



REPUBLIC OF KENYA

IN THE HIGH COURT AT MAILINDI

CIVIL APPEAL 235 OF 2010

MONARCH INSURANCE CO. LTD.....APPELLANT

VERSUS

1. BRENDA KAKEA KURDI

2. JAMES MUDASHI BULLY.....RESPONDENTS

Coram:

Mwera, J.

Momanyi for Appellant

Ananda for Respondents

RULING

On 30th March, 2012, the appellant herein filed a motion under sections 1A, 1B, 3A, 63(e), 80 of Civil Procedure Act and Order 45, Order 9 rule 9 of Civil Procedure Rules with the sole prayer:

(i) that there be a stay of execution of a decree from the judgment in SRMCC 346/2009 pending filing an appeal in the Court of Appeal.

It was stated in the grounds that the firm of L. N. Momanyi & Company Advocates had regularized its position as per the court record; it was fair that the court review its ruling and allow the appellant to argue its appeal on merits; the appellant would abide by any conditions to be imposed; the appellant/applicant would suffer irreparable damage (not substantial loss?) in the event orders sought are not granted. From these grounds it was not readily clear as to what was being contended e.g. the firm of lawyers regularizing its position.

In the supporting affidavit sworn by Philomena Theuri, the legal services manager of the applicant, it was averred that their advocate informed her that she had filed a notice of motion on 26th March, 2012 under certificate of urgency for a stay order. A temporary order was obtained before Mwongo J. Then on 28th March, 2012 the applicant's lawyer went back to the learned Judge to get a clarification about prayer (c) in the application. The order was granted. Then the appellant's goods were on 28th March, 2012 proclaimed for sale to realize a sum of Shs. 847,405/= (annexture PTI). That the appellant has deposited in court Shs. 700,000/= pending determination of the present appeal (annexture PT2). And that the respondent (they are two) had no known assets/income to repay the decretal sum if the appeal succeeds. The affidavit ends there with no reference to the M/S L. N. Momanyi & Company Advocate regularizing its position on record or the intended filing of appeal in the Court of Appeal and against what. Further, it is not clear as to what happened with the stay application in which Mwongo J. granted

some orders. Or what ruling should be reviewed so that the appellant argues its appeal on merits.

In the replying affidavit of James Mudashi Bully (2nd respondent), it was deponed that the present application dated 29th March, 2012 was an abuse of the court process. It was *res judicata* because a similar application dated 15th June, 2011 had been disposed of. That there was no appeal pending before this court or the Court of Appeal. The applicant's application of 15th June, 2011 seeking a review of the court's decision of 19th May, 2011 had been dismissed on 6th March, 2012. So the court cannot entertain the present application. That the deposit made in court on 15th June, 2011 was only in respect of an interim stay in the application dated the same 15th June, 2011 which was dismissed. That when the applicant went to get the refund of that money as **deposit** it failed because the money had been paid in court as **fees**. That with that state of things it can only be concluded that the applicant had not complied with the order to deposit Shs. 700,000/= as a condition to the stay order. So it is abusing the court process, causing delay and prejudice/injustice.

In the supplementary affidavit by Philomena Theuri, the court was told that the appeal in issue is the present one HCCA 235/2010. It complied with the order to deposit Shs. 700,000/= as ordered on 15th June, 2011 (annexture PT2). Again, it was repeated that the applicant held the view that if the money is paid to the respondents they had no ability to repay it in the event the appeal succeeded. This court's view on this aspect when some party claims that the other has no financial ability to refund any money if paid to it, such should be by way of **an affidavit of means** sworn by the one claiming financial inability of another. It must lay out the known financial status of the other – not a mere claim as is the case here. Both sides submitted.

On perusal of the affidavits, the submissions and on closer scrutiny of the Shs. 700,000/=, the payment at the bank (PT2) was to:

“NAME: JUDICIARY MOMBASA COURT FEES.”

The order to deposit on 15th June, 2011 by Odero J. read:

“2. That a temporary stay of execution of the decree, proceedings/or consequent judgment be and is hereby issued forthwith restraining the respondents from selling and or attaching the Appellant/Applicant's property pending hearing and determination of the application inter partes on condition that the defendant/applicant do deposit with this court the decretal sum of Kshs. 700,000/= by close of business on Friday 17th June, 2011.”

It appears that the appellant deposited the sum of Shs. 700,000/= as fees and not the **decretal sum** as the learned Judge granted.

It does not appear that the application before Judge Odero was even fixed for hearing *inter partes* as directed at all. Accordingly, bringing the present application with similar prayers – stay of execution pending appeal, is an abuse of the court process. A similar application is still pending – that dated 15th June, 2011. Or even, if it was heard and determined, the prayers for stay have been dealt with in the past.

This application is dismissed with costs.

Delivered on 12th July, 2012.

J. W. MWERA
JUDGE