



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Miscellaneous Civil Application 162 of 2010**

DEMAN CONSTRUCTION LIMITED.....PLAINTIFF

VERSUS

RAMA CHARO UNDA.....DEFENDANT

**RULING**

The applicant, Deman Construction Limited, seeks two main orders of the court namely that there be a stay of execution pending the hearing and determination of its intended appeal and that leave be granted to it to file appeal out of time. The applicant was the defendant and the respondent, Rama Charo Unda, was the plaintiff in the lower court. The application is expressed to be brought under the provisions of Sections 79G, 95, 3A and 1A of the Civil procedure act, Orders XVI Rule 4 and XLIX rule 5 of the Civil Procedure Rules.

The application is predicated upon the main grounds that the applicant desires to appeal against the decision of the lower court delivered on 28.1.2010 but could not do so in time because one of its directors was out of the country and that if the decretal amount is paid over to the respondent the amount will not be recoverable in the event its appeal succeeds as the respondent is a person of modest means. In that event its intended appeal shall be rendered nugatory.

The application is supported by an affidavit sworn by one Denesh M. Varsani one of the directors of the applicant. In the affidavit, it is deponed that on being notified of the judgment sum, the applicant resolved to appeal against the same on the basis that the judgment sum was excessive. It is further deponed that immediate action was not taken because one of its directors was away and a formal resolution could not be made. It is also deponed that unless stay is ordered the entire decretal amount amounting to Kshs. 913,265/- will be paid over to the respondent and will not be recoverable as the respondent is a waiter with humble means. In that event the applicant shall suffer loss and damage. It is further deponed that the applicant is willing to furnish security including depositing the decretal sum as the court may direct.

The application is opposed and the respondent has filed a replying affidavit in which he avers, *inter alia*, that the application has not been lodged without unreasonable delay and that he is a man of means and can be able to refund the decretal sum should the appeal succeed if enlargement of time is granted.

The application was canvassed before me on 28<sup>th</sup> April, 2010 when counsel reiterated their clients' stand-points taken in their respective affidavits. I have considered those stand-points and the application. Having done so, I take the following view of the matter. The discretion of the court under Order XLIX Rule 5 of the Civil Procedure Rules and Section 79G of the Civil Procedure Act is wide. Under the latter, the applicant must satisfy the court that it had good and sufficient cause for not filing the appeal in time and under the former the concern of the court is the justice of the case. The judgment sought to be challenged was delivered on 28<sup>th</sup> January 2010. This application was lodged on 14<sup>th</sup> April 2010. The delay involved was therefore of about 2½ months. The applicant states that it could not formally resolve to lodge the appeal in the absence of one of its directors who was out of the country. The applicant is a limited liability company and makes decisions by resolutions passed by its directors. It is therefore plausible that the absence of one of its directors could cause the delay in lodging an appeal from the decision of the lower court. I accept the applicant's explanation for the delay. The applicant has therefore in my view shown sufficient reason for not filing the appeal in time. I have perused the draft grounds of appeal and I am of the view that the intended appeal cannot be described as frivolous.

With regard to the prayer for stay of execution the test as laid down in Order XLI Rule 4(2) of the Civil Procedure Rules is:-

- (i) *Whether the applicant may suffer substantial loss unless stay is allowed;*

- (ii) *Whether the application has been made without unreasonable delay;*
- (iii) *Whether the applicant has given such security as the court may order for the due performance of the decree or order which may ultimately be binding on it.*

With regard to delay, I have already accepted the applicant's explanation for the delay in lodging this application. I therefore do not consider the delay of 2<sup>1</sup>/<sub>2</sub> months as inordinate. With regard to the establishment of substantial loss, the applicant has deponed that the respondent is a man of straw from whom it will not be possible to obtain back the decretal amount in the event of the intended appeal succeeding. The basis of that averment is that the respondent is a waiter with modest means. That averment as not specifically denied by the respondent who merely deposes that he is a man of means. This case is distinguishable, from that of Lalji Bhinji Sanghani Builders & Contractors –V- Nairobi Golf Hotels Kenya Ltd [Nairobi HCCC No. 1900 of 1995] (UR). In that case, unlike here, there was no affidavit evidence of the status of the respondent. In this case, the applicant has expressly deponed that the respondent is a waiter and is of modest means - which status is not denied by the respondent. The case of Portreizt Maternity –V- James Karanja Kabia (Mombasa HCCC NO. 63 of 1997 (UR) is also distinguishable from this case. In that case the respondent not only stated that he was not a man of straw, but he also stated he worked as a Senior Officer in an Insurance Company and was capable of repaying the decretal amount in the event the appeal succeeded.

In this case I am satisfied that the applicant has demonstrated that it may suffer substantial loss unless stay of execution for the entire sum is not granted.

With respect to security, the applicant has offered to deposit the entire decretal amount in a joint interest earning account of the parties' advocates. That offer, in my judgment constitutes sufficient security for the due performance of the decree herein in the event the intended appeal succeeds. The applicant's main complaint against the judgment of the lower court seems to be that the sum awarded to the respondent was excessive. Prima facie therefore, some amount will ultimately be payable to the respondent notwithstanding the success of the intended appeal.

In the end, I make the following orders:-

- (i) *The applicant is granted leave to appeal out of time. It should file and serve the appeal within seven (7) days from the date hereof.*
- (ii) *The applicant shall pay to the respondent the sum of KShs. 400,000/- within thirty (30) days from the date hereof.*
- (iii) *The applicant shall deposit into an interest bearing joint account to be opened in a reputable financial institution in the names of the parties advocates the sum of KShs. 513,265/- within thirty (30) days from the date hereof.*
- (iv) *There shall be stay of execution pending compliance with 1, 2 and 3 above.*
- (v) *In default the applicants Notice of Motion dated 6<sup>th</sup> April, 2010 shall stand dismissed with costs.*
- (vi) *If 1, 2 and 3 are complied with there will be stay of execution of the decree of the lower court until the determination of the appeal.*
- (vii) *Costs of the Notice of Motion shall otherwise abide the results of the intended appeal.*
- (viii) *Each party has liberty to apply..*

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 20<sup>TH</sup> DAY OF MAY, 2010.**

**F. AZANGALALA**  
**JUDGE**

Read in the absence of the parties or their advocates:-

**F. AZANGALALA**  
**JUDGE**  
**20<sup>TH</sup> MAY, 2010**