



**IN THE COURT OF APPEAL  
AT NAIROBI  
CORAM: KWACH, J.A. (IN CHAMBERS)  
CIVIL APPLICATION NO. NAI. 229 OF 2001 (UR.120/2001)**

**BETWEEN**

**IGNAZIO MESSINA AND C.S.P.A. .... APPLICANTS**

**AND**

**STALLION INSURANCE COMPANY LTD ..... RESPONDENT**

**(An application for an Order for security for costs  
pending an Intended Appeal from the High Court of  
Kenya at Nairobi-Milimani (Mr. Justice Ransley)  
dated 16th May, 2001**

**in**

**H.C.C.C. NO. 216 OF 2001)**

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**R U L I N G**

This application has been brought by Ignazio Messina and CSPA under **rule 104(3)** of the Court of Appeal Rules for the following among other Orders:-

- (a) That the appellant do provide security for the payment of the respondent's costs of Civil Appeal No 18 of 2001 in such sum and within such period as may be directed by this Honourable Court.
- (b) The appellant do also provide further security for the payment of costs already awarded to be paid to the respondent by the appellant in HCCC No 216 of 2000 in such sum and within such period as may be directed by this Honourable Court.
- (c) Pending the provision of the security aforementioned by the appellant the hearing of this appeal be stayed.

*Ignazio Messina (the applicant)* sued Stallion Insurance Company Limited (the respondent) in the superior court to recover Shs 45,561,095.20 alleged to be due and payable under a Guarantee given to the applicant by the respondent for the benefit of Marship Limited, which had commercial relations with the applicant. The respondent obtained judgment in default of appearance. The applicant applied to set the judgment aside but its application was dismissed. The amount due under the decree is therefore Shs 45,561.20 together with interest at the rate of 2% per month from 27th July 1999 until payment in full, and costs of the suit which were taxed and certified d apapl iSchast i7o7n5 ,b2y6 5t.h0e0 .applicant to set aside the default judgment was dismissed by Commissioner of Assize Ransley on 16th May, 2001. The

applicant then applied for stay of execution pending an appeal to this Court. Stay was granted on terms and the respondent was ordered to provide security bonds which it did in the sum of Shs 22,000,000/=. These bonds were issued by five insurance companies namely, Intra Africa Assurance Co Ltd, Concord Insurance Co Ltd, Lakestar Insurance Co Ltd, Inveco Assurance Co Ltd and Gateway Insurance Co Ltd. In accepting these bonds the learned Commissioner of Assize said:-

***"This sum represents approximately on e half of the decretal amount. I am satisfied that this is a sufficient sum for me to grant a stay pending the hearing of the appeal."***

The reasons for making this application are to be found in the supporting affidavit of Guisseppe Fedele dated 13th June 2001. First, he says that the respondent has been placed under statutory management by the Commissioner of Insurance and because of this it is no longer trading. Secondly, he says that the fate of the respondent is uncertain because it has ceased trading and will therefore be unable to pay the costs of the appeal if these are awarded to the applicant. Thirdly, the applicant is apprehensive that the respondent will be unable to satisfy the decree and the order for costs made by the superior court.

It is true that the respondent has been placed under statutory management by the Commissioner of Insurance. This power is given to the Commissioner of Insurance under **section 67C** of the **Insurance Act (Cap 487)** . The appointment is for a period not exceeding twelve (12) months and may be extended only by an order of the High Court on the application of the Commissioner. At the end of that period, the manager is required to prepare and submit to the Commissioner a report on the financial position and the management of the insurer with recommendations as to whether the insurer is capable of being revived; or the insurer should be liquidated. The appointment of a manager does not therefore mean that the respondent is under liquidation. It is true that during this period the respondent is not allowed to trade but this is done to allow the manager to carry out his statutory duties. Mr Karori says that the fate of the respondent is uncertain because it has ceased to trade. This is not a good enough reason to justify an order for security for costs because no one can say with any degree of certainty whether the respondent will be revived or ordered to be liquidated until the manager completes his work and submits a report to the Commissioner of Insurance.

The apprehension that the respondent will be unable to satisfy the decree and the order for costs made by the superior court is, with respect, misplaced, because the respondent has provided insurance bonds which Commissioner of Assize Ransley found adequate.

The decree which the applicant is so anxious to execute is based on a default judgment which the respondent applied to set aside without success in the superior court. It has now appealed to this Court against the order dismissing its application to set aside that judgment. It would be unjust to place additional financial burden on the respondent with the sole object of making it difficult or impossible for it to prosecute its appeal.

For these reasons, I decline to exercise my discretion in favour of the applicant and dismiss this application with costs.

**Dated and delivered at Nairobi this 15th day of August, 2001.**

**R. O. KWACH**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**