



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 654 of 2006

OCHIENG',ONYANGO, KIBET & OHAGA APPLICANTS

VERSUS

ADOPT A LIGHT LIMITED RESPONDENT

RULING

1. The Notice of Motion dated 25th February 2010 was filed by Adopt A Light Limited (herein after referred to as the '**client**'). The client is seeking for a stay of execution of the judgment and the decree emanating from the bill of costs that was awarded to Messrs **Ochieng, Onyango, Kibet and Ohaga advocates** (herein after referred to as the '**advocates**'). This application is premised on the grounds that judgment was allowed in favour of the plaintiff for Ksh.7.815,050/- . The client is aggrieved by the said decision and intends to file an appeal to the Court of Appeal. The client will suffer substantial loss if stay is not granted. The client has detailed the special circumstances why he should be granted stay in the supporting affidavit sworn by **Esther Pasaris** on 25th February 2010.
2. According to the client the business is undergoing difficulty times as a result of interference by the Nairobi City Council , the financiers of the client have also recalled their facilities thereby affecting their cash flow. The client annexed documents to show she has other obligations e.g. outstanding tax liabilities which are due and payable to KRA. The applicant also has a huge monthly payroll for the staff. As a condition for granting a stay, the client is proposing to pay an undisputed sum of 1.627,300/- in monthly installment of Ksh.200,000/- per month which offer has already been made to the advocates but they declined. Counsel for the applicant also filed written submissions in support of the clients case and argued that the client has demonstrated that they are in dire financial crises and if the stay is not granted, the client will suffer irreparable harm which will lead to the crippling of the business and perhaps the closure of the business.
3. This application was opposed by the advocates, reliance was placed on the replying affidavit sworn by **Mr. John Ohaga** on 9th March 2010. The advocates also filed written submissions in support of their position that the application if it is seeking for stay of execution fails to meet the test set out under the provisions of **Order 41 rule 4(2)** of the Civil Procedure Rules. The client is supposed to prove that it will suffer substantial loss, and must provide for security for the settlement of the decree to enable this court exercise its discretion to grant an

order of stay of execution. The client must provide a security which is commensurate with the decree.

4. As the records will show attempts were made to offer settlement by installments for a sum which the client claims is not disputed amounting to 1.627,300/-. The decretal sum now outstanding is over 10 million, that is according to the decree that has been extracted. As regards substantial loss, it is in regard to a decretal sum which is paid as the applicant may always recover it in the event the appeal succeeds. There is no evidence before the court to show that the advocates may not be able to pay the money in the event that the appeal is successful. Reference was made to the case **Kenya Shell Limited vs. Karuga 1982 – 1988 1KAR p. 1010** especially page 1022 per **Plat JA** held;

“It is usually a good rule to see if Order 41, r4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”

Counsel further submitted that if the client is in dire financial straits this is an indication it will be unable to satisfy the decree. He urged the court to dismiss the application which in any event is badly drawn and is therefore incompetent.

5. I have considered all the submissions for and against this application. Admittedly the application is slovenly drawn. However that has not caused the respondent any prejudice and considering the overriding principle that guides this court in the administration of justice as provided for under **Section 1(A) of the Civil Procedure Act**. I find the failure to cite the correct provisions of the law has not caused any miscarriage of justice I will therefore proceed to determine the application on merit.

Under the provisions of **Order 41 rule 4 (2)** it is provided that:

“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”

6. The application by the client as I understand it, seeks for a stay of execution pending an appeal to the Court of Appeal. Thus the elements to bring into consideration are those provided for under the above law. The 1st consideration is whether the client will suffer substantial loss unless the order of stay of execution is granted. For this the client has to show if the appeal is successful she will not be able to recover the decretal sum. The client has not shown that the advocates will not be able to refund the decretal sum. It was argued that if the client is made to pay the decretal sum its business will be forced to close down due to financial crises that the business is facing.

7. More importantly the client is supposed to provide security for the due performance of the decree. The client is requesting to be allowed to pay what it terms to be an undisputed sum of about 1.6 million. I agree with counsel for the advocate that there is a decree on record therefore the applicant cannot talk of an admitted sum of 1.6 million but the entire decree.

8. As it was held in the case of **Butt vs. Rent Restrictions Tribunal Civil Appeal No. NAIROBI 6 OF 1979** (unreported) Madan JA (as he then was) said:

“It is in the discretion of the court to grant or refuse stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal if successful from being nugatory, per Brett L.J. in Wilson v. Church (N.2) 12 Ch.D. (1979) 454 at p.459.”

In the present application, the decretal amount is now standing at almost 10 million. The client's claim is that its operations may be brought to a halt if it were to pay the entire decretal sum. Bearing in mind all these circumstances and considering also the interest of the advocates who should not be denied the fruits of their judgment, I hereby grant a conditional stay of execution in the following terms.

- 1. The client is granted stay on condition that a sum of Ksh 2 million is paid to the advocates within 30 thirty days of this order.**
- 2. A sum of Ksh.3 million is deposited in a bank in the joints names of the advocate for the client and the advocates herein within sixty days(60) from the date of this ruling.**
- 3. Costs of this application to the advocates.**
- 4. Failure to comply with the above orders the conditional stay will lapse.**

RULING READ AND SIGNED ON

4TH JUNE 2010 AT NAIROBI.

M.K. KOOME
JUDGE