



**REPUBLIC OF KENYA**

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

**Civil Case 2772 of 1997**

**ALLAN S. REYNOLDS .....PLAINTIFF**

**V E R S U S**

**TWIGA CHEMICALS INDUSTRIES LTD .....DEFENDANT**

**R U L I N G**

On 12<sup>th</sup> November, 2004 the court (Githinji J, as he then was) entered judgment for the Plaintiff against the Defendant for the sum of KShs 7,116,628/34 (plus costs and interest) calculated as follows:-

Admitted claim .....	KShs 2,226,144.00
Add school fees.....	<u>KShs 260,000.00</u>
Sub-total.....	KShs 2,486,144.00
Add value of Plaintiff's goods sold by AGS	<u>KShs 4,550,000.00</u>
	KShs 9,036,144.00
Less set-off	<u>KShs 1,919,515.00</u>
Balance	<u>KShs 7,116,628.34</u>

There was obviously an error in this calculation which occurred at the point where the value of the Plaintiff's goods sold was added to the sub-total. The resulting figure should have been **KShs 7,036,144/00**, and not **KShs 9,036,144/00**. This error affected the sum awarded. It should have been **KShs 5,116,629/00**, and not **KShs 7,116,628/34**.

The Defendant therefore applied by notice of motion dated 23<sup>rd</sup> November, 2004 to correct this error. The court (Ransley J) allowed this application on 24<sup>th</sup> February, 2005.

The Defendant had been dissatisfied with the entire judgment and had lodged notice of appeal. It then applied by notice of motion dated 27<sup>th</sup> July, 2005 for stay of execution pending appeal. A further application by notice of motion dated 30<sup>th</sup> January, 2006, essentially for interim stay of execution pending disposal of the substantive application, was dealt with.

The Plaintiff has opposed stay of execution. I have read both the supporting and replying affidavits. I have also given due consideration to the submissions of the learned counsels appearing, including the cases cited. As provided for in **Order 41, rule 4 (2)** of the **Civil Procedure Rules** (the Rules), the court will not grant stay of execution pending appeal unless satisfied that the applicant will suffer substantial loss unless the order is granted, and further, that the application has been made without unreasonable delay. The applicant must also give such security as the court may order for the due performance by him of any decree or order that may ultimately be binding upon him.

The Defendant's case in this application is that the Plaintiff is a foreign national who has been declared a prohibited immigrant in Kenya. As such, if the decretal sum is paid to him the Defendant is unlikely to recover it in the event that it succeeds in its appeal. Its appeal will then have been rendered nugatory.

The Plaintiff's response as set out in the replying affidavit is that though he is a foreign national, he is not a prohibited immigrant and is able to come to Kenya at will. In any case, he has the means to refund the decretal sum should the need arise. As such, the Defendant does not stand to suffer substantial loss. However, in the course of his submissions, the Plaintiff's learned counsel admitted that indeed the Plaintiff is a prohibited immigrant in Kenya, but that the said status was brought about by the intervention of the Defendant who, therefore, should not be allowed to benefit from it.

It is further argued for the Plaintiff that the Defendant does not deserve stay of execution because it has failed to pay the admitted sum of KShs 2,226,144/00, having paid only KShs 306,628/40. The Defendant's answer to this is that it has fully paid the admitted sum by way of the set-off of KShs 1,919,515/00 and the KShs 306,628/40.

Finally, it is the Plaintiff's case that there was unreasonable delay in bringing this application, the decree having been passed on 12<sup>th</sup> November, 2004 and notice of appeal having been lodged on 19<sup>th</sup> November, 2004. Further, there has been inordinate delay in prosecuting the application.

I will first deal with the issue of substantial loss. It is not in dispute that the Plaintiff is a foreign national and, for the time being, a prohibited immigrant in Kenya. The court cannot in this application investigate the circumstances in which he was declared a prohibited immigrant. For purposes of this application, the fact that he is a foreign national is sufficient. By this fact alone, I find that the Defendant may have extreme difficulty in recovering the decretal sum in the event that it succeeds in its appeal, should the same be paid to the Plaintiff. This decretal sum is a very substantial sum with interest factored in. Interest was awarded at 12% p.a. from the date of suit. I am satisfied that the Defendant may suffer substantial loss unless stay is granted.

What about the issue of unreasonable delay? The judgment sum was corrected on 25<sup>th</sup> February, 2005. This application was filed on 28<sup>th</sup> July, 2005, about 5 months later. But by that time the Plaintiff's costs had not been taxed, and hence he was not in a position to execute the decree. The Defendant was in fact prompted to apply for stay when the Plaintiff moved to tax his costs. In the circumstances of this case therefore, I find that the application was made without unreasonable delay because the decree was not yet ripe for execution. There has been delay in prosecuting the application; but it is not such as to disentitle the Defendant stay of execution.

The Defendant has therefore met the legal perimeters for grant of stay of execution, subject of course, to security. But it was also argued for the Plaintiff that stay is not deserved on account of the Defendant's failure to pay the admitted sum. Was there in fact such failure? I think not. The admitted sum of KShs 2,226,144/00 was indeed paid by way of the set-off of KShs 1,919,515/00 and the sum of KShs 306,628/40 which the Plaintiff has admitted to have received.

I will now deal with the issue of security. The primary purpose of security is that the decretal sum should be readily available to the decree-holder in the event that the judgment-debtor's appeal fails. There is indeed an appeal pending, being, the court was told, **Court of Appeal Civil Appeal No. NAI 300 of 2006**. Only a hearing date is awaited. To ensure that the decree-holder does not have any

difficulty in recovering the decretal sum, or at any rate the substantial portion of it, should the appeal fail, the proper security is to require the judgment-debtor to deposit the decretal sum so far accrued into an interest-earning account in the joint names of the advocates on record for the parties. **For purposes only of the order that I shall make**, the decretal sum so far is **KShs 14,203,040.50** made up as follows:-

Principal sum ..... KShs 5,116,629.00

Add interest @ 12% p.a.

from date of suit (5/11/97)

to date of judgment

(12/11/04) KShs 4,297,968.40

KShs 9,414,597.40

Add taxed costs ..... KShs 488,680.00

KShs 9,903,277.40

Less paid ..... KShs 306,628.40

KShs 9,596,649.00

Add interest from 12/11/04

to 12/11/08 ..... KShs 4,606,391.50

KShs14,203,040.50

I will therefore allow the application by notice of motion dated 27<sup>th</sup> July, 2005. There shall be stay of execution of decree pending disposal of the appeal now pending before the Court of Appeal. This stay is conditional upon the Defendant depositing, **within thirty (30) days of delivery of this ruling**, the decretal sum so far accrued, for purposes of this order calculated at **KShs 14,203,040.50**, in an interest-earning account to be opened in the joint names of the advocates on record at a bank or financial institution to be agreed or appointed by the court. As the Defendant has already deposited KShs 2 million in court as per interim orders made, it means that it will have to get another KShs 12,203,040.50. Once that sum is deposited in the joint account, the court shall release the KShs 2 million into the joint account.

In default of the Defendant depositing KShs 12,203,040.50 as above, the stay of execution of decree now granted shall lapse, and the Plaintiff shall be at liberty to execute the decree. Costs of this application shall abide the outcome of the appeal. Those shall be the orders of the court.

**DATED AT NAIROBI THIS 2<sup>ND</sup> DAY OF OCTOBER, 2008**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 3<sup>RD</sup> DAY OF OCTOBER, 2008**