



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL APPEAL NO. 52B OF 2010

BETWEEN

CHEBUT TEA FACTORY LIMITED:::APPELLANT

AND

TOM NDEGE OKOMBO:::RESPONDENT

RULING

This application, brought under Order XLI Rule 4 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, is seeking one main order that execution be stayed pending hearing and determination of the appeal herein. The application is by **Chebut Tea Factory Limited** (hereinafter “the applicant”) which company was the defendant in the Lower Court Case.

The application is based on the main grounds that the order made to release half the decretal sum to the respondent will cause the applicant substantial loss as the respondent does not have assets sufficient to resort to in the event the said sum is paid to him and the appeal eventually succeeds. The said order was made by the Lower Court on the applicant’s application for stay of execution therein.

The application is supported by an affidavit sworn by one **Rose Maraka**, the applicant’s Production Manager. There is a further affidavit which was filed with the leave of the court in response to a replying affidavit sworn by the respondent. In both affidavits, the applicant maintains that if execution is not stayed, its appeal may be rendered nugatory in the event it eventually succeeds, in which event it will suffer substantial loss since the respondent does not have assets which are sufficient to resort to to recover any sum paid to him in pursuance of the lower court’s ruling. The applicant, by way of security, is prepared to deposit the entire decretal amount together with costs in a joint account of the parties’ advocates.

As already stated above, the application is opposed on the basis of a replying affidavit sworn by the respondent. In the affidavit, the respondent contends, *inter alia*, that he is a man of means engaged in taxi business and has a motor vehicle garage. The apprehension of the applicant is accordingly without basis. In a further affidavit sworn by Harris A.A. Chanzu, Counsel for the respondent, it is deponed, *inter alia*, that the appeal raises no arguable issues and is an abuse of the process of the court in view of the material availed to the lower court.

When the application came up for hearing on 25th January, 2011, counsel agreed to file written submissions which were duly in place by 15th March, 2011. The submissions elaborated the stand points

taken by the parties in their respective affidavits. I have considered the application, the affidavits filed both for and in opposition to the application and the submissions of counsel. Having done so, I take the following view of this matter. For an applicant to be granted a stay of execution pending appeal, he must satisfy all the conditions stated in Order XLI Rule 4 of the Civil Procedure Rules. Under sub-rule (1) of that rule, the applicant has to establish sufficient cause and under sub-rule (2), the applicant must demonstrate that he will suffer substantial loss if the order of stay is not granted and that the application has been lodged without unreasonable delay. Finally, he should demonstrate that he can furnish sufficient security to meet the decree in the event the amount due to the respondent has ultimately to be paid.

With regard to delay it is noted that the order granting partial stay was made on 11th May, 2010, by the Lower Court. This application was then lodged on 25th May, 2010. The delay involved was therefore of only 14 days. I do not consider the same inordinate. With regard to the establishment of substantial loss, the applicant has sworn, through its Production Manager and counsel, that the respondent has no assets upon which it can resort to to recover the decretal amount if paid and the appeal eventually succeeds.

The respondent has in response sworn that he is a man of means: he has a taxi business and operates a motor vehicle garage. It is significant that the respondent, in an attempt to demonstrate that he is a man of means, has been rather short on detail. Although he swore that he is engaged in taxi business and operated a motor vehicle garage, he did not disclose the location of both businesses. He did not also disclose the registration number of the vehicle in which he operates the taxi business. If he indeed operates a motor vehicle garage he must be doing so legitimately and in which case he must have been issued with a business licence by either the local authority where he operates and/or by the central Government. So, the basic documents to support the allegation of operating both businesses were not exhibited. In the premises, the respondent has not demonstrated that he is in a position to pay the decretal sum or any part thereof should he be required to do so in the event the applicant's appeal succeeds. The corollary is that the applicant has demonstrated that if it pays ½ the decretal amount as ordered by the Lower Court and the appeal succeeds recovery of the same is not assured. The success of the appeal would thereby have been rendered nugatory.

In the premises I have come to the conclusion that substantial loss may result to the applicant unless stay is granted.

With regard to security, the applicant has offered to deposit the entire decretal amount plus costs in a joint account of the parties' advocates. In my view if that is done, the requirement for security will thereby be satisfied.

The applicant has challenged the decision of the lower court on substantial grounds. Such as basing its decision on matters which were not pleaded and proved and that the accident occurred due to the respondent's own negligence about which the applicant could do nothing. In my view the appeal cannot be described as frivolous. In view of my finding that substantial loss may result to the applicant unless stay is granted and that the applicant's appeal is arguable there is sufficient cause to order stay.

In the end, I am satisfied that the applicant has satisfied the conditions for granting a stay of execution set out in order XLI Rule 4 of the Civil Procedure Rules under which the application was made. Accordingly the application dated 25th May, 2010, is allowed in terms of prayers 2A and 3.

I therefore make the following order:-

1) The applicant should deposit into an interest bearing joint account to be opened in a reputable financial institution in the names of the parties' advocates, the entire decretal amount plus costs within fourteen (14) days from the date hereof.

2) There shall be stay of execution if the applicant complies with (1) above.

3) In default of compliance with 1 above, the applicant's Notice of Motion dated 25th May, 2010, shall stand dismissed with costs.

4) Costs of the Notice of Motion shall otherwise abide the results of the appeal.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET
THIS 12TH DAY OF APRIL 2011.**

**F. AZANGALALA
JUDGE**

Read in the presence of:-

Mr. Marube for Ms. Nderitu for the Applicant.

**F. AZANGALALA
JUDGE
12TH APRIL, 2011**