



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS) Civil Case 39 of 2005**

**JAYANTILAL DHARAMSHI GORSRANI.....PLAINTIFF**

**VERSUS**

**KENYA OIL COMPANY LIMITED.....DEFENDANT**

**RULING**

1. By a Judgment delivered by Khaminwa J, on 21<sup>st</sup> December 2009, judgment was entered in favor of the Plaintiff against the Defendant as follows:

- “1. That the defendant do pay the Plaintiff the sum of Kshs.101,574,900/= less the amount received from the present dealers I the sum of Kshs.100,000/= per month from 1<sup>st</sup> June 2004 to 31<sup>st</sup> May 2016 leaving a sum of Kshs.97,174,900/=, plus interest from the date of filing suit to the date of full payment.
2. Those costs of the suit plus interest at court rates are paid to the Plaintiff.”

Immediately the judgment was pronounced, the Defendant applied for a temporary stay of execution pending the filing of a formal application for stay and an appeal to the Court of Appeal. The Defendant has now filed a notice of appeal and a formal Notice of Motion seeking for stay of execution pending the hearing and the determination of the appeal.

2. When the judgment was delivered, the Defendant was given 21 days within which to file a formal application for stay of execution. Counsel for the Defendant argued that the computation of the 21 days begun to run on 7<sup>th</sup> January 2010 due to public holidays and as provided for under Order 49 Rule 3A of the Civil Procedure Rules therefore this application was filed within time. On the merit of the application, judgment involves a colossal sum of money and taking into account the principles of law governing the elements to bring to bear, the Applicant should be granted the order of stay. For example the Court of Appeal decision in Civil Application No. 4 of 2002 Banque Indosuez vs D. J. Lowe & Company. The applicant was granted an order of stay so that the Appeal was not rendered nugatory.

3. In Civil Application No. Nai.258 of 2009, E. Muriu Kamau Njoroge Nani Mungai t/a Muriu Njoroge & Company Advocates vs. National Bank of Kenya Ltd their Lordships expressed themselves in the following words;

*“The Courts including this Court in interpreting the Civil procedure Act, or the Appellate Jurisdiction Act, or exercising any power must take into consideration the overriding objective as defined in the two Acts. Some of the principle aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the Courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing.”*

4. Counsel for the Defendant further submitted that the approach being taken by the Court of Appeal is in furtherance of the overriding objective provided for under Section 1A of the Civil Procedure Rules which takes into account the overarching objective in the

administration of justice is to provide proportionality or a fair playing ground for both parties who should not be prejudiced by the pending appeal. The decision of the High Court is subject to the Court of Appeal decision and in balancing the interests of the parties; none should be put at an advantage. On the issue of security, counsel submitted that the judgment-debtor can provide a corporate guarantee because requiring them to provide security by cash, guarantee or bonds can lead to unnecessary expense. The Judgment-debtor is a sound Company which is listed at the Nairobi Stock Exchange; it is a public company which is even allowed to borrow from the public through the commercial paper.

5. This application was opposed by counsel for the Respondent. He relied on the replying affidavit by the Plaintiff sworn on 22<sup>nd</sup> February 2010. Counsel for the Respondent also filed written submissions and urged the court to strike the entire application as it was filed outside the 21 days period allowed by the Judge. The Judgment-Debtor did not apply for the extension of time because even the submissions were filed outside the period allowed by this court. The supporting affidavit to the application seeking for stay of execution was also challenged on the grounds that it was filed to support an earlier application dated 15<sup>th</sup> February 2010 which was withdrawn. The Judgment-Debtor did not swear a fresh affidavit to support this application therefore it should be struck out.

6. On the merit of the application, the Judgment-Debtor has not met the conditions for granting a stay as set out under the provisions of Order 41 Rule 4(2) of the Civil Procedure Rules. The Applicant has not met the requirement by showing that they will suffer substantial loss unless the order of stay is granted. They have also not provided for a security. The offer to provide a commercial paper is not a reasonable security as the Plaintiff is not impecunious and can always pay back money in the event that the appeal is successful. The Plaintiff should not be denied the fruits of his judgment. As it was held in the case of; Stephen Wanjohi vs. Central Glass industries Ltd Nairobi HCCC 6726 of 1991.

7. Counsel also urged the court to take judicial notice of the fact that Oil Companies become insolvent due to the global economic melt down or they migrate to the other countries, thus they should not be granted the order of stay as there is a likelihood they will not pay the decretal sum in the event that the intended appeal fails. The Plaintiff is also an elderly person aged about 78 years old he should be allowed to enjoy the fruits of his judgment which he has waited for almost six (6) years.

8. I have considered the rival submissions and also the provisions of Order 41 rule 4(2) of the Civil Procedure Rules where it is provided that:

“(2) No order for stay of execution shall be made under sub rule (1) unless...

- (a) the court is satisfied that substantial 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.”

9. Applying the first test, whether the applicant will suffer substantial loss unless the order of stay is issued, I appreciate the decretal sum of over 150 million is by no means a small amount of money. I also find this application was filed without unreasonable delay. The court is called upon to exercise its discretion to grant an order of stay. In the oft' cited case Butt vs. the Rent Restriction Tribunal [1982] KLR 417 the Court held;

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. the general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant and refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.”

The applicant intends to give security by way of a commercial paper. I do not know whatever that paper means as a security. Providing a

security is meant to secure the judgment creditor and for the Judgment-Debtor to demonstrate its ability to settle the decretal sum after the appeal.

10. This is a money decree, to balance the interest of all the parties, I will allow the application on condition that the Judgment-Debtor will deposit in court within thirty (30) days from the date hereof, a sum Kshs. 15 million by way of cash, a bank guarantee or insurance bond to be held in court as security pending the determination of the Appeal. Failure to do so, the order of execution will lapse. The Plaintiff will also have the costs of this application.

RULING READ AND SIGNED ON 7<sup>TH</sup> MAY, 2010 AT NAIROBI

**M. K. KOOME**  
**JUDGE**