



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

**Civil Case 202 of 2005**

**PETER JURGEN HERKENRATH**

**URSULA KREZENTIA MONIKA HERKENRATH.....PLAINTIFFS**

**VERSUS**

**AFRICAN SAFARI CLUB LIMITED .....DEFENDANT**

**R U L I N G**

On the 24<sup>th</sup> day of February 2009, this court entered judgment in the sum of Kshs.15,799,124 plus interest for the plaintiffs and against the defendant. Being aggrieved by the aforesaid judgment, the defendant filed a notice of appeal to enable it challenge the same in the Court of appeal. Pending the hearing and determination of the intended appeal, the defendant has taken out the notice of motion dated 7/4/2009 in which it sought for an order of Stay of Execution of the decree. The motion is the subject matter of this ruling. The motion is supported by the affidavit of Frank Neugebauer sworn on the same date. The plaintiffs opposed the motion by filing the replying affidavit of Pauline Makumu Mwole.

Mr. Nanji, learned advocate, argued against the motion on behalf of the plaintiffs while Mr. Omondi, learned advocate argued in support of the motion on behalf of the defendant. It is the defendant's argument that unless the order is given the defendant may suffer substantial loss in that it will be required to pay a colossal sum of more than Kshs.25,000,000/-. It is the defendant's view that if the money is released to the plaintiffs it will be extremely difficult to get a refund. The defendant offered an insurance bond as security for the due performance of the decree.

The plaintiffs opposed the motion by alleging that the defendant has not shown the substantial loss it would suffer. It is also argued that the defendant is guilty of material non-disclosure in that it failed to disclose that it had received the sum insured from its insurers to the tune of Kshs.400,000,000/-. For this reason the plaintiffs are of the view that the defendant will not suffer any substantial loss. It is also argued that the insurance bond is not sufficient security, because the plaintiffs may be forced to file suit to enforce the bond of that insurance company may go down hence leaving the plaintiffs vulnerable. The plaintiff proposed that a sum of Kshs.52,000,000/- be deposited in an interest earning account in the joint names of the advocates. The plaintiffs also pointed out that there was inordinate delay in filing the motion.

I have considered submissions and the material made available to this court. In determining such applications, the principles are well settled. First that the application for stay must be made without unreasonable delay. Secondly that an applicant must show the substantial loss it would suffer if the order for stay is denied. Thirdly, that security for the due performance of the decree must be provided for. Let me apply these principles to the motion before me. Judgment was entered on 24.2.2009. Notice of Appeal was filed on 25.2.2009. the motion was filed on 7<sup>th</sup> April 2009. There was a delay to file the motion but I find the delay reasonable hence excusable. Consequently I am convinced that the motion was timeously filed.

The question is whether or not the defendant will suffer substantial loss. There is an allegation to the effect that the plaintiffs may not refund the money if paid. It is the plaintiff's submission that they are capable of refunding the money when required. The plaintiffs attached to the replying affidavit of Pauline

Makumu Mwole copies of the certificates of title and value of Plot No. 2444/MN/1. The value is fixed at Kshs.45,000,000/- After a careful consideration, I am convinced that the aforesaid property may not be a good guarantee to the defendants that it will easily recover its money from the plaintiffs. It may be forced to file a suit to have the property attached. It may take several years for the legal process to conclude. I am convinced that in the circumstances that the defendant has shown the substantial loss it would suffer.

The last principle which the court must consider is the kind of security to be given. The plaintiffs have demanded that the defendant be ordered to make a deposit of Kshs.52M. The defendant has proposed to give an insurance bond of Kshs.25,000,000/-. I have taken into account the divergent suggestions. I prefer that the defendants should deposit cash instead of the proposed Insurance bond. I have come to that conclusion because in recent past, many insurance companies have gone under due to mismanagement and due to the economic downturn currently affecting the world. It is possible the insurance company which will offer the bond may not satisfy the decree when called upon to do so at the conclusion of the appeal. I am in agreement that the reasonable estimate of the deposit should be Kshs.25,000,000/-. I grant the order of stay on condition that the defendant deposits a sum of Kshs.25 million in an interest earning account in the joint names of the Advocates/firms of Advocates appearing in this suit within 30 days from the date hereof. In default the motion shall stand dismissed. Costs of the motion given to the plaintiffs.

Dated and delivered at Mombasa this 28<sup>th</sup> day of May 2009.

**J. K. SERGON**

**J U D G E**

In open court in the presence of Mr. Nanji for the plaintiff/Respondent and

Mr. Omondi for Defendant.