



**REPUBLIC OF KENYA**

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

**Ciivil Case 56 of 2004**

**DANIEL WAMBUA NDABI..... PLAINTIFF**

**VERSUS**

**PETER LUKA NDUTU.....DEFENDANT**

**R U L I N G**

By a notice of preliminary objection filed on the 21<sup>st</sup> December 2007, the plaintiff has raised a preliminary objection to the Defendant's notice of motion dated 18<sup>th</sup> December, 2007 contending that:

1. This Honourable Court is not the proper forum for this application as stay should be sought at the Court of Appeal.
2. The provisions of the law under which the application is brought are non-existent and do not, in any event, avail the Defendant.
3. This Honourable Court dealt with the issues raised at the appropriate time in the past and does not now have jurisdiction to deal with the issue of stay. The Defendant, therefore, has no right in law to re-open the issue of stay of execution before this court.
4. There is no appeal pending before this court to justify the exercise of the court's discretion to grant stay pending appeal.
5. The present application is an abuse of the court process.

In support of the preliminary objection, Mr. Kimuli submitted that the Defendant could only pursue his application for stay of execution in the Court of Appeal. He contends that this court (Kasango J) having given the applicant an order for stay of execution for 30 days following the judgment, its mandate under Order XLIV Rule 4 of the Civil Procedure Rules was exhausted and such the application can only be considered by the court of appeal which is now seized of the matter.

He further submitted that the application was not brought under any provision known to law, as Order IXL1 cited does not exist.

He maintained that the application was an abuse of the process of the court.

Mr. Musyoki who appeared for the applicant, submitted that the application was properly before the court. He stated that only an application for stay of execution pending review had previously been made. He contended that the applicant has adequately explained the delay in bringing the application in his replying affidavit. He explained that the applicant has commenced the process of appeal and that He could apply for an order for stay of execution under Order XLI Rule 4 of the Civil Procedure Rules. He submitted that there was a typographical error in the order cited in the application and that, that error has not occasioned any prejudice to the Respondent.

It is clear on the face of the application that the same has

been brought under Order IXLI which does not exist in the Civil Procedure Act & Rules. That however has not prejudiced the Respondent. Although Order L rule 12 of the Civil Procedure Rules provides that every order or rule under which an application is made should ordinarily be stated, it provides that no objection can be taken merely by reason of failure to comply with that rule. The spirit of that rule therefore is that the court should deal with the applications on merit rather than knocking them out on technicality. Other than this, the matters being raised by the Respondent in support of the preliminary objection are matters of fact which have to be ascertained. For instance, as to whether this court has discharged its mandate under Order XLI Rule 4 of the Civil Procedure Rules. Secondly as to whether the applicant has been granted leave to appeal out of time and whether there is actually an appeal pending.

Further, the application is for an order of stay of execution which is a discretionary order. It is therefore evident that the objection raised does not qualify to be a preliminary objection as enunciated in the case of **Mukisa Biscuit Manufacturers Limited –vs- Westend Distributors Ltd [1969] EA 696.**

Accordingly I overrule the objection and order that the Notice of Motion dated 18<sup>th</sup> December, 2007 do proceed to hearing on a date to be fixed by the parties in the registry.

Orders accordingly.

**Dated, signed and delivered this 13<sup>th</sup> day of February, 2008.**

**H. M. OKWENGU**

**JUDGE**