



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Commercial Suit 130 of 2006**

**SAFE RENTALS LTD..... PLAINTIFF**

**VERSUS**

**AFRICAN SAFARI CLUB.....DEFENDANT**

**RULING**

This is an application for stay of execution pending the hearing and determination of an intended appeal to the Court of Appeal. The defendant is the applicant and has lodged this application under Order XLI Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application is supported by an affidavit sworn by one Frank H. Neugebauer, the applicant's Managing Director and is based on the main grounds that unless execution is stayed, the applicant's appeal, which it states is meritorious, may be rendered nugatory resulting in substantial loss to the applicant and further that the decretal sum which is colossal may, once paid over to the respondent prove irrecoverable. There is also a supplementary affidavit sworn by the said Managing Director in reply to the respondent's affidavit in opposition to the application. In the affidavit the applicant substantially denies the averments in the replying affidavit.

The respondent has opposed the application on the basis of the said replying affidavit sworn on 1<sup>st</sup> October 2009 in which it is deposed, *inter alia*, that the application has been filed late and that no evidence has been exhibited to demonstrate the substantial loss that may result to the applicant unless an order of stay of execution is made. The respondent has further averred that the applicant is so heavily indebted to other parties that unless the decretal amount is settled without delay the applicant may be left with only a paper decree.

I have considered the application, affidavits filed and the submissions of counsel. I have also given due consideration to the authorities cited to me. Having done so, I take the following view of the matter. What is to be considered in an application such as this is to be found in Order XLI Rule 4 of the Civil Procedure Rules. Under the rule, I am required to consider whether or not there is sufficient cause to warrant the stay of execution. The applicant is convinced that the success of its appeal may be rendered nugatory unless stay of execution is granted as the decretal amount if paid over to the respondent may not be refunded. In that event it will suffer substantial loss. The respondent has not expressly denied that allegation but contends that the applicant has not demonstrated that there is real likelihood that the decretal sum once paid over to the applicant may prove irrecoverable. There is not as much, as one positive averment by the respondent that it will be able to pay back the decretal amount if paid over in the event that the intended appeal eventually succeeds. The total sum awarded to the respondent was Kshs. 141,862,365.98 which sum is substantial and if paid over to the respondent without assurance that it will be paid back in the event of success of the appeal, will obviously adversely affect the applicant who, on the respondent's own showing, is heavily indebted to other parties. In the premises, the applicant has demonstrated not only sufficient cause but also that substantial loss may result to it unless the order of stay of execution is made. It is settled that it is the substantial loss which is to be prevented by a stay of execution.

With regard to delay, the record shows that on 7<sup>th</sup> October 2009, while considering an application for leave to file a further affidavit made by the applicant, Ibrahim J was of the view that this application was filed within reasonable time. Given that express view of the Learned Judge, I do not consider the delay involved in filing this application to be inordinate.

The applicant had also to give such security as may ultimately be binding upon it for the due performance of the decree passed against it. Regarding that requirement the applicant swore as follows at paragraph 8 of the supporting affidavit:

- “8. That even though the applicant is willing to abide by such orders for provision of security as this Honourable Court may in its discretion prescribe the Applicant humbly beseeches this Court to grant an unconditional stay, especially having regard to the circumstances of this case namely:
- (a) That an order of security in monetary terms would be extremely onerous upon the Applicant whose business is still in recovery mode and may well amount to denying the Applicant the stay sought, yet the applicant is still engaged in hotel and tourism business as it has been for the last forty years with no intention to fold up.
  - (b) That however, should the Court feel inclined to grant a stay only upon terms then the Applicant intends to make proposals at the hearing hereof as to the nature of other securities as would be available.”

From the above averment, the applicant obviously appreciates the requirement for security despite the plea for an unconditional stay. The plea for unconditional stay, with all due respect to the applicant, cannot be entertained in view of the clear language of Order XLI Rule 4 of the Civil Procedure Rules. Despite the promise made in paragraph 8 (b) quoted above, the applicant made no proposal regarding security at the hearing of this application. However, failure to

furnish security is not a bar to making an order regarding the same if the other requirements have been satisfied. In the premises, as the applicant has satisfied the other requirements, I make the following orders:

- 1) The applicant to pay Kshs. 7,218,664.00 into an interest earning bank or financial institution account in the joint names of the advocates of the parties within thirty (30) days from the date hereof.
- 2) The applicant to provide a guarantee from a reputable bank or reputable financial institution or a performance bond or guarantee from a reputable insurance company for the sum of Kshs. 134,643,701.98 within the same period of thirty (30) days from the date hereof.
- 3) I order that there be a stay of execution pending compliance with 1 and 2 above.
- 4) I further order that there be a stay of execution pending the intended appeal if the applicant complies with 1 and 2 above.
- 5) In default of compliance with 1 and 2 above within the time appointed, the applicant's Notice of Motion shall stand dismissed with costs.
- 6) Costs of this application shall otherwise abide the results of the Appeal.
- 7) Each Party has liberty to apply.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 23<sup>RD</sup> DAY OF FEBRUARY 2010.

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Ms. Sijeny for the Applicant and Mr. Nanji for the Respondent.

**F. AZANGALALA**

**JUDGE**

**23<sup>RD</sup> FEBRUARY 2010**