



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA

Civil Suit 69 of 2009

SHELL KENYA LIMITED .....PLAINTIFF  
VERSUS  
HUSSEIN DAIRY LIMITED.....DEFENDANT

RULING

Before court is the Defendant/Applicant's Notice of Motion dated  
23<sup>rd</sup> November 2009 by which they seek the following orders –

- “1. **THAT** all further proceedings herein at the instance of the plaintiff be stayed and that this suit should not proceed for hearing either by way of summary judgment or otherwise until the Defendants Appeal to the Court of Appeal against the Ruling/Decision of Lady Justice Maureen Odero made on 3<sup>rd</sup> November 2009 is heard and determined;
2. **THAT** this Honourable Court make such further or other or consequential orders as the case of justice demands;
3. **THAT** costs of this application be provided for”

This present application emanates from my decision dated  
3<sup>rd</sup> November 2009 in which I did allow the Plaintiffs/Respondent's application to amend its pleadings. The Defendant/Applicants being aggrieved with my said decision have filed an appeal against the same to the Court of Appeal. They have now come to court seeking to have all proceedings in this present suit stayed until the determination of this appeal. Ms. Kawere appeared for the Applicants whilst Mr. Weloba appeared for the Respondents. Parties agreed to argue the application by way of written submissions. I have carefully perused the written submissions filed by both parties and I have considered the relevant law as well as the cited case law.

The Applicants submit that to deny their application for a stay would be prejudicial to themselves in that they have an arguable appeal which has a high chance of success and secondly that if no stay is granted their appeal may be rendered nugatory. The Respondents on the other hand submit that the present application has no merit and ought to be dismissed in its entirety.

It is trite law that in order to succeed in such an application for stay pending appeal, the Applicant must satisfy the court in two essential issues

- “(i) ***That they have an arguable appeal***
- (ii) ***That unless such stay is granted the intended appeal will be rendered nugatory.***”

In the cited case of **DOONHOLM RAHISI STORES –VS- BARCLAYS BANK OF KENYA & ANOTHER [2006]**. Hon. Justice Fred Ochieng held at page 5

*“An applicant such as the one before us is obliged to prove not only one, but both of these requirements before he can hope to obtain an injunction or an order of stay from the court ...” [my own emphasis]*

The Applicants have cited the two following cases in support of their prayer for a stay **SWANYA LIMITED –VS- DAIMA BANK LIMITED Civil App. 45 of 2001** and **KIHURIA KAMURI & JANE WATURI MWAURA –VS- JACKSON MAINA MWANGI Civil App. 112 of 2005**. However I do find both cases distinguishable from the present one in that they both dealt with the issue of stay of execution. That is in both cases the suit had been heard and determined. In the present case the hearing of the suit has not commenced at all and no judgment has been entered. I am not persuaded that failure to enter a stay will render the appeal nugatory nor am I persuaded that the Applicant will be in any way prejudiced. Whilst I do not wish to comment on the merits or otherwise of the intended appeal I cannot rule out the possibility that this is merely a tactic by the Applicants to buy time and delay the hearing of the suit. In my view the Applicants ought to welcome the opportunity to vigorously defend the suit. In summary I am not convinced that the prerequisites for a stay have both been established by the Applicant. As such I find no merit in this present application and I do hereby dismiss the same in its entirety. Costs in the cause

**Dated and Delivered in Mombasa this 3<sup>rd</sup> day of September 2010.**

**M. ODERO**  
**JUDGE**

Read in open court in the presence of:-

Mrs. Kawere for Applicant

Mr. Ochwa holding brief for Respondent

**M. ODERO**  
**JUDGE**  
**3/09/2010**