

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NUMBER 734 OF 2007

HARAKA ENTERPRISES LIMITED. APPELLANT

VERSUS

S K WAIRIA. RESPONDENT

R U L I N G

In the first appeal from the Judgment of Principal Magistrate, this court reversed the decree of the said trial court and entered judgment in favour of the Respondent who was the plaintiff in the lower court. The judgment so entered on 14th April 2011 was for a sum of Ksh.813,075/- which with interest and costs now stands just over Ksh.2,000,000/-.

The Respondent/Applicant got aggrieved and filed a Notice of Appeal to the Court of Appeal, dated 28th April 2011. It also obtained a stay of 30 days of execution of the judgment on the same of delivery of the judgment which was 14th April 2011. It is not clear why the applicant did not sooner file this formal application for stay until 4th November 2011, seven months down the line. The applicant was granted an interim stay of execution herein on 7th November, 2011 when the application was filed under a certificate of urgency. He had apparently not disclosed to the court that he had on delivery of judgment been granted 30 days stay which expired on 13th May 2011. It is also not clear from the record and was not disclosed during the prosecution of this application whether or not a substantive appeal has even been filed in the Court of Appeal.

The Applicant however asserted that his intended appeal has high chances of success and that if the decretal sum is paid by or recovered from him the chances of recovering it back from the Respondent/Decree-holder are slim. He added that decree-holder is a small construction company whose background and assets are unknown. Finally, the Applicant offers to deposit the decretal sum in court or joint interest-earning account until the appeal is determined.

However the Respondent states in reply, that this application for stay, was filed seven months after the temporary stay of 30 days granted to him expired, which was an inordinate delay in the circumstances. He also argued that since the Appeal to the Court of Appeal is allegedly already filed, this application should have been filed there since all relevant material to assist the court to consider the application are there and not here. That is more so because the court considering the application to grant a stay needs, inter alia, to consider the possible chances of success which this court which decided the judgment appealed from, has no jurisdiction to decide. The applicant denied being made of straw as imputed by the applicant. He welcomed the suggestion to deposit the decretal sum in court or in an interest-earning joint bank account.

I have carefully considered the application. The decree-holder/Respondent does not appear to oppose a stay of execution if the decretal sum is safely deposited until the appeal is determined. It is not clear whether or not the intended appeal has been substantively filed in view of the provisions of Rule 82(a) of the Court of Appeal Rules. Nor is it clear that the Respondent is small company whose financial capacity cannot be determined. The applicant has not shown that the decree-holder is made of straw. I, however, share the view that if a substantial appeal has been filed in the Court of Appeal the right court to properly consider and decide the issue of stay, is the Court of Appeal.

Taking into account the points mentioned above, I find that this is suitable case for grantim a limited stay of execution pending a formal application for stay in the Court of Appeal.

ORDERS

1. A stay of execution of the decree of this court is hereby granted for a period of 9 months hence that:

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(i) The substantive appeal, if not filed will be filed within 30 days.

(ii) The judgment sum with interests to date shall be deposited in court within 30 days in default of which, the stay shall automatically stand discharged.

Dated and delivered at Nairobi this 20th day of February 2012.

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D A ONYANCHA
JUDGE