



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

**Civil Appeal 175 of 2007**

**SANA INDUSTRIES COMPANY LTD.....APPELLANT**

**VERSUS**

**PETER GATHAIYA MUREITHI.....RESPONDENT**

**R U L I N G**

Sana Industries Company Limited, the appellant herein, seeks an order for stay of execution of the decree in CMCC (Milimani) No.262 of 2006 pending the hearing and determination of its appeal. The appellant has deposited the sum of Kshs.271,837/= in court as security.

The respondent Peter Gathaiya Mureithi objects to the application contending that the decree is a monetary decree and that an order for stay of execution pending appeal can only be granted if there is evidence that the respondent will not be able to pay the decretal sum. It is submitted that the appellant who has the onus to prove that the respondent will not be able to refund the decretal amount if required to, has failed to discharge this burden. Relying on the case of *George Oraro vs KTN HCCC No.151 of 1992*, it was submitted that the respondent's contention that he is a businessman owning several properties in Nakuru, has not been controverted.

I have carefully considered this application. The order subject of the appeal was made on 28<sup>th</sup> February, 2007, however, the appellant only brought his application for stay of execution over 3 months later on 6<sup>th</sup> June, 2007 after being threatened with execution. No attempt has been made to explain why the appellant did not bring his application timeously.

Secondly, under Order XLI Rule 4(2) of the Civil Procedure Rules, an application for stay of execution can only be granted if it is made timeously and if it is proved to the court that the appellant is likely to suffer substantial loss unless an order for stay of execution is granted. In this case, the appellant contends that it will suffer substantial loss. This allegation is supported by paragraph 7 and 8 of the affidavit of Gerald Gakuru, the Operations manager of the appellant's company, wherein he depones that if the appellant is called upon to pay the decretal sum, it will suffer substantial loss, as the amount is substantial and payment of that amount will disrupt the appellant's business operations. It is further deponed that the respondent operates in Malawi outside the jurisdiction of this court and if the decretal sum were paid to him, recovery of the money will be beyond the reach of the appellant. That contention is countered by an averment in the respondent's replying affidavit, that the respondent is a man of means as he is a businessman who owns properties in Nakuru.

I have considered these contentions. The argument that payment of the decretal sum will disrupt the appellant's business operations, cuts both ways as it can also be argued that the respondent's business operations is also equally suffering, by the decretal sum being withheld from the respondent. As regards the appellant's concern that recovery of the decretal amount if paid to the respondent, may be difficult as the respondent carries on business outside the jurisdiction of this court, that concern though genuine is misplaced. An order for security under Order XLI Rule 5(1) of the Civil Procedure Rules, will protect the appellant. I am therefore not convinced that payment of the decretal sum will result in substantial loss to the appellant. I see no reason why the respondent who has a judgment in his favour should be kept away from reaping the fruits of that judgment.

Accordingly, I decline to grant the order for stay of execution pending appeal. The respondent is at liberty to execute the decree subject to the filing of an appropriate guarantee from a reputable financial institution for refund of the decretal sum should that become necessary.

**Dated and delivered this 29<sup>th</sup> day of July, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Simiyu for the appellant

Gaita for the respondent