REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Appeal 186 of 2007
STANDARD ASSURANCE CO. LTD.....APPELLANT/APPLICANT

VERSUS

ALFRED MUMEA KOMU.....RESPONDENT
RULING

1. The Application dated 6.11.2007 by Standard Assurance Company Limited is premised on order XLI Rule 4(1) of the Civil Procedure Rules and the substantive prayer sought is that of stay of execution pending appeal. The grounds in support are as follows:-

a. That the Appellant is completely dissatisfied with the ruling delivered on the 12th September 2007 in **SRMCC No. 23 of 2007, Makueni.**

b. That the Applicant has already filed an appeal against the said ruling.

c. That the Appeal shall be rendered nugatory if the orders sought herein are not granted.

d. That the Appellant's appeal has high chances of success.

e. That its only fair and just that the orders sought herein be granted pending the hearing and determination of the appeal

2. The Appeal arises from the judgment and decree in **Makueni SRMCC No. 23 of 2007 and** I note from annexture "***IKI"*** to the Affidavit in support, sworn by Isaac Kitur on 8.11.2007, that the decretal sum was Kshs. 165,642/=. The decree apparently arose when the Defence by the Applicant was struck out on 26.3.2007 and judgment duly entered for the Respondent, Aflred Mumea Komu.

3. Ms Mboko who argued the Application on behalf of the Applicant relied on the decision in **Kenindia Assurance Co. Ltd vs Patrick Muturi C.A. 197/1193** where the Court of Appeal in an application under Rule 5(1) (b) of the Court of Appeal Rules reiterated the position that "***stay should be granted if the intended appeal is not a frivolous one or as is sometimes put, if the intended appeal is an arguable one and in addition, to ensure that the intended appeal if successful would not be rendered nugatory***" and further that stay of execution orders can be granted in respect of money decrees as was the decision in **Nairobi Deluxe Services Ltd & Erick Onyango Ndenge Civil Appl. Nairobi 64/1992.**

4. In response to the Application, the Respondent in his Replying Affidavit sworn on 14.11.2007 deponed that the Applicant has failed to meet the conditions and criteria set in law for grant of orders of stay of execution. That the Application is in any event frivolous, is brought in bad faith and is calculated to stop the Respondent from enjoying the fruits of his judgment. Mr Kilonzo who appeared for the

Respondent further urged the point that the Applicant has failed to show what loss, substantial or less, that it would suffer if the stay order is not granted. Further, that the amount involved in the decree is minor and payment thereof would not prejudice the Applicant at all. He relied on the following case to reinforce his arguments;-

i. **Kenya Shell Ltd vs Kibiru [1986] KLR 410** for the point that where a decree can be repaid as in a money decree, a stay of execution cannot be granted.

ii. **Patani vs Patani [2003] KLR 518**-where no prejudice will be caused to an Applicant, no order of stay should be granted.

iii. **Diamond Trust (K) Ltd vs Peter Mailanyi HCC 177[2002)** – the evidence of substantial loss must be substantiated.

iv. **United Builders vs Standard Chartered Bank Ltd, HCCC 41/1995**- there ought to be proof of substantial loss if the orders are to be granted.

5. My own understanding of the law in this regard is both founded on the wording of order XLI Rule 4(1) and(2)and also on the emphatic words of Platt J.A. in **Kenya Shell** (Supra) where the learned judge stated as follows:-

"***Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money."***

6. Similarly in **United Builders** (supra) the Court of Appeal upheld the **Kenya Shell** decision and stated that in an application under order XLI Rule 4 of the Civil Procedure Rules, "***the applicant must show that he will suffer substantial loss or that they will have difficulty in recovering the money. Security must be offered in an application under the said order."***

7. Order XLI 4(1) aforesaid specifically fetters the discretion of this court as was held in **Halai & another vs Thornton & Turpin [1963] Ltd [1990] KLR 365** at **365** that :-

"The ***Superior Court's discretion to order a stay of execution of it's order or decree is fettered by three conditions. Firstly the applicant must establish sufficient cause, secondly the court must be testified that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay."***

8. The Applicant in this case ought to have persuaded this court that he would suffer substantial loss if the stay is not granted, noting that the Application has not been attacked as having been brought belatedly. In his Affidavit, Isaac Kitur at paragraph 8 thereof deponed that if the execution proceeded, "***there shall be irreparable loss as the Respondent's financial status is unknown."*** As I posed to counsel during arguments, "***unknown"*** cannot be the correct term for one to argue that the Respondent would be unable to repay the decretal sum. Even if the argument had been that loss would be suffered if the money is paid, there would still be need for tangible proof of such loss and sadly in this case not an iota of proof has been tendered. One only needs to look at the grounds in support of the Application and which I have deliberately reproduced above to show that none of them can properly fit the expectation of order XLI Rules 4(2) aforesaid.

9. Even if, as was argued, the Applicant is prepared to abide by the condition that a security should be ordered, without meeting the condition of proof of substantial loss, the Applicant cannot have discretion in its favour.

10. I think I should end by saying that parties that invoke the discretion given to the Court of Appeal under its own Rules and ignore order XLI Rule 4(2) will always suffer the same fate; dismissal of their Applications. The Applicant in this case is one of them.

11. The application dated 6.11.2007 does not meet the favour of this court and for reasons given above, is best dismissed with costs and it is so decided.

12. Orders accordingly.

Dated and delivered at Machakos this 14th day of April 2008

ISAAC LENAOLA

JUDGE