



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Civil Suit 190 of 2002**

**NOORDIN FAZAL HUSSEIN RAJABALI .....PLAINTIFF**

**VERSUS**

**KUTUBDIN AKBERALI KHANBHAI**

**HUSSEINBHAI KHANBHAI**

**HATIMI JOINERY WORKS LTD. ....DEFENDANTS**

**R U L I N G**

The subject matter of this ruling is the Notice of Motion dated 30<sup>th</sup> March 2009. The aforesaid motion is taken out pursuant to the provisions Order XLI rule 4 (1) of the civil Procedure rules in which the defendants are seeking for an order of stay of execution and further proceedings pending appeal. The motion is supported by the affidavit of Husseinbhai Khanbhai sworn on the 30<sup>th</sup> day of March 2009. The plaintiff filed an affidavit in reply to oppose the motion. When the motion came up for interpartes hearing learned advocates appearing in this motion made oral arguments in support of their positions.

I have keenly read the material placed before this court. I have also considered the oral submissions made by learned counsels. It is not in dispute that this court dismissed the defendants' notice of motion dated 25.6.04 on the 13<sup>th</sup> day of March 2009. In the aforesaid motion the defendants had sought to set aside execution proceedings. The defendants became aggrieved and have since then filed a notice of appeal

to challenge the dismissal order. Pending the hearing and determination of the intended appeal the defendants are now before this court seeking for a stay of execution pending appeal. The principles which must be considered when dealing with such applications are well settled. First, that the application for stay must be made without an unreasonable delay. Secondly, that the applicant must show the substantial loss it would suffer if the order is denied. Thirdly, that security for the due performance of the order or decree must be provided for. Let me apply the aforesaid principles to the motion now before court. I have already stated that the dismissal order was made on 13<sup>th</sup> March 2009. The defendants lodged a notice of appeal on 26<sup>th</sup> March 2006. The motion was filed on 30<sup>th</sup> March 2009. There is no serious contention that the motion was timeously filed. It is the submission of Mr. Jiwaji, learned counsel for the plaintiff that the notice of appeal was incompetent because it was lodged out of time in contravention of rule 74 of the Court of appeal Rules, hence there is no competent appeal to base the order for stay of execution. I have carefully perused the record and I am convinced that the notice of appeal was lodged with the Deputy Registrar of this court on 26.3.2009. The Deputy Registrar acknowledged receipt on 30.3.2009. I am also convinced that the issue regarding the validity of the Notice of Appeal is a matter which can be canvassed before the Court of Appeal. The notice of appeal on the face of it shows that the same was date stamped 26.03.2009. The record shows that the defendants paid the fees for the notice of appeal on 26.3.2009. I am satisfied that the motion was timeously filed.

The second principle which must be shown is that the applicant must establish that it would suffer substantial loss if the order is denied. It is the submission of Mr. Amollo learned advocate for the defendants that if order is denied, the defendants are likely to suffer substantial loss in that the

judgment sum is colossal. It is the submission of Mr. Jiwaji that the decretal sum is not colossal hence no substantial loss will be occasioned. I have considered the competing arguments. The judgment sum is Kshs.2,560,000/-. Of course the amount will increase if costs is included and may run to a figure of over Kshs.3 million. I am convinced that if the amount is recovered at once, the defendants are likely to suffer substantial loss in that their business is likely to be starved of finances.

Having come to the conclusion that it is necessary to issue the order for stay, this court is enjoined to consider the form of security. The defendants have offered to deposit a sum of Kshs.2,600,000/- in court or in a joint interest earning account within 14 days. The plaintiff has urged this court to order the defendants to make a deposit of between Kshs.5 million to Kshs.6 million. There is no doubt that the parties appreciate the fact that there is need to provide security. It is also not in dispute that the parties agree that it is necessary to make a cash deposit. What is left for the decision of this court is to determine the amount. If the appeal is unsuccessful, the defendants will be required to pay a sum of Kshs.2,560,000 plus costs and interest. Costs and interest are yet to be ascertained. I will fix a conservative figure of Kshs.340,000/- to represent costs and interest. I hereby grant the order of stay of execution pending appeal on condition that the defendants must deposit a sum of Kshs.2,900,000/- in an interest earning account in the joint names of the advocates on record within 14 days from the date hereof. In default, the motion shall stand dismissed. Costs of the motion to abide the outcome of the intended appeal.

*Dated and delivered at Mombasa this 23<sup>rd</sup> day of April 2009.*

**J. K. SERGON**

**J U D G E**