



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Civil Appeal 141 of 2002**

**DRY FOAM CLEANERS .....APPELLANT**

**VERSUS**

**FARID M. AL-MARRY .....RESPONDENT**

**R U L I N G**

Dry Foam Cleaners, the appellant herein, took out a Notice of Motion dated 8<sup>th</sup> February 2008 in which it sought for six orders. However when the motion came up for interpartes hearing, the appellant only argued grounds 4 and 5 as the other grounds had been given and or overtaken by events. The motion is supported by the supporting and supplementary affidavits of Damyanti Gandalal Chouhan. Farid M. Al-marry opposed the motion by filing a replying affidavit and grounds of opposition basically the appellant is seeking for quantum of security ordered on 11<sup>th</sup> December 2007 to be reviewed and adjusted downwards from Kshs.1,200,000/- to Kshs.500,000/- The other prayer is to extend the period required to make such a deposit.

The main reason advanced by the appellant is that business has been low when it has been extremely difficult to raise the amount ordered. It is also averred by the appellant that it owns no immovable property which it could offer as security to obtain a loan for the entire sum. It is alleged that the post election violence which rocked this country early this year adversely affected the appellant's business hence the inability to raise the amount.

The Respondent on the other hand urged this court to reject the motion on the ground that it was filed in bad faith with the intention of delaying the matter and frustrating the Respondent. The Respondent gave the details of how the appellant kept on dodging his advocate to avoid opening an account as ordered by the court.

I have considered the oral submissions made by the learned counsel from both sides. I have also considered the material placed before this court. It is not in dispute that this court gave the appellant an order of stay of execution pending appeal on 11<sup>th</sup> December 2007 on condition that it deposits a sum of Kshs.1,200,000/- in an interest earning account in the joint names of the advocate/firms of advocates appearing in this matter within 60 days. The appellant has now come to court stating that it is unable to raise that entire amount. It has now proposed that the amount of deposit be adjusted downwards to Kshs.500,000/-. When applying for the order for stay of execution pending appeal the appellant stated that it would abide by any order of security this court ordered. In fact in paragraph 16 of the affidavit of Damyanti Gandalal Chouhan sworn on 6<sup>th</sup> September 2007, it is deponed as follows:-

“16. That bearing in mind the likelihood of success and regardless thereof the appellant/applicant is prepared to offer such security or give such undertaking as this court may in exercise of its discretion to make any order for stay of execution require or demand.”

The purpose of giving security is to ensure that at the end of it all, the Respondent is able to enjoy the fruits of its judgment. In other words the appellant gives an assurance that there will be due performance of the decree in case the appeal fails. What will happen if the amount of deposit is adjusted downwards from Kshs.1,200,000/- to Kshs.500,000/-? The basis of this court's order in fixing the amount of deposit at Kshs.1,200,000/- is the amount the Respondent expected to recover from the appellant on account of arrears of rent (admitted and disputed combined). The appellant has admitted that it has no other source of income. The answer appears to be that the Respondent is likely to find it extremely difficult to recover

the amount above Kshs.500,000/-. The Respondent's right to benefit from the decree will have been taken away if this court grants the order. I am convinced that that is not what the law anticipated under Order XLI rule 4 of the Civil Procedure Rules. The record shows that the appellant's reason may have some merit. It is a matter of common notoriety that this country was faced with violence after the disputed elections of 2007. At the time of filing the application the dust had just started to settle hence it is possible business like those operated by the appellant had been adversely affected. It is now about 5 months down the line and the country has come back to normalcy hence the circumstances obtaining as of February 2008 have tremendously changed. A fair order will be to dismiss the application for adjustment of the amount of deposit. I will however extend the period required by the appellant to top up the deposit to Kshs.1,200,000/- from what it has so far raised by another 30 days. In default the stay order shall stand discharged and the Respondent will be at liberty to execute the decree. The Respondent is entitled to the costs of the motion.

Dated and delivered at Mombasa this 24<sup>th</sup> day of July 2008.

**J. K. SERGON**

**J U D G E**

In open court in the presence of Mr. suchak for Appellant and Mr. Sitonik h/b Ndegwa for Respondent.