



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO.300 OF 2001

WALTER E. OMINDE.....PLAINTIFF

VERSUS

KOBIL PETROLEUM LIMITED.....DEFENDANT

R U L I N G

The application before court is by way of a Notice of Motion dated the 19th of April 2011 brought pursuant to Sections 1A, 1B & 3 of the Civil Procedure Act and Order 42 rule 6 of the Civil Procedure Rules 2010. Prayers 1 & 2 have been taken over by events. Other than the issue of costs the substantive prayer for consideration is that pending filing and determination of an intended appeal there be a stay of execution of the decree of this court passed on the 31st of December, 2010.

The application is supported by the affidavit of **Antony Mathi** a Legal Services Manager with the applicant and on the grounds on the face of the application as follows: the applicant intends to appeal against the court's judgment awarding the respondent Kshs.8,170,986; the applicant has filed a notice of appeal, in the event the appeal succeeds the applicant may not recover monies paid out; and the applicant is ready to deposit the decretal amount as security pending appeal.

The respondent objected to the application through a replying affidavit dated 6th June, 2011 in which **Mr. Walter Edwin Ominde's** partner with the respondent demonstrated his financial worth; stating further that the application was brought in bad faith, was delayed with no explanation and the respondent can pay back the decretal sum.

Three conditions are necessary in order for stay to be granted.

(i) The application should be filed without delay;

(ii) The applicant must show that he is likely to suffer substantial loss;

(iii) Security must be offered.

Although the application was preferred after 4 months of the decree I do not find that the same is not inordinate. Secondly although the deponent of the affidavit in opposition, a partner with the respondent demonstrated his financial status, the assets do not belong to the respondent, they are either in the names of other entities, the said **Walter Ominde** or his wife. None of the assets belong to the respondent, the fear that the amount may not be returnable easily and the applicant may suffer substantial loss in the event the appeal cannot succeed may not be brushed aside.

I take note that the applicant has offered security by proposing that the decretal sums be paid into a joint interest earning account in the names of counsel on record.

In the circumstances I find that this is a suitable case, for the court to exercise its discretion in favour of the applicant. I hereby therefore grant stay of execution pending hearing and determination of the intended appeal on condition that the decretal sum is banked in a joint interest earning account in the names of the counsel on record for the parties in a bank to be agreed upon within the next 10 days.

Costs to be in the cause.

Dated and delivered at Kisumu this 30th day of June 2011

ALI-ARONI

J U D G E

In the presence of:

..... **Counsel for the plaintiff**
.....**Counsel for the defendant**