



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CIVIL APPEAL NO. 637 OF 2011

KIMAIYO KIPTANUI & PETER G MUNYA

T/A KIMAIYO & MUNYA ADVOCATES
..... **APPELLANTS/ APPLICANTS**

VERSUS

KENYA PIPELINE CO. LTD RESPONDENTS/ RESPONDENTS

(Being an appeal from the Judgment of Hon. A.K. Ndungu Esq, Senior Principal Magistrate on 30th September 2011 in Civil Case No. 9811 of 2006 at Milimani Commercial Courts at Nairobi)

RULING

(Application for Stay of Execution

9th December 2011)

I. BACKGROUND

1. One of the associates in the applicant's law firm was found guilty of professional mis-conduct by the Disciplinary Committee Misc. Case No. 345/2007.
2. The clients who suffered loss, sued the firm in the subordinate courts. Upon hearing the parties, the Hon. Magistrate found that the law firm was vicariously liable for the omission or commission of the associate and on 30th September 2011 awarded Ksh. 870,000/= in damages.
3. The law firm did not appeal immediately but on 8th December 2011, an application Misc 945/11 was filed during the court vacation seeking orders for leave to appeal out of time. This was granted (Kimondo J) and an appeal filed on 13th December 2011.
4. It was by application 9th December 2011 filed on 13th December 2011 that the appellant/applicant/law firm partners prayed to have a stay of execution pending appeal, - the subject of this ruling.

II APPLICATION

9TH DECEMBER 2011

5. The applicant prays that there be a stay of execution. This is given at the court's discretion. There was a likelihood of success in the intended appeal. The parties applicant are ready to abide by the orders of the court.

6. In reply, the respondents stated that they should not be kept from the fruits of their judgment. The sum awarded is capable of being refunded.

II FINDINGS

7. The granting of orders for stay of execution, is indeed discretionary upon the court. It would not normally be granted but the court may do so if it can establish that:

"... Substantial loss may result to the applicant unless the order is made and that the application was made without unreasonable delay.

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."

8. It is true that the application was filed immediately upon the filing of the appeal. The respondent argues the delay should be counted from the date of the judgment. This appeal was dealt with by the Hon. Judge who gave leave, if not, it be dealt with in the main appeal.

9. Substantive loss would be the loss of the sum awarded of

Ksh. 870,000/=. If paid, it may not be recovered from the associate. The respondent argues the respondent have funds to reimburse, if the case would not be successful TO them.

10. The issue of security amounts to, whether it be proved or not for the due performance. The court is of the opinion that security must indeed be provided for in this case.

11. The application is hereby granted. There be security provided for Ksh. 870,000/= by way of a bank guarantee to be filed within 14 days of today's date. Liberty to apply.

12. The costs be in the appeal.

DATED THIS 20TH DAY OF DECEMBER 2011 AT NAIROBI

M.A. ANG'AWA

JUDGE

Advocates :

i) *G.E Kariuki instructed by M/s Gacau Kariuki & Co Advocates for appellant/applicant original defendant*

ii) *P.K. Mbabu instructed by M/s P.K. Mbabu & Co Advocates for respondent respondent/ original plaintiff*

Editorial Summary

1. *Civil Appeal*
2. *Civil Procedure and Practice*
3. *Subject of Subordinate Court Case*

CONTRACT

- 3.1 *Professional misconduct*
Misc. Cause 345/2007,
Disciplinary Committee
- 3.2 *Law firm held vicously liable for acts*
committed by associate (Ksh. 870,000)
- 3.3 *Law firm appeal case to High Court,*
with leave granted
8th december 2011
Misc. 945/11)
(Kimondo J)
Vacation duty judge
- 3.4 *Application for stay of execution*
9th December 2011.
Pending interparties hearing
pending appeal.

4. *Application 9th December 2011*

- i) *Stay of execution prayed for.*

5. *In opposition:*

- i) *Delay inordinate*
- ii) *No merits for application*

6. *Held:*

Application granted

Security Ksh. 870,000/=

Bank guarantee

7. *Case Law:*

8. *Advocates :*

i) *G.E Kariuki instructed by M/s Gacau Kariuki & Co Advocates for appellant/applicant original defendant*

ii) *P.K. Mbabu instructed by M/s P.K. Mbabu & Co Advocates for respondent respondent/ original plaintiff*