



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Suit 119 & 131 of 2005

**FISH & MEAT LTD.....1ST PLAINTIFF
VICTORIA NILE PERCH LTD.....2ND PLAINTIFF
LAKE TANNERS LIMITED.....3RD PLAINTIFF**

VERSUS

**ORIENTAL COMMERCIAL BANK OF
KENYA LTD.....1ST DEFENDANT
JAMES TULIDEPH BERNIE.....2ND DEFENDANT
PRAFUL HEMRAJ SHAH.....3RD DEFENDANT
COOPERS & LYBRAND.....4TH DEFENDANT**

CONSOLIDATED WITH

**NAKURU HIGH COURT CIVIL CASE NO.131 OF 2005
(FORMERLY KAKAMEGA CIVIL CASE NO. 416 OF 1994)**

**FRANCIS KINUTHIA NDERU.....1ST PLAINTIFF
HELLEN NJERI NDERU.....2ND PLAINTIFF**

VERSUS

**ORIENTAL COMMERCIAL BANK
OF KENYA LTD.....DEFENDANT**

RULING

This is an application under **Order 41 Rule 4(1) & (2)** of the **Civil Procedure Rules** as well as **Section 3A** of the **Civil Procedure Act** for “stay of execution of the Order of this Court requiring payment of the Judgment sum by Lake Tanners Limited to the defendant bank for a period of at least sixty days to allow Davis Kinyanjui Nderu recover from his illness.” The application is based on the ground that the said Davis Kinyanjui Nderu who is central in the management of the affairs of Lake Tanners Ltd (the company) suffered a heart attack on 22nd March 2010 and is hospitalized. Without him nobody can decide what to do in this matter, whether to appeal or arrange to settle the decree. This is because the other director of the company is his mother Hellen Njeri Nderu who is herself also unwell.

As a matter of abundant caution, the company has filed a notice of appeal. It is feared if the stay sought is not granted, the defendant will appoint a receiver thus occasioning the company substantial loss and render its appeal if it decides to appeal nugatory.

The application is strongly opposed. In the replying affidavit of Mr. Atul Dave the General Manager of Oriental Commercial Bank Ltd (the bank) it is deposed that this application is bad in law as **Order 41 Rule 4(1) & (2)** under which it is made provides for stay of execution pending appeal and not to allow a judgment debtor time to decide whether to settle a decree or appeal against it. It is further deposed that the company has many directors and does not cease operating because one director is unwell. Besides that, it is further averred, the bank is a solid entity capable of refunding the decretal sum if the company's appeal is allowed.

Counsel for the parties argued this as an application for stay of execution pending appeal. But as I have pointed out the stay is sought to enable Davis Kinyanjui Nderu who, it appears, is the managing director of the company, time to recover from his illness and decide whether to settle the decree or appeal against it. I have therefore ignored most of counsel's arguments and the authorities cited as they relate to stay of execution pending appeal.

I agree with counsel for the bank that **Order 41 Rule 4(1) & (2)** under which the application is made provides for stay of execution pending appeal and not for stay to allow a judgment debtor time to decide whether to settle a decree or appeal against it. The application is, however, also brought under **Section 3A** of the **Civil Procedure Act** which gives this court powers to do justice to the parties.

Given the circumstances of this case and the large decretal amount I am inclined to grant the application. Consequently, in exercise of my inherent powers, I grant a stay of execution for a period of forty five (45) days to enable the company's managing director recover and decide what to do about the judgment against the company. I agree with counsel for the bank that this is an old case. If, within the period allowed, the managing director is not well enough to deal with the affairs of the company the other directors should decide what to do. The bank shall have the costs of this application in any event.

DATED and DELIVERED at Nakuru this 29th April, 2010.

D. K. MARAGA
JUDGE.