



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 131 of 2003

STANLEY KINYANJI

MEIR MIZRAHI (Treasurer and Secretary respectively of the Outdoor Advertising Association of Kenya) suing for and on behalf of OUTDOOR ADVERTISING

ASSOCIATION OF KENYA.....

PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL 1ST DEFENDANT

**ADOPT A LIGHT LIMITED 2ND
DEFENDANT**

**ALLIANCE MEDIA KENYA LIMITED 3RD
DEFENDANT**

RULING

By a notice to show cause dated **17th January, 2007**, **Stanley Kinyanjui** (*hereinafter referred to as the Applicant*) was required to appear before the court to show cause as to why a warrant of arrest and committal to civil jail should not issue against him in execution of the decree issued in this court for Kshs.4,924,250/=.

On **8th February, 2007**, a notice of preliminary objection was filed seeking to strike out the notice to show cause. When the matter came before the Deputy Registrar on the **9th February, 2007**, the preliminary objection was argued. In a reserved ruling, the Deputy Registrar overruled the preliminary objection and ordered that warrant of arrest do issue against the Applicant.

The Applicant has now moved this court through a notice of motion brought under **Section 63 (e)** of the Civil Procedure Act, **Order XLI Rule 4 (1) & (2)** and **Order L Rule 1** of the Civil Procedure Rules,

seeking an order for stay of execution of the Orders issued by the Deputy Registrar Miss Maina, dismissing the preliminary objection and directing that warrant of arrest do issue against Stanley Kinyanjui. The Applicant intends to appeal against the said orders and therefore seeks an order for stay of execution pending the intended appeal. The application is supported by grounds stated on the body of the application, and a supporting affidavit sworn by the Applicant.

It is the Applicant's contention that in dismissing the preliminary objection, the Deputy Registrar relied on an earlier order made by **Hon. Emukule, J** against which order there is a pending appeal in the Court of Appeal. The Applicant maintains that his intended appeal has good prospects of success. The Plaintiff maintains that unless the order for stay of execution is granted, he will suffer irreparable loss as his liberty is at stake.

The Respondent has objected to the application through a replying affidavit sworn by Esther Muthoni Passaris, the Managing Director of the 2nd Defendant. It was contended on behalf of the Respondent that before the court's jurisdiction to grant an order for stay of execution can be revoked under **Order XLI Rule 4(1)** there must be a valid and proper appeal. It was contended that the order made by the Deputy Registrar, was in exercise of powers donated to her by **Order XLVIII Rule 5 (1) X**. It was contended that under **Order XLVIII Rule 5(2)**, an appeal against an order made by the Deputy Registrar lies to a judge in chambers.

It was maintained that the decision of the Deputy Registrar cannot be challenged by filing a fresh suit. It was maintained that that is what the applicant has purported to do by filing **H.C. Civil Appeal No.167 of 2007**. The court was therefore urged to find that there is no proper appeal which would justify the invoking of an order for stay of execution pending appeal. The court was urged to consider the conduct of the Applicant in deliberately delaying this matter by filing another suit instead of a chamber summons in this suit.

It was further submitted, that there was no question of the appeal being rendered nugatory as the Applicant can easily pay the decretal sum to avoid going to civil jail, which money he would easily get back if his appeal is successful. It was contended that the concept of "**nominal plaintiff**" is alien to the law in this country and that in this respect the law in England is different. It was contended that since the court had ruled that there was no association in existence, the litigants who were the movers of the suit had to bear the cost. Submitting that there was no substantial loss that the Applicant was likely to suffer, the court was urged to dismiss the application.

Having considered this application, I find the arguments presented on behalf of the respondent quite persuasive. Nevertheless, it is not within the mandate of this court to prejudge an appeal which is pending as that might embarrass the trial judge whilst dealing with the appeal. In order to determine an application under **Order XLI Rule 4(1)**, the court has only to be satisfied first that there is an appeal which has been lodged, secondly, that substantial loss may result to the applicant unless the order for stay of execution is granted, and thirdly that the application has been made without unreasonable delay. The court may as it deems fit, order security for the due performance of the decree.

In this case, it is clear that the applicant has filed an appeal which is pending. It is also evident that unless the order for stay of execution is granted, the applicant is likely to suffer substantial loss as he either has to pay over **Kshs.4.9 million** or go to civil jail. Further, this application seeking orders for stay of execution was brought without undue delay as it was brought slightly over a month after the making of the order, subject of the intended appeal. I am therefore satisfied that there is sufficient cause to justify the granting of the order of stay of execution. However, in order to ensure that the applicant proceeds with the matter without undue delay, and the interest of the respondents are taken care of, I find that there is need to order the applicant to provide security. Accordingly, I make the following orders:

(1) An order for stay of execution shall issue staying the orders made by the Deputy Registrar on the **8th March, 2007**, pending the hearing and determination of the appeal launched by the applicant.

(2) The applicant shall provide security in the form of a bank guarantee for the sum of **Kshs.1 million**

within **twenty one (21) days** from the date hereof.

(3) In default of the applicant providing security, as per (2) above, the order for stay of execution shall lapse without further reference to the court.

Orders accordingly.

Dated, signed and delivered this 19th day of March, 2008.

H. M. OKWENGU

JUDGE