



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**COMMERCIAL & TAX DIVISION – MILIMANI**

**CIVIL CASE NO. 579 OF 2008**

**RADIO AFRICA LTD. .... PLAINTIFF**

**VERSUS**

**LINGAM ENTERPRISES ..... 1<sup>ST</sup> DEFENDANT**  
**ERWEN ELECTRONICS LTD. .... 2<sup>ND</sup> DEFENDANT**  
**ARJUN RUZAIK ..... 3<sup>RD</sup> DEFENDANT**  
**BINA RAJU PATEL ..... 4<sup>TH</sup> DEFENDANT**  
**BANKIM MANUBHAI PATEL ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. By a notice of motion dated 3<sup>rd</sup> June, 2010, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants (hereinafter referred to as the applicants), seek an order for stay of execution and any further proceedings in this suit, pending the hearing of an appeal which they intend to file against the ruling delivered against them on 29<sup>th</sup> April, 2010. In that ruling an application made by the applicants seeking to set aside an order striking out their defence was dismissed with costs.
2. The applicants maintain that their intended appeal which is arguable may be rendered nugatory unless an order of stay of execution and further proceedings is granted. The applicants are further apprehensive that they will suffer substantial loss as the decree is for a substantial amount.
3. The application is supported by an affidavit sworn by the 3<sup>rd</sup> defendant Arjun Ruzaik to which is annexed a copy of a notice of appeal filed in the Kenya Court of Appeal Registry on 14<sup>th</sup> May, 2010 pursuant to Rule 74 of the Court of Appeal Rules. In the affidavit the deponent reiterates that the applicants are likely to experience difficulties in recovering the decretal sum if they are successful in their appeal. Written submissions have also been filed in which it is pointed out that the decretal sum is a substantial amount of Kshs.4.3 million, and that the applicants will be highly prejudiced if the order of stay is not granted. Relying on *Oceanic View Hotel Limited V/s Kenya Commercial Bank [2002]2 KLR 339*. It was submitted that the fact that the applicants have an arguable appeal with high chances of success, and the fact that the decree involves a substantial amount, constitutes special circumstances warranting the granting of the order of stay, to avert the possibility of the intended appeal being rendered nugatory.
4. The plaintiff/respondent opposed the application raising five grounds as follows: That the applicants

have not shown or demonstrated that they will suffer irreparable loss if the order of stay of execution and/or proceedings is not granted; that the application herein has been brought after a period of more than one (1) month after the ruling was delivered. Therefore the applicants are guilty of unreasonable delay; that the applicants have not provided any security for the performance of such decree or order as may ultimately be binding upon the applicant; that the applicants have not demonstrated that they have an arguable appeal with a chance of success, as no memorandum of appeal has been exhibited; and that the application is an abuse of the process of the court, solely aimed at denying and/or delaying the respondent from reaping the fruits of the judgment.

5. Counsel for the respondent has also filed written submissions the highlights of which are as follows: That the applicants have not exhibited any memorandum of appeal to enable the court determine whether they have an arguable appeal; that in any case the intended appeal is frivolous and unlikely to succeed; that the applicants have not demonstrated any substantial loss that they are likely to suffer, and that the application is merely an attempt to delay the respondent from reaping the fruits of its judgment, that the application has been made after an undue delay; and that no security in the performance of the decree has been given.

6. I have carefully considered the application. I have also considered the submissions and the authorities cited in support and in opposition to the application. The conditions upon which an order of stay of execution pending appeal may be issued are clearly stated under Order 42 Rule 6(2) of the Civil Procedure Rules 2010, as follows:-

**(2) No order for stay of execution shall be made under subrule (1) unless –**

**(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

7. In addition, Order 42 Rule 6(1) provides that an order for stay of execution or proceedings may be issued by the court “for sufficient cause”.

8. The applicants have maintained that they will suffer substantial loss if the order of stay is not issued because they are unlikely to recover the decretal sum if their appeal is successful. The applicants have however not laid any basis to justify this apprehension. Nor have the applicants provided anything to demonstrate that the respondent will not be able to refund the decretal sum if required to do so. The applicants’ main fear appears to be the fact that in their view the amount of the decree is substantial. However, the amount on the decree on its own is not a sufficient excuse to justify an order for stay of execution or proceedings. Therefore, the applicants have not provided any plausible reason as to why the court should order a stay of execution or proceedings.

8. The court has a responsibility to balance the interest of both litigants. It would not be fair nor just to deny a successful litigant the fruits of his judgment unless there is a good reason for doing so.

9. Further although the ruling was delivered on 29<sup>th</sup> April, 2010, this application was not brought until 4<sup>th</sup> June, 2010, which was about 5 weeks later. The applicant has not given any explanation for this delay. For the aforesaid reasons, I find no merit in this application and do therefore dismiss it with costs.

Orders accordingly.

**Dated and delivered this 11<sup>th</sup> day of March, 2011**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Anzalla for the plaintiff/respondent

Rimui for the defendants/applicants

Jason - Court clerk