



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CIVIL APPEAL 216 OF 2008**

**CITY HOPPER LIMITED ..... APPELLANT/APPLICANT**

**VERSUS**

**THOMAS JEREMIAH KIVUVA ..... RESPONDENT/RESPONDENT**

*(Being an appeal from the Judgment of Honourable J.O. Ombura dated 28<sup>th</sup> November 2008 in Kitui Senior Resident Magistrate Civil Case No. 117 of 2007)*

**RULING**

1. The Applicant herein seeks a stay of execution of the decree in **Kitui SRMCC No.117/2007**. In that Application premised on Order XLI Rule 4 (1) of the Civil Procedure Rules, the Applicant has itself not put any fact before the court but its advocate, one Churchill Midwa in his Affidavit sworn 15/1/2009 depones inter-alia that the Application was filed without delay because the contested judgment was delivered on 28/11/2008 and thereafter an application for stay of execution was filed in the subordinate court on 18/12/2008 and by that time an appeal to this court had already been filed i.e. on 16/12/2008. Further that if the stay order is not granted, the Applicant will suffer irreparable loss as the Respondent is **“a man of straw and there is no way of establishing that once the decretal amount is paid to him and the appeal succeeds he will not be able to reimburse the decretal amount”**.

2. In his Replying Affidavit sworn on 27/1/2009, the Respondent depones that the Applicant is acting in bad faith because although it obtained ex-parte orders of stay of execution before the lower court, it failed to prosecute the Application and it was dismissed and then the Applicant attempted to reinstate the said Application and before determination of that other Application, it rushed to this court and obtained ex-parte orders of stay of execution.

3. The Respondent also takes issue with the contention by Mr Midwa that he is a man of straw because the said Mr Midwa does not know him nor his means. Further, that he suffered serious injuries and the award in damages was not even adequate to compensate him for his losses.

4. I have taken into account the submissions by the advocates for the parties but to my mind the issue before me portends no difficulty. I say this because as Platt J.A. stated in **Kenya Shell Ltd vs Kibiru**

**(1986) KLR 410,**

**“Substantial loss in its various forms is the corner stone of both jurisdictions for granting a 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.”**

5. In this case, it is stated, by an advocate, that the Respondent is a man of straw and that substantial loss will be occasioned if the decree is executed. I wholly agree with the Respondent that such a contention cannot stand. In the lower court, I gather that the Respondent did not offer any evidence as judgment on liability was entered by consent and the contested issue before me on appeal shall be quantum of damages. How then does Mr Midwa know what the Respondent does and how he earns his living? How can an advocate for the opposing party without disclosing his source of information determine that the Respondent will not be able to repay the decretal sum? Ringera J **in Kisya Investments Ltd & Another vs Kenya Finance Corporation Ltd H.C.C.C 3504/1993 (Milimani)** confronted with a similar situation stated as follows:

**“It is impossible and unseemly for an advocate to ...enter into controversy as a witness. He cannot be both counsel and a witness in the same case. Besides that, the counsel’s affidavit is defective for the reason that it offends the proviso of Order XLIII Rule 3 (1) by failing to disclose who the sources of his information are and the grounds of his beliefs...I strike it out.”**

6. I am of the same mind and once there is no evidence of substantial loss to be suffered, and there is none before me, it matters not that the Application was brought timeously or that the Applicant is prepared to offer some security in the meaning of the operative rule.

7. The Application before me is without merit and is dismissed with costs to the Respondent.

8. Orders accordingly.

Dated and delivered at Machakos this **16<sup>th</sup>** day of **July** 2009.

**ISAAC LENAOLA**

JUDGE

In presence of: **Mr Mulu for Respondent**

**N/A for Applicant**

**ISAAC LENAOLA**

JUDGE