



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
(Coram: Omolo, Akiwumi & Lakha, JJ.A.)

CIVIL APPLICATION NO. NAI. 94 OF 1997 (45/97UR)
BETWEEN

KENSAN INSURANCE BROKERS LIMITED)

JIM CHOGE).....APPLICANTS

AND

KENINDIA ASSURANCE COMPANY LIMITED.....RESPONDENT

RULING OF THE COURT:

This is an application by the unsuccessful defendants under rule 5(2)(b) of the Court of Appeal Rules for a stay of execution of the order of the superior court (Wambiliangah, J.) made on April 17, 1997 whereby he dismissed their application to set aside an ex parte judgment obtained against them by the respondent on March 7, 1997. By that decree the defence was struck out and judgment was entered in favour of the plaintiff as prayed in the plaint.

In entering judgment, as he did, for about K.Shs. 13 million for the respondent as prayed the learned judge was granting the very strong and summary remedy which he must only do in the clearest of cases and with extreme caution. This he did not do and we are persuaded by Mr. Omwella for the applicants that the intended appeal cannot be said to be frivolous.

But there is another requirement upon which we must be satisfied before a stay can be granted. It is that unless a stay is granted the intended appeal will be rendered nugatory. It was conceded by Mr. Omwella and, in our view properly, that he could not contend that the respondent would be unable to repay the decretal amount if the appeal succeeded. He conceded and, again, in our view properly, that he could not seriously contend that if stay was not granted the appeal would be rendered nugatory but urged that it would cause considerable hardship. That may be so but no decision was cited to show that sympathy and/or hardship can supply the basis that could, in the circumstances of this case, be considered to render an appeal nugatory.

All in all, while we are satisfied that the applicants have an arguable appeal we are not satisfied on the second requirement that unless a stay is granted the intended appeal will be rendered nugatory. Mr. Kasamani for the respondent, however, conceded that he would not object to a stay upon a sufficient security being furnished. On this basis we grant the application for stay on condition that the applicants shall deposit into a joint account of the parties' advocates the whole decretal amount with a Bank of repute within thirty (30) days hereof failing which the stay shall lapse. One final matter. In the preparation of the decree and its execution the respondent flouted the rules of procedure which this Court will not

allow. As a mark of our disapproval of the respondent's flagrant breaches of the rules in this regard, we do not make any order for costs of this application.

Dated and delivered at Nairobi this 21st day of May, 1997.

R.S.C. OMOLO

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JUDGE OF APPEAL

A.M. AKIWUMI

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR