



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 29 of 2007

ASSOCIATED INSURANCE BROKERS. APPLICANT/APPELLATE

VERSUS

KENINDIA ASSURANCE CO. LTD. RESPONDENT

RULING

This application to review the Ruling of Sitati, J dated 1st December, 2011, was a Notice of Motion dated 1st February, 2012. It is brought inter alia under Order 41 rule 1 of the Civil Procedure Rules now repealed. In the said Ruling, Sitati, J ruled that this appeal had been fully compromised by the full payment to the Respondent of the decretal sum of Ksh.942,361. She did so under another application filed by the Respondent and dated 15th July, 2010.

To understand the circumstances under which the said ruling was made, the following facts must be stated: - The Respondent, Kenindia Insurance Co. Ltd, obtained a summary judgment for Ksh.798,320/- against the Applicant/Appellant - Associated Insurance Brokers. The latter who was aggrieved by the summary judgment, filed this appeal stating that the judgment should not have been entered because it had a good defence which had been properly filed and which raised arguable legal and factual issues which should have been allowed to go to trial.

In the meantime, to avoid execution of the decree issued, the applicant sought a stay of execution pending the hearing of the appeal. A conditional stay was granted to the effect that the Appellant/Applicant do deposit the decretal sum in court pending a hearing. Alongside, the directions towards the hearing of the appeal were made allowing the parties to argue their appeal by way of written submissions which were duly filed pending either highlighting or fixing of the judgment date by the court.

Unfortunately, the Appellant failed to deposit the decretal sum in court as ordered and thus lost protection of the court through the conditional stay of execution. In the circumstances, the Appellant by a letter, approached the respondent directly and offered to pay the decretal sum by instalments. The Respondent accepted the proposal and received the instalments until the full decretal sum together with costs and interests were paid.

No longer facing any threat of execution, the appellant began taking steps to fix the appeal for hearing and final disposal. However, the Respondent would not now accept to go for a hearing. It felt that the purpose of the appeal was exhausted since the whole decretal sum and costs had been received by it. It accordingly, promptly filed the application dated 15th July, 2010 seeking orders of court to the effect that the appeal had by payment of the full decretal amount by the Appellant, been compromised so that what remained, was to mark the appeal as settled.

Sitati, J agreed so and ruled that the appeal had been compromised and that there was no purpose for prosecution of appeal. There upon, the Appellant filed this application asserting that the court was not only inadvertent to the actual facts but made an error in the face of the record since the facts were clear that at no time did it compromise the appeal.

I have carefully perused the file. I observe that the court prepared to have the appeal heard and made directions to that end. It protected the substratum of appeal by ordering a stay of execution pending the hearing while at the same time demanding that the decretal sum be deposited in court to give the Respondent the relevant security. That is to say that the court protected the Appellant's right to be heard in respect of its appeal which often is a Constitutional right, without also failing to protect the respondent's proprietary right in the judgment of court.

From the record and in my best understanding of the sequence of facts that occurred, the Appellant clearly took up an alternative method of stalling execution of the lower court's decree after, for unexplained reasons, it failed to meet the court's conditional stay order to deposit the decretal sum within 15 days. It took up direct negotiations with the Respondent clearly to divert or stall such execution. Fortunately, the Respondents saw a quicker method of receiving the funds forming the decree without waiting for the appeal process to end.

It is clear to me therefore that what was before the parties for negotiations, was not as to how to compromise the appeal, but on how to avert the execution on the part of the Appellant. But for the Respondent, it was as to and on how to receive the decretal sum faster without waiting until the appeal is determined. The issue of compromising the appeal did not feature at any stage of negotiations and with great respect, to read a meeting of the minds for such contract of compromise, would in my view, be far-fetched. Not even by implication would one argue that there was such compromise.

In my further view, in as much as the deposit of the decretal sum in court would not imply a compromise of the appeal, so an alternative availment of the same by instalment even directly to the Respondent as it was, could not imply a compromise. It is unfortunate, that neither party disclosed to the court all along of the on-going arrangement of paying the decretal sum but instalment. However, such silence would not imply a creation of an unintended contract or compromise.

There is the issue also that a suit, inclusive of an appeal, belongs to the party who filed it although some suits are public and can be owned by a class of or the whole lot of the members of the public. In my understanding, a party who has a cause of action and who files it has power and authority, subject to procedural and substantive law, to conduct his cause, as he may wish. He can voluntarily terminate or withdraw or compromise it in the way he thinks fit or beneficial. To do so, he must express his wish clearly or conduct himself in such a manner that his intention can be clearly and undeniably been understood. Where such intention or conduct is not clear, it is my understanding that court's regular purpose is to sustain a party's cause of action. I would on my part, therefore, with great respect have dismissed the application dated the 15th July, 2010 and would have allowed the appeal to go to a hearing.

I, on the other hand notice that the issues before me were fully in the mind of the court and Sitati, J considered the merits of the application. It was her clear view upon the same facts as are before me that the appeal had been compromised. This court has no jurisdiction to reverse her ruling which could only be challenged through an appeal as this court cannot sit on appeal on such a decision. The applicant was, therefore, clearly naughty in filing this application before this court which has no jurisdiction to reverse the earlier decision.

The application dated 1st December, 2011, is, therefore hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 7th day of March 2013.

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D A ONYANCHA

JUDGE