

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 2772 of 1997

ALLAN S. REYNOLDSPLAINTIFF

V E R S U S

TWIGA CHEMICALS INDUSTRIES LTD.....DEFENDANT

R U L I N G

On 3rd October, 2008 the court (Waweru, J) conditionally allowed an application herein for stay of execution of decree pending appeal. The condition was, essentially, that the Judgment-Debtor deposits the decretal sum (calculated at KShs. 14,203,040/50 as at 12th November, 2008) in an interest-earning account (to be opened in the joint names of the advocates on record for the parties at a bank or financial institution to be agreed or appointed by the court) within 30 days of the order.

The Judgment-Debtor has now come back to court by notice of motion dated 27th October, 2008. It seeks the main order for stay of the above-mentioned condition of deposit of the decretal sum pending appeal against the same, and in the alternative, an order that the Judgment-Debtor do furnish a bank guarantee instead of deposit of the decretal sum.

At the hearing of the application only the alternative prayer was pursued. An amendment permitted by the court was to the effect that the alternative prayer was brought under **Order 44, rule 1** of the **Civil Procedure Rules** (the Rules).

I have read the supporting affidavit and the grounds of opposition dated and filed on 31st October, 2008. I have also given due consideration to the submissions of the learned counsels appearing, including the cases cited.

In an application for review under Order 44, rule 1, which this one is, the applicant must demonstrate the discovery of a new and important matter or evidence which, after exercise of due diligence, was not within his knowledge, or could not be produced by him at the time when the decree was passed or the order made; or some mistake or error apparent on the face of the record; or any other sufficient reason.

No discovery of such new and important matter or evidence is pleaded in the grounds on the face of the application or in the supporting affidavit. There is also no mistake or error apparent on the face of the record pleaded.

The Judgment-Debtor, from the submissions of its learned counsel, has no quarrel with the court's calculation of the decretal sum, notwithstanding what is stated in paragraph 9 of the supporting affidavit. The issue of bank guarantee is not a new one as it featured during hearing of the application for stay. It was common ground that a bank guarantee automatically expires after a year and would have to be renewed. Indeed the bank guarantee for KShs. 2 million ordered pending *inter partes* hearing of the application for stay had expired at the time of hearing of the application.

There is no allegation in the supporting affidavit that the Judgment-Debtor cannot afford to deposit the decretal sum as ordered, or that such deposit will so affect its operations as to amount to a fetter on prosecution of its appeal. I accept that the aim of security should be to protect the interests of both parties

and not to punish the party giving the security, and that such security should be that which is least disadvantageous to the party giving it, so long as it is such that the decretal sum would be available if required and the appeal is not prejudiced. In the present case, because of the requirement to renew a bank guarantee every year, I did not consider that a bank guarantee for the decretal sum was the appropriate security. I still hold that view.

I therefore do not find any sufficient reason to review the condition requiring deposit of the decretal sum. There is no merit in the application and I must refuse it. It is hereby dismissed with costs. As the present application was filed on 28th October, 2008, that is 25 days after the order of 3rd October, 2008, it means that the Judgment-Debtor now has only five (5) days to meet the condition to deposit the decretal sum as ordered, from the date of delivery of this ruling. In default the stay of execution granted on 3rd October, 2008 shall lapse, and the Decree-Holder shall be at liberty to execute the decree. Those shall be the orders of the court.

DATED AT NAIROBI THIS 18TH DAY OF NOVEMBER, 2008

H. P. G. WAWERU

J U D G E

DELIVERED THIS 21ST DAY OF NOVEMBER, 2008