

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1799 OF 1991

PHILIP WACHIRA MWANIKI.....PLAINTIFF

VERSUS

BLUE SHIELD INSURANCE CO. LTD.....DEFENDANT

R U L I N G

By a Notice of Motion dated 4th and filed on 8th June, 1999, the defendant moved the court for orders that there be a stay of execution and further proceedings in this matter pending appeal and the costs be provided for. The application is supported by an affidavit sworn by the learned counsel for the defendant and one Jemimah Koigia a legal officer of the defendant company. The grounds have also been set out in the body of the application.

The application is opposed and the learned counsel for the plaintiff/respondent has filed grounds of objection alongside a replying affidavit. Both learned counsel have also addressed me on the same.

An appeal lies as of right against the judgment of this court against the defendant. In exercise of that right the defendant has filed a Notice of appeal and for purposes of order 41 Rule 4 under which this application has been brought, the appeal to the Court of Appeal is deemed to have been filed.

It is contended that the defendant/applicant has a good arguable appeal on merit. A draft memorandum of appeal has been annexed. Unless a stay is granted, the defendant/applicant stands to suffer substantial loss.

The other points raised by the defendant/applicant are that the defendant has already paid the plaintiff a sum of Kshs. 500,000 and further provided sufficient security to satisfy any eventual decree deposited at the Barclays Bank of Kenya, Union Towers branch and the plaintiff by his own admission would not be able to refund anything. The plaintiff has already applied for the release of the security deposit despite having been served with a Notice of Appeal and should the money be released this would amount to execution and render the intended appeal nugatory. Further it is said, the plaintiff is not a man of means and would not be in a position to re-imburse the defendant/applicant should the money be released to him and the defendant's appeal succeeds.

On the other hand the plaintiff contends that the defendant/applicant should the money be released to him and the defendant's appeal succeeds.

On the other hand the plaintiff contends that the defendant has no arguable appeal, the projected appeal is misconceived and calculated to cause the plaintiff inordinate delay, financial loss emotional and physical exasperation and injustice. It is also the plaintiff's case that the defendant would suffer no loss if execution is ordered.

My first observation is that any attempt to enforce the guarantee is indeed execution of the decree herein. In that case a decree has to be drawn and approved. Further, costs have to be agreed and or tax and if any execution has to be allowed before the issue of costs is settled, then leave us to do must be sought and obtained.

Be that as it may, the defendant is only required to show that the appeal shall be rendered nugatory if stay is not granted. I believe this has been shown. The plaintiff has admitted that he will not be able to reimburse even the kshs. 500,000/- paid to him following the order of Amin J. He is also not able to pay the

additional court fees. This appears in his application. Now, if execution is allowed to proceed and the appeal succeeds, what remedy will the defendant have to recover any money that may have been paid to the plaintiff? For now I see none. In that case irreparable loss shall surely occur.

On the other hand, the plaintiff has a judgment in his hands in his favour. His only duty is to defend that judgment in the Court of Appeal. There is also a valid guarantee by a reputable bank Barclays Bank Kenya Ltd. The plaintiff cannot be more secure he should find solace in the fact that a stay of execution only prevents the plaintiff from putting into operation the machinery of law the legal process of warrants of execution and so forth. It does not take away any right whatsoever.

On my part therefore I find that the application for stay succeeds.

Stay shall issue forthwith and remain in place until the process of appeal is determined. The costs of this application shall be on appeal.

Orders accordingly.

Dated and delivered at Nairobi this 14th day of July, 1999.

A. MBOGHOLI MSAGHA

JUDGE