REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 319 OF 2017

CHARLES NYAMWEGA.....APPELLANT/APPLICANT

VERSUS

ASHA NJERI KIMATA.....1ST RESPONDENT

MADISON INSURANCE COMPANY (K) LTD.....2ND RESPONDENT

RULING

The Appellant filed an Amended Notice of Motion dated 17th October, 2017 under the provisions of Order 22 Rule 22, 42 Rule 6 and Order 51 rule 1 of the Civil Procedure Rules seeking stay of execution and stay of proceedings pending the hearing and determination of the Appeal. The Appellant also prays for the costs of the application.

This Application is premised on the grounds on the body of the same and its supported by the Affidavit of **CHARLES NYAMWEGA,** the Appellant herein. The grounds advanced in support of the application are that the Applicant is the owner of motor vehicle registration number KAV 964 W which was insured by the 2nd Respondent which insurance policy was valid at the time of accident. Judgment was entered against the Appellant on 2nd June, 2017 for the sum of Kshs. 5,434,412 in general and special damages which the Appellant contends, unfairly absorbed the 2nd Respondent from indemnifying him, yet he was not in breach of any terms of the insurance policy. The Appellant further avers that the only way the 2nd Respondent would have been absorbed is, if they had filed a declaratory suit in line with section 10 of the insurance (Motor Vehicles third Party Risks Act) Cap 10. The Applicant also depones that the Application is brought without unreasonable delay and his security is that the 2nd Respondent is a well to do company capable of fulfiling the judgment if the Appeal succeeds. The appellant also claims that he is a pastor and does not have the capacity to pay the decretal sum.

The 1st Respondent filed grounds of opposition dated 23rd October, 2017 opposing the application on the grounds that the application has not met the conditions for stay pending appeal. On the other hand, the 2nd Respondent also filed grounds of opposition dated 7th November, 2017 and stated that the applicant has not shown sufficient cause to warrant the granting of stay pending appeal. That the application is misconceived and meant to delay the plaintiff from enjoying the fruits of her judgment.

The Application was canvassed by way of oral submissions. The applicant relied on the case of **Antonie Ndiaye Vs. African Virtual University, Nairobi HCCC No. 422 of 2006.**

The 1st Respondent submitted that the applicant has not met the requirements of Order 42 rule 6, that the applicant has not disclosed what substantial loss he would suffer and he has not demonstrated that the 1st

Respondent is not capable of refunding the decretal sum and the fact that one is a pastor does not mean that he should not satisfy a decree. The 2nd respondent submitted that the applicant has not met the requirements of Order 42 Rule 6.

I have considered the application and the submissions by the parties. Order 42 Rule 6 of the Civil Procedure Rules provides the conditions for granting an order of stay of execution which are;

(a) That the application has been made without unreasonable delay;

(b) That security for costs has been given; and

(c) That substantial loss may result to the Applicant unless the order for stay is made.

The said guidelines were outlined by the Court of Appeal in the case of **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** where the Court held that,

> ***"We cannot over emphasize that at this stage we are not required to go to the merits of the case as tempting as it may be or consider whether the issues will be successful in favour of the appellant, lest we embarrass the trial judge. We therefore find that the applicant has discharged this requirement on the balance of probabilities. We are further guided by this court's decision in CARTER & SONS LTD. V. DEPOSIT PROTECTION FUND BOARD & TWO OTHERS – Civil Appeal No. 291 of 1997, at Page 4 as follows:***
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> *"**. . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay**."*

What constitutes unreasonable delay varies from the circumstances of each case. The instant application was filed on 17th October, 2017 whereas the Judgment sought to be stayed was delivered on 2nd June, 2017. The question of unreasonable delay was dealt with in the case of Jaber ***Mohsen Ali & another v Priscillah Boit& another E&L NO. 200 OF 2012[2014] eKLR*** where it was stated:

> ***"The question that arises is whether this application has been filed after unreasonable delay. <u>What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.</u> In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret ELC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land."***

The applicant submitted that there was initial stay for 30 days which lapsed on 1st July, 2017. Thereafter, the Applicant took three and a half months to file the instant applicant. This delay has not been explained and it is after warrants of arrest were issued and court bailiffs visited the applicant on 22nd September, 2017 that he moved to court to seek the instant orders. I therefore find that there was delay in filing this application.

On substantial loss, the Appellant is a valid decree holder and therefore entitled to execution. The fact that the appellant is a pastor does not mean that he is not entitled to settle judgments against him. As properly submitted by the 1st respondent, the Appellant has not demonstrated what loss he risks to suffer if the judgment is settled and the Appeal happen to be successful. What constitutes substantial loss was further discussed in the case of **JAMES WANGALWA & ANOTHER V AGNES NALIAKA *MISC APPLICATION No 42 of 2011* [2012] eKLR (Gikonyo J)** stated that:

> ***No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be***

put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, **a question that was aptly** ***discussed in the case of Silverstein Vs .Chesoni [2002] 1KLR 867,*** *and* ***also in the case of MukumaVs.Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus*****:***

"…the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

Even though the Appellant claims that he is not financially capable of settling the judgment which allegation does not amount to substantial loss, I find that on the other hand he has raised pertinent grounds of appeal.

The third tenet for granting an order of stay of execution is that the Applicant must provide security for the due performance of the decree. The Applicant has not offered any security that he is ready to commit for the performance of the decree. As it stands, the judgment in question is against the Appellant and not the 2nd Respondent and therefore, the averment that the 2nd respondent is a well to do company cannot be a security for the due performance of the judgment.

The Orders sought herein are discretionary orders which this Court will only grant in clear circumstances. Section 3A of the Civil procedure Act empowers this court to make such orders as would be expedient for ends of justice to be met. Justice is justice to all the parties, and it is the finding of this Court that even though the Applicant has not met all the conditions for stay, he has an arguable appeal.

On the other hand the Respondent has a decree which he would like to execute. In balancing the interests of the parties, I will grant the application with orders that the Appellant does deposit half of the decretal sum in joint interest earning account to be opened in the names of the advocates. The said amount to be deposited within 60 days from today, failing which the order for stay shall automatically lapse.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 13th Day of December, 2017.

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L. NJUGUNA

JUDGE

<u>In the Presence of</u>

…….....…..for the Appellant/Applicant

……for the 1st Respondent

……..…..for the 2nd Respondent