



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

**Civil Appeal 46 of 2008**

**BATA SHOE CO. (K) LIMITED.....APPELLANT**

**VERSUS**

**ANTONY KAKA NANDOYA.....RESPONDENT**

**R U L I N G**

By a notice of motion dated 10<sup>th</sup> March, 2008 Bata Shoe Co. (K) Ltd has moved this court under Order XLI Rule 4(a), Order L Rule 1, Order XXI Rule 22 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, seeking orders for stay of execution of the judgment delivered on 14<sup>th</sup> January, 2008 in Limuru RMCC. No.145 of 2006 pending the hearing and final determination of the applicant's appeal.

The appellant's main concern is that the respondents means and assets are unknown, and there is fear that the respondent may not have the capacity to refund the decretal sum, if the appeal is successful thereby rendering the appeal nugatory.

The respondent objects to the application complaining that it is brought under non-existence or inapplicable rules. It is also contended that the appellant has not fulfilled the conditions of Order XLI RuLe 4 of the Civil Procedure Rules.

It is true that the provisions cited by the appellant are not applicable to the application before the court. Nevertheless, it is clear that the application before court is one for stay of execution pending appeal which falls within the provision of Order XLI Rule 4(1) & (2) of the Civil Procedure Rules.

Under Order L Rule 12 of the Civil Procedure Rules, an application cannot be defeated by the failure to cite the Order, Rule or Statutory provision under which it is brought. Essentially therefore, in the interest of substantial justice, the citing of the wrong provisions notwithstanding, this court will deal with the application as if it were brought under Order XLI Rule 4(1) & (2) of the Civil Procedure Rules. It is evident from the record that the appellant promptly filed the memorandum of appeal on the 4<sup>th</sup> February, 2008 and filed the current application on the 10<sup>th</sup> March, 2008. It cannot be said that there has been undue delay in bringing the application. The appellant has already deposited the decretal sum of Kshs.171,500/= into court and the requirement for security has therefore been met.

Although the respondent maintains that he is a person of means, he has not satisfied this court that he is in any gainful employment, business or that he has any assets. The appellant's fears are therefore not unfounded. Accordingly, I do grant the application and issue an order for stay of execution pending appeal on the following conditions:

1. That the decretal sum which was deposited in court on the 17<sup>th</sup> March, 2008 shall be released to the advocates for the parties to be deposited in an interest earning account in the joint names of the parties' advocates.
2. The money shall be deposited into the interest earning account within 7 days from the date of release from the court.
3. The appellant shall file and serve a memorandum of appeal within 90 days from the date hereof.
4. The orders for stay of execution shall lapse within 12 months from the date hereof unless otherwise extended by a court.

Those shall be the orders of this court.

**Dated and delivered this 13<sup>th</sup> day of June, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Wambua H/B for Njuguna the appellant

Lokorito H/B for Mwangi the respondent