



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**

**CIVIL CASE 1998 OF 1998**

**JEROME SHLOMO.....PLAINTIFF/RESPONDENT**

**VERSUS**

**RAMJI LADHA COMPANY LTD ..... DEFENDANT/APPLICANT**

**RULING**

By notice of motion dated 06.12.06 stated to be brought under Order XLI rule 4, Order XXI rule 22 (1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Cap.21, the defendant applied, *inter alia*, for the following orders:-

**‘3. THAT this Honourable Court do grant a stay of all proceedings herein pending hearing and determination of Civil Appeal No.267 of 2006.**

**4. THAT execution of the decree and proceedings herein be stayed pending the hearing and final determination of the appeal against the judgment and decree of Mr Justice B.P. Kubo given on 7<sup>th</sup> October, 2005.**

**5. THAT the costs of the application be costs in the cause.’**

The grounds upon which the application is based are that:-

- a) The plaintiff is not resident and/or domiciled in Kenya.
- b) The plaintiff does not have any known fixed or moveable assets within the court’s jurisdiction.
- c) If payment is made to the plaintiff he will be incapable of paying back therefore rendering the appeal nugatory.
- d) The appeal already lodged in the Court of Appeal, that is Civil Appeal No.267 of 2006, has a high probability of success.

The application is supported by the affidavit of R. Munyasi, defendant’s Advocate sworn on 06.12.06.

At the hearing of the application, the defendant/applicant was represented by learned counsel, Miss R.N. Munyasi while the plaintiff/respondent was represented by learned counsel, Mr. P.T. Kiiru.

Defendant’s/applicant’s counsel informed the court that the defendant/applicant was seeking prayers 3, 4 and 5 for the reasons stated in the notice of motion and its supporting affidavit.

On the other hand, plaintiff's/respondent's counsel opposed the application. He noted that the judgment being challenged was delivered on 07.10.05 while the notice of motion was filed on 06.12.06, i.e. some 14 months later. Plaintiff's/respondent's counsel informed the court that the plaintiff/respondent had filed a replying affidavit sworn on 14.12.06. In the affidavit, the plaintiff/respondent denied that he is a man of no known assets in Kenya as he is employed by a construction company in Nairobi and able to refund the money awarded to him by this Court if the defendant's appeal before the Court of Appeal succeeds. It was the plaintiff's/respondent's counsel's contention that the defendant/applicant had not satisfied requisite conditions for the grant of orders of stay, including offering security for due performance of this Court's decree. Plaintiff's/respondent's counsel said he had no objection to an order of stay being granted pending hearing of the defendant's appeal if the defendant/applicant deposits the decretal sum either in Court or in a joint account in the names of the advocates for the parties.

I have given due consideration to the rival representations of the parties.

Order XLI rule 4 (2) provides that no order of stay of execution shall be made under sub-rule (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 as may ultimately be binding on him has been given by the applicant.

Not much of an explanation was given by the defendant/applicant for the delay in infiling the present application. However, the judgment being challenged on appeal recorded that the plaintiff is a Jew, that he hailed from France and came to Kenya in 1988 and was engaged by the defendant company. That is probably the basis of the allegation in the grounds upon which the present application is based that the plaintiff/respondent is not resident and/or domiciled in Kenya, which allegation the plaintiff/respondent has denied on oath. Be that as it may, this court has a duty also to see to it that the plaintiff/respondent is assured of the fruits of the judgment given in his favour if the defendant's appeal does not succeed. Accordingly, I grant prayers 3, 4 and 5 in the notice of motion dated 06.12.06 on condition that the defendant/applicant deposits the decretal sum in a joint account in the names of the advocates for the parties within 45 days.

Orders accordingly.

**Delivered at Nairobi this 14<sup>th</sup> day of April, 2008.**

**B.P. KUBO**

**JUDGE**