



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL APPEAL 109 OF 2015

BRITISH AMERICAN INSURANCE COMPANY(K) LIMITED.....APPELLANT
V E R S U S
DAVID NJOROGE NJAMBI.....RESPONDENT

RULING

This is an application by the Appellant by Notice of Motion dated 17th March 2015 for the main order that there be stay of execution of decree pending hearing and determination of the appeal herein. It is brought under Order 42, rule 6 of the Civil Procedure Rules, 2010 (the rules). Rule 6(2) of that order sets out the legal conditions for the grant of an order of stay of execution.

Those conditions are that the application must be made without unreasonable delay; that the applicant must stand to suffer substantial loss unless the order for stay sought is granted; and that the applicant must give such security as the court might order for the due performance by him of any order or decree that may ultimately be binding upon him upon disposal of his appeal.

There is a supporting affidavit sworn by one RACHEL MWENDA who describes herself as a Legal and Compliance Officer of the Appellant.

The Respondent has opposed the application upon the grounds set out in the replying affidavit sworn by him and filed on 5th May 2007. Apart from giving a chronology of events of the lower court case that led to default judgement being entered against the Appellant (and why the appeal will not succeed) the Respondent has stated that the Appellant's averments are baseless and that if the application is allowed, then half the amount deposited in court be released to him to invest in a joint interest earning account.

The learned counsels filed written submissions and cited numerous authorities. It is imperative to take note that the prospect of success or otherwise of the appeal is not one of the matters that must be considered in this application. It suffices that the Appellant had an undoubted right of appeal which it has duly exercised, and that there is a proper appeal before the court. Whether or not the appeal is meritorious is a matter to be decided when it is heard.

After setting out above the matters that the Court is required by the law to consider in such an

application, it is essential to consider them in the circumstances of this case. May substantial loss result to the Appellant unless the order of stay of execution sought is made? The Appellant has already deposited in Court the entire decretal sum amounting **Kshs. 1,042,728/00**. As rightly pointed out by the Appellant this sum will be available to the successful party upon determination of the appeal.

It is also submitted that the Respondent has no means or assets to refund the decretal sum if allowed to proceed with the execution. The Respondent has met the challenge by stating that the Appellant does not know him personally and thus those are wild allegations. His means are a matter peculiarly within his own knowledge and therefore he should have met the Appellant's challenge by filing an Affidavit of means demonstrating that he has assets that the Appellant can have resort to, to recover the decretal sum. Whereas it is the Appellant's burden to prove the Respondent's inability to refund the decretal sum in the event of the appeal succeeding, it is within the Respondent's peculiar knowledge as to what assets he may own which he has not illustrated. I am satisfied on balance that the Appellant would have great difficulty recovering from the Respondent the decretal sum in the event of it succeeding in its appeal.

The Appellant has therefore succeeded in demonstrating that it will have extreme difficulty in recovering the decretal sum from the Respondent in the event that it succeeds in its appeal, and therefore it stands to suffer substantial loss.

The application has been brought without unreasonable delay. The Appellant has also given such security in terms of the whole decretal amount which has been deposited in court.

In the event, the Respondent having met all the conditions for grant of the orders sought, the court grants an order of stay of execution of decree pending hearing and disposal of the appeal. Costs of this application shall be in the appeal.

Orders accordingly.

Dated, signed and delivered at Nairobi this 16th day of July, 2015

A.MBOGHOLI MSAGHA

JUDGE