

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 29 of 1999 (RD)

RICHARD OKUTOYI.....PLAINTIFF

VERSUS

A.O. BAYUSUF & SONS LTD.DEFENDANT

RULING

Pursuant to Order XLI rule 4 and Order L Rule 1 of the Civil Procedure rules, A.O. Bayusuf & Sons Limited, the defendant herein, took out a motion in which it prayed for an order of stay of execution of the order or decree of this court made on 22nd April 2005 pending appeal. The motion is supported by the affidavit of Yusuf M. Aboubakar sworn on the 22nd day of December 2005.

On the plaintiff's part, Miss Paula Ngetich swore a replying affidavit to contest the motion.

The background of this motion is simple. On or about 18th February 1997, Motor Vehicle registration No. KTQ 880/ZA 6984 Mercedes Benz Lorry owned by A.O.Bayusuf & Sons Ltd was involved in a road traffic accident along Mombasa-Nairobi road. In that accident, Benson Lanyo Okutoyi (deceased) who was a turn-boy of the defendant died as a result of the injuries he sustained. Richard Okutoyi (Plaintiff) took up letters of administration in respect of the Estate of Benson Lanyo Okutoyi, deceased upon which he filed this compensatory suit. In the end after hearing the case, Lady Justice Khaminwa awarded the plaintiff a sum of Kshs.305,150/- as general and special damages in a judgment delivered on 22nd April 2005. On the same date the defendant filed a notice of appeal to intimate its intention of challenging the judgment and the consequent decree. The applicant now seeks to stop any execution of the decree pending the hearing and determination of the intended appeal.

When dealing with such an application, this court is guided by the conditions and or principles set out in Order XLI rule 4 of the Civil Procedure Rules. This court is given the discretion to grant the order if sufficient cause is shown by the applicant on the following conditions:

- (i) That substantial loss may result to the applicant unless the order is made.
- (ii) That the application has been made without unreasonable delay.
- (iii) Such surety is given to ensure due performance of the decree or order.

Let me now apply these principles to this motion. It is the averment and submission of Mr. Aboubakar learned advocate for the defendant that the plaintiff is a man of straw hence if the decretal sum is released to him he will not be able to refund the decretal sum in case the appellant's appeal succeeded. In response to this averment Miss Ngetich was of the firm view that the affidavit be struck out because the advocate made an affidavit on contested matters. The submissions and averments of Mr. Aboubakar advocate over this issue is basically sound but it is contested. He is of the view that in interlocutory matters such as this he has the leverage of deponing on anything. In my view the averments made by Mr. Aboubakar under Oath are factual matters which are contested. It will require certain evidence to prove that Richard Okutoyi is a man of Straw or otherwise. In any case Mr. Aboubakar did not disclose the sources of his information. In the end and for those two reasons I am satisfied that the affidavit is incompetent and hence it should be struck out.

The second issue is whether or not there was inordinate delay in filing this motion? The plaintiff is of the view that the applicant's motion should be dismissed because it was filed after an inordinate delay. Some doubt has also been expressed as to whether the appeal has been filed. It is admitted by the defendant's advocate that there was a delay for eight (8) months before the motion was lodged. In the appreciation of Mr. Aboubakar, that was not inordinate but excusable. It is a fact that judgment in this matter was delivered on 22/4/2005 and this motion was filed on 19th January 2006 about 8 months from the date of Judgment and from the date when the notice of appeal was lodged. The affidavit in support of the motion does not disclose the reasons for the delay. Mr. Aboubakar also did not give an explanation as to why there was such a delay. I find the delay inordinate. No reasons were advanced to excuse the delay.

It has been stated by the defendant that it is ready to deposit the decretal sum in court. In my view that is good security which will guarantee that at the end of the appeal there is available funds for refund or to satisfy the decree. Unfortunately the applicant appears to have met only one condition of the conditions set out under order XLI hence I will not exercise my discretion in its favour.

For the above reasons the affidavit of Mr. Aboubakar sworn on 22/12/2005 is ordered struck out with the motion being dismissed with costs to the plaintiff.

Dated and delivered at Mombasa this 20th day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Abubakar for defendant/applicant and Mr. Gakuhi h/b the firm of A. A. Amadi & Co. Advocate for the Plaintiff/Respondent.