. It does not matter that the court from whose judgment/order the appeal is filed has dealt with the issue of stay and granted it or refused to grant it.

10. In this case at hand, the court below has dealt with the application for stay and even granted it but under conditions that the Appellant/Applicant feels are not favourable to it hence this application.

11. From the Replying Affidavit the decretal sum is Kshs. 3,600,000. Half of this is Kshs. 1,800,000 which should be paid to the Respondent according to the Ruling of 31st March, 2015.

12. The Judgment giving rise to the said Ruling was delivered on 12th August, 2014 in Kericho CMCC No.314 of 2013. It is this Judgment that forms the basis of this appeal.

13. The Appellant/Applicant is uncomfortable paying Kshs.1,800,000 to the Respondent as it is not sure of her capability to repay the money in the event of a successful appeal. If I hear the Appellant/Applicant well, its complaint is that by striking out its defence the court below denied it a chance to be heard. If proved this would be a meritorious ground of appeal.

14. I would not be able to say anything about that right now because the proceedings are not before this Court despite the appeal having been filed on 21st August, 2014.

The Ruling (EXB1) dated 31st March, 2015 is clear in its conditions for stay.

15. Its these conditions that the Appellant/Applicant finds oppressive. Instead the Applicant requests that the conditions be varied to the effect that the whole decretal sum be deposited in an interest earning account in the name of the Counsels appearing for both parties OR a Bank Guarantee for the whole decretal sum be deposited.

16. Indeed the sum of Kshs.1,800,000 is not little money, hence the fear by the Appellant/Applicant. Has the Respondent allayed the fear raised by the Applicant.

17. At paragraph 7 of the Replying Affidavit the Respondent avers as follows:

“That in further reply to paragraphs 7,8,9 and 10, the defendant has not demonstrated any irreparable substantial loss it may suffer. That side, I can comfortably repay the decretal sum in the unlikely event the applicant is successful on Appeal as:-

(i) I am the Langata Sub-County Commander of the Administration Police based at Nairobi with a steady monthly income.

(ii) I own businesses and other motor vehicles and assets.”

Fair enough, she is a Sub-County Commander of the Administration Police and has the various properties she mentions. What is her financial standing and the identity of all these properties? These are things that are known to her alone. I find that the Appellant/Applicant's fear has not been allayed by this explanation.

18. The Respondent has also indicated that there was undue delay in filing the application. The applicants Counsel has explained that the application was filed soon after the Ruling but there was delay in filing it because the Counsels of both parties were negotiating for a settlement which never came to be. That has not been disputed by the Respondent. I am satisfied that the application was filed timeously.

19. The Applicant is ready and willing to deposit the whole decretal amount in an interest earning account. This to me is a sign of good faith and willingness to pay.

20. In totality I am satisfied that the Appellant's application for stay of execution is merited. I therefore allow prayer no.3 and 4 of the application dated 2nd April, 2015.

21. The Appellant/Applicant to deposit the entire decretal sum in a joint interest earning account operated by both counsels on record within twenty one (21) days.

22. The Applicant is directed to fast track the appeal which should be disposed off within the next 120 days.

Dated, signed and delivered in open court this 4th day of May, 2015.

H.I.ONG'UDI

JUDGE

In the presence of

M/s Maritim for Musundi for the Respondent

Mr. Wekhomba for the Appellant/Applicant

Miriam- court assistant.