



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

**AT KISUMU**

**Civil Case 186 of 2000**

**AMALO COMPANY LTD.....PLAINTIFF**

**-VERSUS-**

**GLAXOSMITHKLINE COMPANY LTD ..... DEFENDANT**

**R U L I N G**

The application before court is a Notice of Motion brought pursuant to Section 3A, Order XLI Rule 4 and Order L Rules 1 & 2 of the Civil Procedure Act and Rules. The same is supported by the affidavit of ANIL SHAH dated the 21<sup>st</sup> of October, 2009 and the grounds on the face of the application. It seeks for stay of execution pending hearing and determination of an appeal against the judgment of this court delivered on the 23<sup>rd</sup> of January, 2007.

The Respondents oppose the application through an affidavit of GRACE KIMOTHO Advocate filed on the 3<sup>rd</sup> of December, 2009.

The applicant contends that it has already lodged an appeal and if stay is not granted the applicant is likely to suffer serious financial constraint. The applicant further contents that it has an arguable appeal. It has offered to deposit reasonable security. In opposing the application the respondents submits that the applicant has failed to meet the requirements of Order XLI Rule 4 of the Civil Procedure. The application was not filed in good time, there was undue delay, judgment having been entered on the 23<sup>rd</sup> of January, 2007 and this application filed on 21<sup>st</sup> October, 2009 and no explanation has been given for the delay, the same is unreasonable. Further the actions of the applicant smack with bad faith having filed a consent to stay the matter for 21 days, no effort has been made by the applicant over time to settle the outstanding sum. It is also the respondents contention that the chances of the applicant succeeding on appeal are minimal.

Order 41 Rule (4) provides:-

**“ 4(1)no appeal or second appeal shall operate as a stay of execution of proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty, on such application being made, to consider such application ---**

**2) No order of stay of execution shall be made under sub-rule (1) unless:-**

- a) The court is satisfied that substantive loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay and;**
- 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.”**

Whether or not to grant the order is a matter of judicial discretion which discretion has to be exercised judiciously and on the interest of justice and fair play taking into consideration the 3 conditions set out in Order XLI Rule 4. It is not for this court to determine whether or not the appeal has chances of succeeding.

Although the application was brought late it is my view that the applicant has shown that he is likely to suffer if the stay is granted and it will be just and fair if the same is granted.

In the circumstances of the case, I grant the stay of execution on condition that the applicant deposits the sum of Kshs 4,892,482 in an interest earning account in the joint names of the counsels on record within the next 30 days pending hearing and determination of the appeal.

DATED AND DELIVERED IN KISUMU ON 23.04.2010.

**ALI-ARONI**

**JUDGE**

In the presence of:

Mr. Olando Advocate present for plaintiff

Mr. Ajuoga Advocate h/b for Mr. Maiyo Advocate for defendants

*AAA/hao*