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IN THE HIGH COURT OF KIRIBATI
CIVIL JURISDICTION
HELD AT BETIO
REPUBLIC OF KIRIBATI

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HIGH COURT CIVIL CASE 135 OF 2010

BETWEEN: KIRIBATI INSURANCE CORPORATION APPLICANT

AND: ANZ BANK (KIRIBATI) LTD RESPONDENT

BEFORE: THE HON SIR JOHN MURIA CJ

FOR THE PLAINTIFF: MS ERETA BRUCE
FOR THE DEFENDANT: MR AOMORO AMTEN

DATE OF HEARING: 6 MAY 2011

JUDGMENT

Muria CJ: By its application by way of Notice of Motion dated 26 November 2010 the applicant, Kiribati Insurance Corporation (KIC) seeks the following orders:

1. That the High Court Civil Case No. 135 of 2010 be stayed pending the appeal;
2. Such further Order or Orders which in the circumstances may be just.

Rules of Practice and Procedure

2. Before I consider the arguments raised by Counsel on the application, let me deal briefly with three matters regarding the application itself. These are matters which, I regret to say, demonstrate the laxity of legal practitioners in adhering to the rules of practice in the High Court.
3. First, the Notice of Motion is said to have been brought under Order 30, rule 1 of the High Court (Civil Procedure) Rules. Had Counsel double-checked the Rules, I am certain Counsel would note that O.30 r.1 deals with amendment to pleadings and not, application by way of Notice of Motion. An Application on Notice of Motion is provided for under O.55.
4. Secondly, an application such as the present one, must state the grounds on which the application is brought. The application is always supported by affidavit. Neither grounds nor affidavit had been filed with the application in this case. This is non-compliance with the Rules, in particular O.55 r4.
5. Thirdly, despite non-compliance with the Rules, no objection was ever taken by Counsel for the respondent. Non-compliance with the Rules is a ground for objecting to an application under O.69 of the High Court Rules where the Court has power to strike out, amend or otherwise deal with such an application.

I regret to say that Counsel simply sailed along with the waves of disregard for the Rules of Court. I would earnestly urge legal practitioners to pay heed to the Rules of Court as they are drafted

and designed for the proper resolution of disputes in a fair and just manner.

The Application

6. Despite the irregularities mentioned above, and there being no objection by the respondent, the Court dealt with the application. It is apparent that Ms Bruce, in her submission, is seeking a stay of execution of the judgment of this Court given on 29 October 2010, although the order sought in the Notice of Motion is "that the High Court Case No. 135 of 2010 be stayed pending appeal" which sounds very much like seeking a stay of the High Court proceedings in CC 135/10.
7. The judgment of the Court dated 29 October 2010 is a declaratory judgment. It is perhaps the enforcement of that judgment that is being sought to be stayed. Ms Bruce, however, insists that she is seeking a stay of execution of the judgment, although, she accepts that no order has been made yet as to execution of the judgment.
8. In support of her application, Ms Bruce relies on section 18 of the *Court of Appeal Act* and O.60 of the *High Court Rules*. After the Court pointed out that O.60 *High Court Rules* is concerned with appeals from Magistrates' Court to the High Court, Counsel retracted from relying on O.60 of the *High Court Rules*.
9. Ms Bruce accepts that the Court's power in an application for stay is discretionary. Section 18 of the *Court of Appeal Act* clearly shows that the power is discretionary. It provides:

"18. The powers of the Court under this part of this Act –

.....

(f) to stay execution or make any interim order to prevent prejudice to the claims of any party pending an appeal;

.....

may be exercised by any judge of the Court in the same manner as they may be exercised by the Court and subject to the same provisions; but, if the judge refuses an application to exercise any such power, the applicant or party aggrieved shall be entitled to have the matter determined by the Court as duly constituted for the hearing and determining of appeals under this Act".

10. Mr Amten agrees that the power of the Court to grant a stay is discretionary. Like Ms Bruce, Mr Amten also overlooks the fact that section 18 of the Act contains the power of the Court of Appeal exercisable by any single judge of that Court. In the present case the application for stay is made in the High Court to a Judge of the High Court. The relevant rules, applicable, are rules 25(a), 26(3) and 29(6) of the *Court of Appeal Rules*. Those rules give the High Court power to order stay of execution or of proceedings pending appeal to the Court of Appeal.
11. The Court has sought from Counsel for the applicant, the legal principles upon which, I as a judge of the High Court, should bear in mind when considering an application for stay of execution pending appeal to the Court of Appeal. Ms Bruce relied on section 18(f) of the *Court of Appeal Act* which Counsel suggested

empowers this Court to grant a stay "to prevent prejudice" to the applicant's case pending an appeal.

12. Since the power to "prevent prejudice" under section 18(f) is exercisable by the Court of Appeal, the legal basis for this Court to order stay of execution must be found elsewhere. It is here that the difference between the power to order a stay by the High Court of its decision pending appeal and power of the Court of Appeal to grant a stay pending the determination of an appeal must be noted.
13. It is a well settled general proposition of law that a stay is entirely at the discretion of the Court and that the discretion must be exercised judicially in accordance with well-established principles. One such principle, and the first, is that the Court does not deprive a successful party of the fruits of a judgment in his favour and lock up funds to which he is entitled, pending appeal. See *Annot Lyle* (1886) 11 PD 144; *Lawrence Okafor -v- Felix Nraife* (16 October 1987) Supreme Court of Nigeria, S.C. 89/87; see also *Fort Street Tourism Village Limited -v- Attorney General et al* (28/4/08) Court of Appeal of Belize, Civ. Apps 4 & 6 of 2008.
14. The second principle is that if a stay is not granted the applicant would be ruined and that he has some prospect of success in his appeal. This is the principle set out in *Lynotype-Hell Finance Ltd -v- Baker* [1992] 4 All ER 889, the case relied on by Mr Amten. The question here is: will the applicant face ruin if a stay is not granted?
15. The third principle and following on from the abovementioned principles, is that the applicant/appellant must show special or exceptional circumstances to justify the grant of a stay. Depending

on the facts of the case, those circumstances must be such as to avoid injustice being done to the applicant.

16. From the facts of the case as found by the Court in its judgment on 29 October 2010, there can be no doubt that the settlement of the claim by the third party in this case had been fraught with "gross delay" on the part of the defendant (KIC). That has led the plaintiff to commence proceedings in this Court and obtained declaratory judgment on 29 October 2010 in its favour.

17. The Court then made the following declaratory orders:

"(a) That by virtue of the Insurance Policy the plaintiff is entitled to be indemnified by the Defendant against third party risks.

(b) That by virtue of the operation of the said Policy the Defendant has a duty to act with utmost good faith in order to protect not only its interest but also those of the Insured, the Plaintiff.

(c) That the Defendant has an obligation immediately to take over and conduct in the name of the Insured the claim made by the Third Party".

(d) In *Fort Street Village* case referred to above, the Court was there considering an application for stay of execution pending an appeal against the declaratory orders made by the Supreme Court of Belize. Sitting as a single Judge of the Court of Appeal, I made the following remarks:

"An application to stay execution of a judgment means exactly what it says, to stay execution. A stay must be to

prevent a party from taking executory measures on a judgment under appeal."

and concluded, in respect of declaratory orders:


"Quite apart from that aspect of the orders of the learned Chief Justice, all the other orders are simply declaratory orders. There is nothing, as yet, executory about them. It is therefore, hardly something, the execution of which needs to be stayed. There cannot be a stay of execution of a declaratory judgment".

19. The orders made by the Court on 29 October 2010 in this case are all declaratory orders. While the defendant, now appellant/applicant, has its undoubted right of appeal against those orders, there is absolutely nothing executory about them and therefore cannot be stayed.
20. I have already mentioned that one of the considerations in an application such as this relates to the prospect of success in the appeal. I have looked at the two grounds of appeal. The first is on a point of law, on the meaning of the term "unsafe condition" in relation to a vehicle being driven, and the second is against the order "awarding more than \$50,000.00 damages" beyond the terms and conditions of the Insurance Policy.
21. It is not within my authority to say that the appeal will or will not succeed. That is a matter for the Court of Appeal. But it is certainly within my remit to say, as a factor taken into account when

considering an application for stay pending appeal, that the prospect of a successful appeal in this case is slim.

22. Applying the principles governing applications for a stay of execution pending appeal in the present case, I cannot detect any special or exceptional circumstances in the applicant's application to justify a stay. Putting the grounds raised in the applicant's Notice of Appeal alongside its application for stay, the steam in the applicant's case for stay evaporates. It cannot stand.
23. The application by the applicant for stay of execution pending appeal is dismissed with costs to the respondent, to be taxed, if not agreed.

Dated the 13th day of May 2011


SIR JOHN MURIA
Chief Justice