



**REPUBLIC OF KENYA**

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

**Civil Case 554 of 2007**

**M. N. NG'ANG'A**

**ALEX N. THANGEI**

**JOB M. THIGA t/a WARUHIU K'OWADE &**

**NG'ANG'A ADVOCATES..... PLAINTIFFS/RESPONDENTS**

**VERSUS**

**LAB CONSTRUCTION LIMITED..... 1<sup>ST</sup> DEFENDANT/APPLICANT**

**LAB ENTERPRISES LIMITED..... 2<sup>ND</sup> DEFENDANT/APPLICANT**

**KISUMU CONCRETE PRODUCTS LTD...3<sup>RD</sup> DEFENDANT/APPLICANT**

**LALJI KARSAN RABADIA ..... 4<sup>TH</sup> DEFENDANT/APPLICANT**

**RULING**

(1) On the 9<sup>th</sup> May 2008, the Defendants in this case took out a Notice of Motion under Section 3A of the Civil Procedure Act, Order XX rule 7 and Order XLI rule 4 of the Civil Procedure Rules in which the Defendants seek the setting aside of the decree issued on the 24<sup>th</sup> April 2008 and also an order of stay of execution of such decree pending the hearing and final determination of a proposed appeal against the ruling and order of Sitati, J made on the 15<sup>th</sup> day of April 2008.

(2) The application is based on several grounds including that the said ruling giving rise to the decree was delivered without notice to the Defendants; that the decree was extracted without the Defendants' approval as prescribed by Order XX rule 7 of the Civil Procedure Rules; and that it is unlawful for the Plaintiffs to use an unprocedurally acquire decree in execution.

(3) The Defendants rely on two affidavits in support of their motion. The first is of the fourth Defendant, Lalji Karsali Rabali, sworn on the 8<sup>th</sup> May 2008 on his own behalf and also on behalf of the other Defendants of whom he is a Director. He says that various vehicles used in the day to day operations of the Defendants have been proclaimed and if attached will adversely affect the ability of the Defendants to serve their customers and that paying out the decretal sum will reduce the liquidity necessary for the said operations thereby causing the Defendants substantial loss. He also asserts that in the event of the intended appeal succeeding, recovery of the decretal sum if paid to the Plaintiffs **“may pose problems.”**

The second affidavit sworn by Caroline Amondi Omondi, learned counsel for the Defendants, is also dated the 8<sup>th</sup> May 2008. Ms. Omondi says that following the transfer of Sitati, J from the Commercial & Tax Division of the Court at Milimani to the Civil Division at the Central Registry, she verily believes that the court “**would have notified us when and where the ruling would have been delivered if it was at a place different from where the matter was heard and ruling reserved.**” As no such notice was given, she did not become aware that the ruling had in fact been delivered until the 5<sup>th</sup> May 2008 when her clients informed her that their goods had been proclaimed in execution of the decree.

(4) In the replying affidavit of Alex Ngatia Thangei, a Partner in the Plaintiff firm of Advocates, made on the 14<sup>th</sup> May 2008, he challenges the application as being bad in law, incurably defective and unsustainable because there is no appeal pending on the ruling of Sitati, J. He contends that the date of the ruling having been given in court, counsel for the Defendants failed to make any effort to establish whether or not the ruling was delivered on the 15<sup>th</sup> April 2008; and that in these circumstances the Defendants have failed to show sufficient cause for failing to file the Notice of Appeal.

(5) It is common ground that there is no pending appeal as the Defendants have failed to file a Notice of Appeal within the period prescribed by law. Accordingly, I find and hold that the provisions of Order XLI rule 4 of the Civil Procedure Rules are not available to the Defendants and that an order of stay of execution cannot be granted in this application pursuant thereto.

(6) Learned counsel for the Defendants has also urged me to set aside the decree and warrants of attachment on the ground that the Plaintiffs omitted to submit a draft decree for approval by the Defendants. I have considered the decree and I am satisfied (as the Deputy Registrar presumably must have been before signing and sealing it) that it is drawn up in accordance with the Ruling of Sitati, J. No prejudice or injustice has been occasioned to the Defendants and prayer No. 3 in the application must accordingly fail.

(7) I now consider whether I ought in the circumstances of this application exercise the inherent powers of the court under section 3A of the Civil Procedure Act “**to make such orders as may be necessary for the ends of justice .....**” Before deciding this point, it is necessary to see whether any other remedy is open to the Defendants. As I have already stated, the provisions of Order XLI rule 4 are not available to them and I have also given my reasons why the decree cannot be set aside.

The foregoing notwithstanding, the fourth Defendant at paragraph 6 of his affidavit says that a Notice of Appeal has been filed and “**we are proceeding to file an application for extension of time to so lodge and serve it and to treat it as if lodged and served in time.**” Ms. Omondi in her submission confirmed that such application has been made. In these circumstances, I consider that it would be in the interests of justice to grant an order of stay to enable the Defendants pursue the pending application in the Court of Appeal.

(8) Accordingly, and for the reasons I have given, prayer 3 in the Notice of Motion filed on the 9<sup>th</sup> May 2008 is dismissed. There shall be an order of stay of execution of the decree for a period of sixty (60) days from today’s date; such order of stay is conditional upon the Defendants depositing with the court as security the decretal sum of Kshs.3,138,174.30 within the next fourteen (14) days of the date hereof and in default the order of stay shall automatically lapse and stand vacated. The Defendants shall bear the costs of the application.

So ordered.

Dated and delivered at Nairobi this Thirtieth day of May 2008.

**P. Kihara Kariuki**

**Judge.**