REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

Miscellaneous Civil Application 37 of 2011

GATEWAY INSURANCE COMPANY ....PLAINTIFF

-VS-

ANDERSON NZARO MWATETE ....DEFENDANT

R U L I N G

1. Before me is a miscellaneous application brought under certificate of urgency on 14th September, 2011 and expressed to be brought under Section 1A, 1B, 3B, 79G of the Civil Procedure Act and Order 42 rule 6(1) of the Civil Procedure Rules. The main prayers are for stay of execution pending hearing of the intended appeal and leave to file such appeal out of time.

2. The application is supported by the affidavit of **Fatma Hyder Mohamed** who is described as the Regional Manager of the applicant, Gateway Insurance Company. The affidavit expands on the four grounds upon which the application is premised, namely:

a) The applicant's goods have been proclaimed and are due for removal and sale through auction in execution of the judgment it is sought to appeal from.

b) The appellant received the proceedings of the Lower Court after some delay.

c) The applicant's intended appeal has high chances of success and the applicant is ready to furnish security.

d) No prejudice will be occasioned upon the respondent who being a "man of straw" may not be able to refund the decretal sum if released to him.

3. There is no explanation why the respondent did not swear the replying affidavit in response to the application. Rather his counsel, **Cecilia Faith Mango** purported to do so on his behalf, in the process raising contentious issues of fact and law regarding the supporting affidavit of the applicant and the application generally. That is unacceptable. Counsel cannot descend into the arena of contention on behalf of a client in this manner without inviting himself to cross-examination by the adverse party (see **Kisya Investments Ltd & Anor vs Kenya Finance Ltd & Others HCCC No. 3504 of 1993 and David Kinyanjui and others v Meshack Omari Monyoro (Civil Appeal no. 121 of 1993 (unreported**).

4. In **Kisya Investments** Ringera J. (as he then was) stated:

"It is not competent for a party's advocate to depone to evidentiary facts at any stage of the suit. By deponing to such matters, the advocate courts an adversarial invitation to step (down) from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions. It is impossible and unseemly for an advocate to discharge his duty to the court and his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case. Besides that, the counsel's affidavit is defective for the reason that it offends the proviso (to) Order XVIII rule 3 (1) (now Order 19 rule 3 of the Civil Procedure Rules failing to disclose who the sources of his information are and the grounds of his belief."

Such is the situation obtaining in the instant case and I can do no less than disregard the purported replying affidavit, if not strike out *suo motu.*

5. Thus only the written submissions of the respondent stand in opposition to the application. This being an application primarily brought under Order 42 rule 6(1) of the Civil Procedure Rules, the court must consider, as correctly submitted by the respondent's counsel, whether the threshold prescribed in Order 42 rule 6(2) of the Civil Procedure Rules has been met. The said rule provides as follows:

"(2) 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"

6. The applicant's submissions dwell at length on arguments that the intended appeal has high chances of success. That is not a relevant consideration before this court. Secondly, bald statements to the effect that the applicant's goods have been attached and that the respondent "is a man of straw" are not sufficient proof that the applicant will suffer substantial loss as contemplated in rule 6(2) **(see Kenya Shell Ltd vs. Benjamin Karuga Kibiru and Ruth Wairimu Karuga (1982 – 88)1 KLR 1018**.

7. Besides the applicant has not attached a certificate of delay to support the allegation that the appeal and this application could not be filed earlier because proceedings of the Lower Court were delayed. In the **Shell Case** the court had this to say:

"The Court should balance to parallel propositions, first, that a litigant of success should not be deponed of the facts of a judgment in his favour without a just cause and secondly, if execution would render the proposed appeal nugatory (or in our case whether the applicant will suffer substantial loss)"

8. In my considered view, no just cause has been demonstrated in this case to deny the respondent the fruits of his judgment. Secondly, this being a monetary decree, it was upon the applicant to prove that indeed the respondent will be unable to refund the decretal sum if the appeal succeeds.

9. The applicant is guilty of laches and was apparently prompted to move to court by the proclamation of its goods. This conclusion is based on the applicant's failure to explain the delay between the date of judgment in the Lower Court and the filing of the first application for stay of execution pending appeal (as noted by the Lower Court). Again subsequent to the ruling of the court on 27th July, 2011 it took almost two months and the proclamation to spur the applicant to action.

10. Hence, even though the applicant has offered security for the eventual performance of the decree, I am not satisfied that this application has merit. I dismiss it with costs to the respondent.

Delivered and signed at Malindi this **5th** day of **July, 2012** in the presence of: Mr. Otara holding brief for

Mr. M. Kariuki for applicant.

Court clerk - Evans/Leah.

C. W. MEOLI
JUDGE