



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 191 OF 2009

**SOUTH NYANZA SUGAR
COMPANY.....APPELLANT**

VERSUS

**JANE O.
AKINYI.....RESPONDENT**

RULING

This is an application for stay of execution of the judgment and decree in **Kisii CMCC No. 185 of 2003** pending the hearing and determination of an appeal. The application is supported by an affidavit sworn by **Gabriel Ouma otieno**, Advocate, the Legal Services Manager of the appellant. He stated that the respondent is a complete stranger to the appellant, yet he alleged in his suit that the appellant breached a contract it had entered into with him. When the appellant filed an application for stay of execution before the lower court, the court granted stay but on the onerous condition that half of the decretal sum be paid to the respondent's advocates and the other half be deposited in a joint interest earning account in the names of the advocates for the parties. The decretal sum is **Ksh 233,550/=**. There is no guarantee that the half of the decretal sum that is supposed to be paid to the respondent's advocate will be refunded in the event that the appeal is successful, the deponent stated. He added that the appellant is a state parastatal and would be able to satisfy the decree in the event that the appeal is not successful. He further stated that the appellant is ready and willing to abide by whatever conditions that may be imposed as relates to provision of security. Mr. Odhiambo advocate made brief submissions in support of the application.

Mr. Oduk for the respondent submitted that the lower court had exercised its discretion in granting stay of execution and this court should not therefore interfere with that discretion since it has not been shown that the discretion was improperly exercised. He further stated that the time that had been given by the lower court for depositing the one half of the decretal sum had already lapsed.

Counsel further submitted that when a party is not satisfied with orders of stay given by a lower court, those orders can only be varied by way of an appeal. He urged the court to dismiss the application.

I will start with the last limb of Mr. Oduk's submissions. I do not agree that the appellant, having filed an appeal against the trial court's judgment and decree, ought to have filed another appeal to challenge the terms of stay of execution that were imposed by the trial court. **Order XLI rule 4 (1) of the Civil Procedure Rules** is clear that.....

“ 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 application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such orders set aside.”

it appears to me that a more appropriate prayer that ought to have been made by the appellant is for setting aside of the terms that were given by the trial court in granting stay and to ask this court to impose such other terms as it may deem just. But either way, the application has to be brought pursuant to the provisions of **order XLI rules 4 and 5**.

Turning to the merits of the application, the respondent has a monetary decree in his favour. The appellant has challenged the same by preferring an appeal to this court. The appeal was filed in 2009 and as rightly stated by the appellant, it may take some years to be heard and determined. The trial court, in granting stay of execution, ordered that half of the decretal sum be paid to the respondent's advocate. It is that condition that seems to have made the appellant uncomfortable. This is because the respondent's advocate shall be at liberty to release the money to his client, so it appears to me. That being the case, if the appeal is successful the appellant may not be able to recover that money. On the other hand, the appellant is a substantial corporation and would be able to settle the decree if the appeal is not successful, See **INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION -VERSUS- DABER ENTERPRISE LTD** [1999] 2 E.A 111.

So as to secure the interests of both parties, I grant stay of execution of the lower court judgment and decree and set aside the terms that were imposed by that court. In their place, I order that the entire decretal sum be deposited in an interest earning account in the joint names of the advocates for the parties herein. That should be done within the next **thirty (30) days** from the date hereof failing which the order of stay shall lapse. The appellant shall bear the costs of the application.

DATED, SIGNED AND DELIVERED THIS DAY 17TH OF SEPTEMBER 2010.

D. MUSINGA

JUDGE.

19/9/2010

Before d. Musinga, J

Mobisa- cc

Mr. Nyambati for Mr.Odhiambo for the appellant

Mr. Oguttu for Mr. Ogweno for the respondent

COURT: - Ruling delivered in open court on 17th September 2010

D. MUSINGA

JUDGE.

