REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 913 OF 2007

KAKUZI LIMITED ..... APPELLANT

VERSUS

KITHEKA MUTISO MATHUVA..... RESPONDENT

RULING

The applicant was aggrieved by a decision of this court dated 6/12/2011, dismissing its appeal against the lower court Judgment ordering it to pay general and special damages to the Respondent herein. The sum total of the said damages was Kshs. 101,500/=.

The applicant meanwhile filed this application dated 31/1/2012 seeking a stay of execution pending an intended appeal, Notice of Appeal of which it filed on 16/12/2011. The application was not accompanied by any draft memorandum of Appeal to the court of Appeal. Instead the Appellant encouraged this court to read the supporting affidavit to this application to decipher from it what might be the grounds of appeal when and if the appeal is filed.

The Applicant seeks a temporary stay of execution pending the hearing and final determination of the intended appeal. The grounds upon which the application is based are that the appeal has high chances of success, that the decree is for a substantial sum, that the appeal will be rendered nugatory if stay is not granted, that the application had been brought without delay, that the applicant would furnish any security ordered and finally that the applicant had taken steps towards prosecuting the appeal.

On the other the hand Applicant also admitted that although it had filed a Notice of Appeal to the court of Appeal on 16/12/2011, it nevertheless had not filed any substantive appeal 60 days down the relevant period despite its awareness of the provisions of Section 82 of the Appellate Jurisdiction Act, which tends to presume the filed Notice of Appeal, as withdrawn if a substantive appeal is not filed within a period of 60 days of the filing of the Notice.

The applicant as well did not explain the reasons for the failure to file the intended appeal noting the fact that the certified copies of Judgment intended to be appealed against, were available and were perhaps

collected by the Applicant almost immediately the judgment was delivered.

Finally, the Applicant further admitted that it failed to annex copy of the Draft Memorandum of Appeal which would enlighten this court of the possible grounds of appeal for the purpose of confirming prima facie, the fact that the appeal has good grounds that would render the appeal arguable.

I have carefully considered the grounds upon which the application is based. There is no doubt that the application was filed within the 60 days prescribed for filing a substantive appeal. I accordingly find no unreasonable delay in doing it. I am also satisfied that the Applicant may easily deposit the decretal sum as a security so that the same can be turned over to the Respondent/decree holder if the intended appeal is not won. Furthermore, this court having delivered the judgment to be challenged in the appeal, might not be the best judge of whether or not it will have high chances of success.

However, whatever that is worth it was relevant and necessary for this court to see a draft memorandum of appeal with possible valid grounds of Appeal going before the court of Appeal. No such memorandum of Appeal was annexed and this court in the circumstances, cannot be blamed in saying that the alleged probable chances of success of the intended appeal were not availed to persuade this court prima facie,that the appeal has any chances of success.

In addition, the stay sought is one pending an appeal. This raises the question as to whether there was a pending appeal in this case where no substantive appeal had been filed at the expiry of 60 days allowed by Section 82 of the Appellate Jurisdiction Act Cap 9 of the laws of Kenya. This question arises because the said law provision also provides that if the party who has lodged a notice of appeal fails to institute a substantive appeal within sixty (60) days, he shall be deemed to have **withdrawn** his notice of appeal. Effectively, as this case is concerned the possibility of existence of the intended appeal expired at the end of the 60th day after 16/12/2011 when the notice of appeal was filed. In the circumstances, there would be no reason for granting a stay as the stay would not really be protecting or preserving an appeal or intended appeal.

It seems to the court accordingly, that there is no reason for this court to make orders that will deny the decree holder his existing substantive rights to realize his judgment. The position in the view of this court, would remain the same notwithstanding the offers made by the Applicant to provide security for future ready payment of the decree sum.

Finally, the applicant is shown to have been granted an earlier stay of execution on condition that it deposited the deretal sum in an interest – earning bank account. That was an exercise of court's discretion in the Applicant's favour. The Applicant, however, admitted during this application that it failed to deposit the decretal sum in a saving interest-earning account as ordered by the court. It neither deposited the same in court, in case the earlier court order was for any reason, frustrated. Instead, it kept the funds and used it to increase its own profits. And now here is the same applicant, seeking the same favour from the court without hesitation after abusing an earlier court favour! The court will not easily grant the favour for a second time to a party whose hands are clogged with soot and without its apology.

For the above reasons, this court is reluctant to grant the stay sought and dismisses this application with costs. Orders accordingly.

DATED and delivered at Nairobi this 21st day of May 2012.

.....
D A ONYANCHA
JUDGE