

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO 24 OF 2014

FIDELITY SHIELD INSURANCE CO LIMITED.....APPELLANT

V E R S U S

1. MASHARIKI MOTORS

2. PAUL CHEMNG'OREM.....RESPONDENTS

R U L I N G

1. The Appellant herein appealed against the decree of the lower court only as it related to costs and interest awarded to the 1st Respondent. It then applied by **notice of motion dated 18th February, 2014** for stay of execution of that portion of the decree pending disposal of the appeal. The main grounds for the application stated on the face thereof are that if the decree for costs and interest is executed against it the appeal will be rendered nugatory; and that the Respondents will not be prejudiced by the stay of execution sought. The application is opposed by the 1st Respondent.

2. Under **Order 42, rule 6(2)** of the **Civil Procedure Rules, 2010** (the **Rules**) the Appellant is obliged to satisfy the Court that the application was filed without unreasonable delay, and that it stands to suffer **substantial loss** unless the stay sought is granted. If stay is granted the Appellant must then give such security as the Court may order for the due performance by it of the portion of the decree appealed against it should its appeal fail. In this regard I note that the decretal sum for costs and interest was deposited in Court by order of the Court as a condition for interim stay of execution.

3. As for delay, I note that the application was filed together with the memorandum of appeal. The appeal itself was lodged within time. There was no delay in applying.

4. Regarding substantial loss, it is stated at paragraph 8 of the supporting affidavit sworn by one **Gladwell Kamau**, an Assistant Manager of the Appellant, that

“...the applicant will suffer irreparable harm and/or loss if the 1st Respondent executes....”

There is absolutely nothing else! There is no allegation that the Appellant will not be able to recover the costs and interest from the 1st Respondent should it succeed in its appeal, or that such recovery can only be with considerable difficulty and cost.

5. Substantial loss is a matter of fact. The Appellant has not provided any evidence of any substantial loss it might suffer if it pays the decree for costs and interest.

6. In the event, I find no merit in the application. It is dismissed with costs. The interim stay of execution now in place is hereby vacated. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 10th DAY OF JULY 2014

H.P.G. WAWERU

JUDGE

DELIVERED THIS 11TH DAY OF JULY 2014