



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 253 of 2006

WILAX GmbH PLAINTIFF

VERSUS

AFRO FOREX BUREAU LIMITED.....DEFENDANT

R U L I N G

The Application is a Notice of Motion dated 13th March, 2009 expressed to be brought under order XLI rule 4 of the Civil Procedure Rules and sections 3A and 63 (e) of the Civil Procedure Act. The application seeks a stay of execution of this court's orders and judgment of 30th January 2009 and any other subsequent orders, pending the determination and hearing of the appeal.

The grounds upon which the application is made are that the Defendant who is the Applicant seeks to appeal against the judgment of this court that was passed on 30th January 2009 and that it has already filed a Notice of Appeal. It is also based on the ground that substantial loss will result on the Defendant unless the orders sought are granted. It is supported by an affidavit of even date sworn by Sadrudin Jiwa which I have considered.

The application is opposed. The Managing Director of the Plaintiff company Jan Wilken swore a relying affidavit dated 24th April 2009. In that affidavit, it is deposed that the application is an afterthought and that it is merely intended to prevent the Plaintiff from enjoying the fruits of its lawful judgment and that the Defendant has not shown what loss, substantial or otherwise it will suffer if the decretal sum is released to the Plaintiff. Mr. Jan Wilken has also deposed that since the Applicant has not offered any security for the due performance of the decree of this court, then the application should be declined.

I have considered the submissions by the learned counsels appearing for the parties in this suit. Order XLI rule 4(2) provides:

“No order for stay of execution shall be made under subrule (1) unless –

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

The Applicant has complied with the conditions set under sub-rule 4 of order XLI and that it has demonstrated that it has filed a Notice of Appeal in the Court of Appeal under the rules of that court. The other conditions that the Applicant has to satisfy are;

1. **Whether the Defendant will suffer substantial loss unless stay is granted,**
2. **Whether the application has been brought without unreasonable delay,**
3. **If the court is inclined to grant stay what appropriate security should be given by the Defendant for the due performance by them of the decree or order as may be ultimately be binding on them.**

In regard to the issue whether the Applicant will stand to suffer substantial loss if this application is not granted, Mr. Achach for the Defendant has urged the court to consider that judgment was entered for the Respondent in the sum of Euros 7,000, which is a substantial amount of money. Mr. Achach contended that the Plaintiff is a foreign company with no subsidiary or branch in Kenya and if the appeal were to succeed, the Defendant has no assurance that the Plaintiff will continue doing business in Kenya and therefore the Defendant may not be able to recover the sums paid in satisfaction of the decree, if the appeal succeeds. In their response, Mr. Njoroge for the Plaintiff urged the court to find that the Defendant has not been able to show that the Plaintiff will be unable to meet any repayment should it succeed in its appeal.

The Plaintiff has relied on the case of **Dr. Praxades Okutoyi vs. The Medical Practitioner and Dentist Board, HCCA No. 1048 of 2007**. In that case Visram, J. as he then was relied heavily on a Court of Appeal decision of **Kenya Shell Limited vs. Benjamin Karuga Kibiru and Others [1982-88] 1 KAR 1018**;

“Per Platt JA

An intended appeal does not automatically operate as a stay. The application for the stay made before the High Court failed because the first of the conditions set out in Order 41, Rule 4 of the Civil Procedure Rules were not met. There was no evidence of substantial loss to the applicant, either in the matter of paying damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts....

Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money”

Per Hancox JA,

“Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgment no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects.”

On the second issue I am satisfied that the application was brought without undue delay. Judgment was delivered on 30th January, 2009 and the court granted a temporary stay of 30 days from that date. This application was eventually filed on the 16th March, 2009. There was therefore no inordinate delay in bringing the application.

On the issue of the security, Mr. Achach for the Defendant/Applicant has urged the court to determine the nature of the security to be provided by the Applicant if it is satisfied that it should grant stay. Counsel relied on the case of **Postal Corporation of Kenya vs. Donald Kipkorir & 3 others t/a as Kipkorir, Titoo and Kiara Advocates, HCCC 658 of 2004** where the court observed as follows:

“Despite my finding in No. 3 above which would disentitle the Defendants to an order of stay, I nonetheless have the discretion to grant stay of execution for sufficient cause. Given the huge sum of money involved, I think it is desirable that the Defendants be accorded an opportunity to prosecute their applications now pending before the court of appeal. I am therefore inclined to grant a conditional stay of execution. Such condition will be that the Defendant will deposit in court within 14 days of the delivery of this ruling the sum in question.”

I have taken into consideration that indeed the Plaintiff company is a foreign company not incorporated locally and which has no subsidiary or branch in Kenya. I do appreciate the difficulty that may be presented to the Defendant trying to recover sums paid in satisfaction of this court’s decree from the Plaintiff in the circumstances. In determining what security should be ordered, the court has a duty to balance the interest of both parties. The Plaintiff has a judgment in its favour while at the same time it is the Defendant’s right to go on appeal. I am satisfied that the Defendant should be given an opportunity to pursue the intended appeal before the Court of Appeal while at the same time, securing the interest of the Plaintiff in this case. **I am inclined to grant a conditional stay of execution. The condition I set is that the Defendant should deposit with this court within 30 days from the delivery of this ruling the sum of Euros 7,218.53.**

Dated at Nairobi this 24th day of July, 2009.

LESIIT, J.

JUDGE

Read and signed in presence of:

Ms. Mwau holding brief Mr. Achach for the Applicant/Defendant

Ms. Kamunya holding brief Mr. Njoroge for the Plaintiff/Respondent

LESIIT, J.

JUDGE