REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 40 OF 2014

KENYA ORIENT INSURANCE CO. LTD …..……..…….. APPELLANT

V E R S U S

PAUL MATHENGE GICHUKI ……..……. 1ST RESPONDENT

JAMES MWOLOLO MUNGITHIA also known as

JAMES MWOLOLO MUNYITHYA also known as

JAMES MWOLOLO MUNJITHYA ……..….…….2ND RESPONDENT

RULING

INTRODUCTION

1. The Court is dealing with two similar applications both by Notice of Motion and both dated 26th September 2013. Both applications seek stay of execution in the **Malindi CMCC Nos. 499 of 2010, 121 of 2013, 451 of 2010 and 122 of 2013** pending appeal.

BACKGROUND

2. In **Malindi CMCC No. 499 of 2010 PAUL MATHENGE (Mathenge)** sued **NICHOLAS OKUMU** alias **NICHOLAS F. K. OKUMU (Okumu)** for injuries suffered following a road accident. After obtaining judgment Mathenge filed **Malindi CMCC 121 of 2013** against Kenya Orient Insurance Co. Ltd (Insurance Company) seeking declaratory judgment. Judgment was entered in that case when the defence of the Insurance Company was struck out. That striking out and entry of judgment against the Insurance Company is the subject of the appeal previously **Malindi HCA No. 44 of 2013** and now bearing the above title after its transfer to this Court.

3. In **Malindi CMCC No. 451 of 2010 JAMES MWOLOLO MUNGITHIA** (Mwololo) sued NICHOLAS OKUMU alias NICHOLAS F. K. OKUMU for injuries suffered following a road accident. After obtaining judgment against Okumu, Mwololo filed a declaratory suit against the Insurance Company. Judgment was entered in favour of Mwololo after the Insurance Company's defence was struck out. It is that striking out of the defence and entry of judgment that is the subject of the appeal **Malindi HCA No. 45 of 2013** and now bearing the above title after its transfer to this Court.

4. **Malindi HCA Nos. 44 of 2013** and **45 of 2013** were consolidated into the present appeal by an order made in the absence of the parties on 7th April 2014.

5. Both of the decrees in the above appeals are money decrees.

6. The Insurance Company has deponed through its legal officer Sara Weru that it is entitled to avoid both claims of Mathenge and Mwololo because Okumu's Policy with Insurance Company was obtained by what the Insurance Company calls non-disclosure of material facts or a representation of a fact which was false in material particular; that there was breach of special conditions in the said Policy and that there was breach of specific provisions under The Insurance (Third Party Motor Vehicle Risk) Act Cap 405.

APPELLANT'S SUBMISSIONS

7. Appellant submitted that it is aggrieved by the orders of the lower Court and hence this appeal. That if stay of execution is not granted the Respondents will proceed with execution. That if the appeal is successful the Respondents will not be in a position to repay the decretal sum. That Appellant has meritorious and arguable appeal with probability of success. In that regard Appellant stated that Okumu had taken out a private Insurance Cover which did not cover the Respondent who were passengers on board a Commercial vehicle. Appellant relied on the case **NAKURU COURT APPEAL NO. 12 OF 1998 CORPORATE INSURANCE COMPANY LIMITED –Vs- ELIAS OKINYI OFIRE** where the Court stated-

> **"If an insured after obtaining an insurance cover for a commercial vehicle for use in connection with his business changes the nature of the vehicle to that of a 'matatu' the nature of the policy remains that of a commercial vehicle policy and such change does not and cannot make the insurer liable to the passengers who are thereafter carried in the vehicle for reward (fare). If this were the case most insurers would decline to issue a commercial vehicle policy."**

On substantial loss Appellant submitted that Respondents had not disclosed nor furnished the Court with documentary evidence to prove their financial standing. Appellant relied on the holding in the case **NRB CIVIL APPEAL NO. 238 OF 2005 (UIR44/2005) NATIONAL INDUSTRIAL CREDIT BANK LIMITED –Vs- AQUINAS FRANCIS WASIKE & ANOTHER** as follows-

> **"… this Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them."**

On security Appellant submitted that it is willing to comply with any such condition as may be determined by the Court.

RESPONDENTS' SUBMISSIONS

8. Respondents submitted that the applications should be dismissed on various grounds. That Appellant having admitted that it was the insurer of the subject motor vehicle and since the Policy of Okumu was valid and subsisting shows that there is no arguable appeal before Court. That Appellant ought to have filed a suit against Okumu seeking to avoid liability. Having not done so that they were duty bound to honour the judgment. Respondents in their replying affidavits stated they were both employed by the government and would therefore be in a position to refund the amount if the appeal was successful.

9. The Respondents relied on the following cases amongst others. **CIVIL APPEAL NO. 186 OF**

2007 STANDARD ASSURANCE CO. LTD –Vs- ALFRED MUMEA KOMU where the Court stated-

> **"Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money."**

CIVIL CASE NO. 41 OF 1995 UNITED BUILDERS & CONTRACTORS (AFRICA) LIMITED –VS- STANDARD CHARTERED BANK LTD where the Court stated-

> **"If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other suits. Substantial loss in its various forms, is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money."**

ANALYSIS/DETERMINATION

10.Both applications are based on Order 42 Rule 6 (1) and (2). That Rule provides-

> "**"6.(1) No appeal or second appeal shall operate as a stay of a decree**
>
> **or order appealed from except 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.**
>
> **(2) No order for stay of execution shall be made under sub-rule (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."**

The above Rule was discussed in the case **PETER ONDANDE T/A SPREAWETT CHEMIS – Vs- JOSEPHINE WANGARI KARANJA [2006]eKLR**-

> **"The issue for determination by this court is whether the applicant has established a case to enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him."**

11.As correctly submitted by Appellant, the burden of proof that the

Respondent can refund the decretal sum if the appeal succeeds, shifts to the Respondent the moment Appellant states that it is unaware of Respondent's resources. Appellant shifted the burden on the Respondents and the only response given by the Respondents was that they were both employees of the government and would be able to refund the amount if need be. The Respondent failed to shift the burden because they did not prove that indeed they were employed by the government and they did not show any other property that they own that could satisfy the decretal sum. I do rely on the case **CIVIL APPLICATION NO. NAI 15 OF 2002 ABN AMRO BANK, N.V. –Vs- LE MONDE FOODS LIMITED**-

> "**"We agree with Mr. Regeru for the Respondent that the burden was upon the bank to show that its appeal would be rendered nugatory if a stay is not granted. But in requiring an applicant to discharge that burden, the Court must also be alive to certain limitations which an Applicant such as the bank, must of necessity suffer from. The bank in this case is required to pay over to the Respondent over Kshs. 30 million. An officer of the bank has sworn that they are not aware of any assets owned by the Respondent. They swear that they have checked the returns filed by the Respondent with the Registrar of Companies and they are unable to find in those returns what property, if any, the Respondent owns. They, of course, cannot be expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. So all an Applicant in the position of the bank can reasonably be expected to do is, to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on."**

12. I am satisfied that the Appellant's application for stay of execution was filed without unreasonable delay as required under Order 42 Rule 6(2) and in any case the Respondent did not allege any such delay.

13. Appellant has stated that they will abide with any order on security the Court may make. Such undertaking is in compliance with provisions of Order 42 Rule 6(2).

14. In my view having considered the grounds of appeal and the affidavit evidence I do find that the Appellant's appeal is not without merit.

15. Having considered the totaling of the parties arguments I decline to order the provision of security by the Appellant.

13. Before ending this Ruling I need to respond to Respondent's submissions that Appellant should have filed a separate suit seeking to avoid the policy. That route would only cause delay and would stand in the way of expeditious disposal of the dispute. The Appellant was free to file a counter-claim in the lower Court cases and thereby join Okumu as a Defendant in its claim to avoid the policy. Respondents were however correct to have stated that there is no merit to stay the cases between them and Okumu in the lower Court since Appellant is not a party to the same.

14. In the end the orders that commend themselves to me are-

> **(a) An order is hereby issued staying execution of the judgments in Malindi CMCC No. 121 of 2013 and Malindi CMCC No. 122 of 2013 pending the hearing and determination of this appeal.**

b. **The costs of the two Notice of Motions in this appeal shall abide with the outcome of this appeal.**

It is so ordered.

DATED and DELIVERED at MOMBASA this 15TH day of MAY, 2014.

MARY KASANGO

JUDGE