



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

**(MILIMANI COMMERCIAL COURTS)
Civil Suit 559 of 1995**

RYCE MOTORS LIMITED.....PLAINTIFF

VERSUS

JONATHAN KIPRONO RUTO.....1ST DEFENDANT

MIDWAY ASSURANCE INTERNATIONAL LTD.....2ND DEFENDANT

R U L I N G

This is Notice of Motion application dated 27th November, 2007 brought under Order XLI rule 4 and Order L rule 1 of the civil Procedure Rules. It seeks the following orders:

- 1. THAT this application be certified as urgent.**
- 2. THAT service of this application upon the 1st Defendant in the first instance be dispensed with and the application be initially heard exparte**
- 3. THAT there be a stay of execution of the Judgment and Decree in the above mentioned case given on 29th May, 2002 pending the hearing and determination of the intended appeal against the order of this Honourable Court made on 31st October, 2007.**
- 4. THAT the costs of this application be provided for.**

The application is based on the following grounds:

- (a) The Plaintiff being aggrieved by the said Decree applied for review thereof on 28th June, 2007 on the ground that the Judgment and Decree were a nullity in law.**
- (b) The Judgment which gave rise to the Decree was not pronounced or delivered by the Court as required by the mandatory provisions of the Law.**
- (c) In the ruling delivered on 31st October, 2007 this Honourable Court dismissed the said application for review and ruled that the said Judgment was valid.**
- (d) The Plaintiff has a statutory right of Appeal against the said ruling and order.**
- (e) Being aggrieved by the said ruling the Plaintiff has exercised the said right of Appeal and**

lodged a Notice of Appeal against the ruling.

(f) The decretal sum is already secured for the decree holder in a joint account opened in the names of the decree holder's Advocates and the Plaintiff's Advocates.

(g) The Plaintiff will suffer irreparable loss if the said decree is enforced before the intended appeal is heard and determined thereby rendering the Appeal nugatory.

(h) The Plaintiff has arguable and/or good grounds of appeal against the said ruling and order.

The application is supported by an affidavit sworn by Habil Omwaka the Personnel and Administration Manager of the Plaintiff Company, dated 18th November, 2007. That affidavit annexes a Notice of Appeal to the Court of Appeal. It also annexes a fixed deposit receipt as proof that the decretal sum has already been deposited in a joint interest earning account in the names of the Plaintiff's Advocates and the Respondent's Advocates. The deposit receipt is exhibit 2 in the supporting affidavit.

The Defendants/Respondents have filed grounds of opposition dated 18th January, 2008 where only one ground is raised which is, that the Plaintiff's (instant) application is incompetent and an abuse of the Court process. Both parties filed submissions which were highlighted before me on the 8th May, 2009.

I have considered the application, the grounds of opposition and the submissions by both counsels. The application seeks to stay the execution of this court's judgment and decree given on 29th April 2002 pending an intended appeal before the Court of Appeal as against this court's order made on 31st October, 2007. This court's discretion to order stay of execution is fettered by three conditions which are set out in the Court of Appeal decision of **HALAI & ANOTHER VS THORNTON & TURPIN [1963] LTD [1990] KLR 365** where Gicheru, JA, Chesoni and Cockar Ag JJA held:

“The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

The brief background of this matter is that the suit was filed on 21st February, 1995. The matter was heard by Hon. Justice Osiemo, J. who delivered a judgment on 29th May, 2002 in favour of the 2nd Defendant. The Plaintiff who is the Applicant has contested the delivery of the alleged judgment. It is the Plaintiff's case that the judgment was not pronounced or delivered by the court as required by the law.

Only the Plaintiff filed an affidavit in this application, the Defendants opting to file grounds of opposition. As correctly stated by Mr. Oyatsi, having chosen to file grounds of opposition, the facts deponed to by the Plaintiff in the affidavit are uncontroverted. The Defendant cannot depend on facts alluded to in their submissions especially if those facts contradict the affidavit sworn by the Plaintiff. The facts given by the Plaintiff in the affidavit should carry the day.

The Plaintiff deposes that on 28th June, 2007 it filed an application seeking orders for the review of the judgment and decree given in court on 29th May, 2002. That application was heard by Warsame, J. who gave a ruling on 31st October, 2007 dismissing the application for review. It is against that ruling that the Applicant has filed a notice of appeal to the Court of Appeal, and which notice is annexed to the affidavit in support of this application.

I am guided by the Court of Appeal decision of **Halai & Another**, supra. The Applicant has to establish a sufficient cause, secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the Applicant must furnish security in order to enable this court grant it the stay sought.

Mr. Oyatsi for the Applicant relies on three grounds as proof of sufficient cause in support of the application. The first ground is that litigation has not ended and the Plaintiff has filed a Notice of Appeal against the ruling of Warsame, J. The Plaintiff contends that if that appeal succeeds, the Respondent will have no judgment or decree to enforce. The second cause relied upon is that if the 1st Defendant is allowed to execute, and then the judgment is reversed on appeal, then the Plaintiff will suffer irreparable loss and the intended appeal will be rendered nugatory. The Plaintiff contends that the decretal sum has been deposited in an interest earning account in the names of the Advocates to the parties. It is the Plaintiff's contention that the Defendant/ Respondent has not sworn any affidavit and therefore has not shown that it has the means to refund the said decretal sum to the Plaintiff in the event he is required to refund the money. Thirdly, the Plaintiff's apprehension that it may suffer injustice if the stay is not granted at this stage, is real and justified.

Mr. Oyatsi has urged that, as provided under order XLI rule 2 of the Civil Procedure Rules, the order for stay should not be made unless the court is satisfied that substantial loss may result to the Applicant and security has been given for the performance of the decree. Mr. Oyatsi has urged the court to apply the test under this rule and balance the interests of the decree holder against the possibility of not recovering the decretal sum after the appeal, and the interest of the judgment debtor losing the decretal sum if it is paid before the final determination of the appeal, were the appeal succeeds. Mr. Oyatsi relied on the case of **Jeffrey Orao Obura v. Martha K. Koome NAI CA No. 161 of 2000** at page 4, where the court observed:

“We are not saying that there is no arguable appeal. What we say is that if the Applicant deposits the sum of Kshs.3 million in an interest bearing account pending the hearing and determination of the appeal the interest of both parties would stand reserved.”

On behalf of the Respondent, Mr. Tiego sought to rely on the facts on pages 1, 2 and 3 of the submissions filed on behalf of the Defendant. These facts are not contained in an affidavit, and as I stated earlier, any which contradicts the affidavit sworn in support of the application, and the proceedings themselves, cannot be relied upon. On page one under a title “Background” item 3, that the judgment was delivered by Osiemo, J. on 29th May, 2002 is contested. Item XXIV has also been contested by the Applicant. On the court's part however, it is shown that the Applicant has lodged its notice of appeal against the ruling of Warsame, J. on 31st October, 2007 and that the notice is dated 1st November, 2007. I agree with Mr. Oyatsi that the lodging of that notice on that date cannot be used before this court to challenge the current application, especially on the basis of observations made by my brother judges, in particular, Justice Azangalala, J. and Justice Warsame, J. It is my view that so long as the principles applicable to an application of this nature are met the Applicant should be allowed to pursue its appeal challenging the validity of the judgment of this court before the Court of Appeal.

Mr. Tiego for the Respondent has placed reliance on the case of **Oceanic View Hotels Limited vs. Kenya Commercial Bank Ltd. [2002] 2 KLR 338**, and has submitted that the three grounds which an Applicant for stay of execution pending an appeal should establish are;

- (i) That the Applicant must satisfy the court that the intended appeal is not frivolous;
- (ii) that there must be special circumstances to merit the stay of execution pending appeal
- (iii) That granting a stay being a discretionary matter the courts must take into consideration all the circumstances including the merits of the intended appeal.

Counsel also placed reliance on the case of **Red Land Enterprises Limited vs. Premier Savings and Finance Limited [2002] 2 KLR 129** for the preposition:

- (i) That the right of appeal must be balanced against an equally weighty right, which is of the Plaintiff's right to enjoy the fruits of judgment delivered in its favour. There must be just cause for depriving him of that right.

(ii) Judgment had been decreed in favour of the Respondent and to expect it to wait for determination of a proposed appeal which is yet to be filed, would be to do injustice as the Respondent would suffer more by being kept out of its judgment indefinitely.

Regarding the **Oceanic View Hotels Limited case**, supra, I have no quarrel with the principles set out by Khaminwa, Commissioner of Assize, as she then was, except to add that Mr. Tiego in his submission in this case left out a qualification to the issue he itemised as number 3. The qualification in that case was that in a discretionary matter, the court should take into account all the circumstances including the merits of the intended appeal but that the judge of the High Court whose order or decree is being appealed against, should always bear in mind that a non successful party before it has an undoubted right to appeal and that under order 41 rule 4, the decree holder assumes that the decree holder must always recognize that its decree or order may be reversed.

In regard to the **Red Land Enterprises case**, supra, I have no quarrel with the principles enunciated thereunder except to say that the cited case is distinguishable from the instant case. In the cited case, the Applicant in that case was yet to file an appeal against the judgment and decree of the court, and the court was of the view that it would do injustice to expect the Respondent to wait for the determination of an appeal that was yet to be filed, as that was tantamount to keeping him out of his judgment indefinitely. In the instant case not only has the notice of appeal been filed but the Applicant has supplied security by paying the decretal sum into an interest earning account in the joint names of the Advocates to both parties in this suit.

Mr. Tiego has argued that the intended appeal is premised on frivolous grounds, as there are three notices of appeal lodged in court by the Applicants herein, seeking through circumlocutious litigation to challenge the same issue of validity of judgment or otherwise of judgment dated 29th May 2002.

Mr. Oyatsi in answer to this issue submitted that, as stated by the Respondent at page 6 of its submissions, paragraph 3 thereof, the learned Kasango, J. was of the view that challenge to the judgment of Osiemo, J. could only be made at the Court of Appeal and that was the basis upon which the current application is made.

The ground that the appeal is frivolous is interwoven with the second issue raised by the Respondent, which is that the intended appeal is premised on an issue of estoppel, that it is barred by the doctrine of *res judicata* and that no special circumstances exist to warrant a stay of execution. Mr. Tiego relied on the case of **Trade Bank Ltd. vs. LZ Engineering Construction Limited [2001] 1 EA 266** thus:

“Issue of estoppel and the doctrine of res judicata arise in these appeals. Issue of estoppel and res judicata bar the appellant from re-litigating matters already ruled on by the Court, since the point at issue in both appeals is the same and based on the same facts between the same parties and arose out of the same action which point had been decided with certainty and it matters not whether the first decision was right or wrong. The question of a validly signed notice of appeal is no longer open as that point had been decided against the Appellant.”

Counsel also relied on the case of **Pop-In Kenya Limited & Others vs. Habib A.G. Zurich CA No. 80 of 1988** where the Court of Appeal held:

“The admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgment upon a different assumption of fact,... parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal results either of the construction of the documents or the weight of certain circumstances. If this was permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted.”

Mr. Tiego has urged the court to find that it ought not to exercise its discretionary power in favour of the Applicant on the basis that the Applicant has brought one application after another, between this Court

and the Court of Appeal, premised on the same grounds, and that it should not be allowed to keep the Respondent from enjoying the fruits of its judgment delivered in its favour six years and four months ago. Mr. Tiego's complaint regarded the applications heard and determined by Justice Kasango on 6th February, 2007 by Judge Azangalala, on 5th July 2007 and by Justice Warsame on 31st October, 2007.

I have had occasion to peruse through the proceedings and to see the various applications mentioned by Mr. Tiego. Regarding the application heard by Kasango, J. in which she ruled on 6th February, 2007 the application before the learned judge is one dated 24th November 2006. It was brought by the Plaintiff/Applicant and it sought a review of a previous order which had been issued in its favour by Mwera, J. in which a stay of execution pending appeal had been granted. Hon. Kasango J. dismissed that application on grounds that the Plaintiff ought to have filed an appeal instead of a review of the judge's order. The issue in that application is nowhere near the current application. The application before Kasango J. was for review of a court order. The current application is for a stay of execution pending an intended appeal against an order of this court made by Warsame, J.

The application heard by Azangalala J. in respect of which he made his ruling on 5th July 2007, was in fact an application made by the 1st Defendant, the Respondent in the instant application and which application was dated 22nd September 2006. The application sought the release of the decretal sum held in an interest earning account in the joints names of the Advocates for the Plaintiff and for the 1st Defendant. That application was granted. Comparing it with the current application, except for the decretal amount which appears in both applications, there is no similarity between the two applications.

The third application complained about is the application dated 28th June 2007 which was ruled upon by Warsame, J. on 31st October, 2007. In that application the Plaintiff was seeking a review of the Judgment of Osiemo, J. made on 29th May, 2002. That application was dismissed. It is against the ruling of Warsame, J. that the Plaintiffs/Applicants herein have now filed a notice of appeal in the Court of Appeal.

Having taken into consideration all these previous applications, I find that the current application is not *res judicata*. I also find that the doctrine of estoppel does not apply to this case. I find that the Applicant has shown a good cause to satisfy the court that it ought to exercise its discretion in the Applicant's favour. The Applicant has a right to appeal where it has been aggrieved by the decision of the court. That is a right which the Respondent is aware of. I do appreciate that the Plaintiff has taken a bit of time trying to have the judgment of Osiemo J. reviewed by this court, and that those attempts have been unsuccessful, and have only contributed to delay having the appeal heard. I have also taken into consideration that the 1st Defendant's interest in this matter is secured since the decretal amount has been deposited in an interest earning account. I do not see any prejudice the 1st Defendant stands to suffer if the Plaintiff is allowed to pursue its appeal in the Court of Appeal. As has been noted earlier, the 1st Defendant will not be asked to wait for the fruits of its judgment since the fruits are secured in the interest earning account. All that is happening is that the 1st Defendant will be kept from those fruits in the meantime.

The Applicant is seeking from this court the exercise of a discretionary power, which power should be exercised judicially. After taking all the relevant circumstances into consideration, I have come to the conclusion that the Applicant should be given an opportunity to pursue its appeal in the Court of Appeal. I therefore find merit in the Plaintiff's application. In conclusion:

- 1. A stay of execution of the Judgment and the decree of this court be and is hereby issued pending the hearing and determination of the intended appeal against the order of this court made on 31st October, 2007.**
- 2. The decretal sum deposited in a joint account in the names of the decree holder's Advocate and the Judgment debtor's advocate should continue to be so held pending further orders of this court.**
- 3. The stay in (1) above will be limited to a period of six (6) months within which the Applicant is**

expected to have pursued its appeal in the court of appeal.

4. It is ordered that six (6) months from the date hereof the stay granted in this application will automatically lapse.

5. Either party has leave to apply.

Dated at Nairobi this 22nd day of May, 2009.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

Ms. Maina holding brief Mr. Oyatsi for the Applicant

Oyeir holding brief Mr. Tiego for the Respondent

LESIIT, J.

JUDGE