



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

**Civil Suit 1064 of 2000**

**DEVJI MEGHJI & BROS. LTD.....PLAINTIFF**

**VERSUS**

**NATIONAL IRRIGATION BOARD.....DEFENDANT**

**R U L I N G**

Judgment was entered by the consent of the parties in this suit as prayed in the plaint. When it came for the defendant to pay the decretal sum, a dispute arose regarding the rate of interest that was to be applied to the principal sum. The defendant made an application seeking the setting aside of the decree drawn, which in the view of the defendant, did not accord with the said consent judgment. The application was heard by Okwengu J and in her considered ruling delivered on 27<sup>th</sup> November, 2007 dismissed the defendant's application. She held that the applicable rate of interest on the principal amount would be the rate of 2% per month until payment in full. The defendant was aggrieved by the said decision of the court and duly filed notice of its intention to appeal against the said ruling to the Court of Appeal.

The defendant filed a notice of motion pursuant to provisions of **Order XLI Rule 4** of the **Civil Procedure Rules** seeking to stay execution of the decree herein pending the hearing and determination of the appeal. The defendant contends that it would suffer irreparable loss if stay is not granted. It stated that its appeal had high chances of success. The defendant was willing to abide by any reasonable conditions and further give security for the due performance of its obligations under the decree. The application is supported by the annexed affidavit of John Philip Olum, the general manager of the defendant.

The application is opposed. Jiten Patel, a director of the plaintiff swore a replying affidavit in opposition to the application. It was his contention that the application was filed to frustrate the plaintiff from enjoying the fruits of its judgment. He deponed that the defendant had failed to demonstrate sufficient grounds to enable the court grant the application for stay of execution. He deponed that the plaintiff was a well established company that was financially sound with sufficient assets which would enable it comfortably repay the decretal sum should the defendant be successful in its appeal. He urged the court to dismiss the application with costs.

At the hearing of the application, I heard the rival submissions made by Mrs. Kimani on behalf of the defendant and Mr. Kinyanjui on behalf of the plaintiff. The issue for determination by this court is whether the client established a case to enable this court grant stay of execution pending the hearing of the appeal. The principles to be considered by this court in determining whether or not to grant an application for stay of execution pending the hearing of an appeal are well settled. In **Butt vs. Rent Restriction Tribunal [1982] KLR 417** at page 419 Madan JA held that:

*“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in **Wilson vs. Church (No.2) 12 Ch. D [1879] 454** at page 459. In the same case Cotton LJ said at page 458:*

*‘I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.’”*

**Order XLI Rule 4 (2)** of the **Civil Procedure Rules** requires of an applicant who desires to be granted stay of execution pending the hearing of an appeal to establish that he would suffer substantial loss if stay is not granted. Further, such an applicant is required to make such an application for stay of execution without unreasonable delay. The applicant will further be required to provide security for the due performance of such decree as the court may direct.

In the present application, there is no doubt that the defendant filed the application for stay of execution without undue delay. The defendant argued that it would suffer irreparable loss if stay is refused. The thrust of the defendant’s application seems to be that if the plaintiff is allowed to proceed with the execution, it would suffer substantial loss and further that its intended appeal, which in its opinion has high chances of success, would be rendered nugatory. I have carefully read the proceedings of the court in this case including several rulings written pursuant to applications made by the parties to this suit. What emerges from the said proceedings is that the defendant does not deny owing the principal sum to the plaintiff. The defendant is challenging the rate of interest that the plaintiff is seeking to apply on the principal sum. It is also clear from the proceedings that the defendant has on several occasions made applications with a view to frustrating the plaintiff from realizing the amount decreed in its favour by the court. While this court appreciates that the defendant has its undoubted right to appeal against any decision of this court, the defendant can only do so without infringing on the rights of the affected party i.e. the plaintiff. In the present application, the defendant is seeking to stay a money decree. The defendant has failed to persuade this court that it would suffer substantial loss if stay is not granted. The plaintiff has demonstrated to the court that it is a financially stable company which will be in a position to refund the decretal sum if the defendant is successful in its appeal.

I hold that the defendant has failed to establish any compelling reasons that would make this court stay the execution of the decree herein. The defendant failed to establish the substantial loss it claims it would suffer if it pays the decretal sum that is now outstanding. I agree with the plaintiff that no sufficient grounds have been established by the defendant to enable this court grant the application for stay of execution. The said application lacks merit and is hereby dismissed with costs.

**DATED at NAIROBI this 30<sup>th</sup> day of July 2008.**

**L. KIMARU**

**JUDGE**