



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

Civil Appeal 238 of 2007

S.S MEHTA & SONS LTDAPPELLANT

V E R S U S

1. STEPHEN NDUNGU MWAURA

2. FIDELIS MWERU KAMAURESPONDENTS

R U L I N G

This is an application by the Appellant by notice of motion dated 4th of April 2007 for the main order that there be stay of execution of decree pending hearing and determination of the appeal herein. It is brought under Order 41, rule 4 of the Civil Procedure Rules. Sub-rule (1) of that rule donates to the court the jurisdiction to make the order sought subject to the conditions set out in sub-rule (2) of the rule. Those conditions are:

(i) that the court must be satisfied the substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(ii) that such security as the court may order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

There is a supporting affidavit sworn by one JOHN MUMO MWANGANGI who describes himself as the human resources manager of the Appellant.

The Respondents have opposed the application upon the grounds set out in the replying affidavit sworn by the 2nd Respondent and filed on the 17th of April 2007. Those grounds are, that the Appellant shall suffer no substantial loss or damage or prejudice; that the appeal is frivolous and without merit; and that the application otherwise lacks merit.

I have duly considered the submissions of the learned counsels appearing. No authorities were cited. I will state at the outset that the prospect of success or otherwise of the appeal is not one of the matters that I must consider in this application. It suffices that the Appellant had an undoubted right of appeal which it has duly exercised, and that there is a proper appeal before the court. Whether or not the appeal is meritorious is a matter to be decided when the appeal is heard.

I have already set out above the matters that I am required by the law to consider. May substantial loss result to the Appellant unless the order of stay of execution sought is made? I have been told that the decretal sum now stands at about KShs. 750,000/=. The Appellant's case is that should it pay this sum over to the Respondents it will have great difficulties recovering the same should its appeals succeed. The Appellant makes reference to the Respondents' own testimony before the trial court to the effect that they earn meagre sums of money every month, and that therefore they would have great difficulties refunding the money. The Respondent's answer is that this is a money decree, and that therefore an order of stay of execution should normally not be available. That, with respect, is the correct position of the law. A court will normally not grant a stay of execution of a money decree. That, however, is not to say that the court will never grant a stay of execution of a money decree. It will depend on the circumstances of the case at hand. The Respondents further argue that their inability to refund the decretal sum in the event of the appeal succeeding does not entitle the Appellant to an order of stay of execution. I do not accept that argument. Should the Appellant succeed in demonstrating that it will have extreme difficulty in recovering the decretal sum from the Respondents in the event that it succeeds in its appeal, it will have succeeded in showing that it stands to suffer substantial loss. In that event the court would be entitled to order stay of execution of the decree in the interests of justice.

In the present case the Respondents have not denied, and they cannot deny, their testimony before the trial court that they earn very meagre sums of money every month. They have not shown that they have any assets that the Appellant can have resort to, to recover the decretal sum. I am, however, not shifting the burden of proof from the Appellant to the Respondents; it is the Appellant's burden to prove the Respondents' inability to refund the decretal sum in the event of the appeal succeeding. But, equally, it is within the Respondents' peculiar knowledge as to what assets they may own, and they have not stated that they own any assets. I am satisfied on balance that the Appellant would have great difficulty recovering from the Respondents the decretal sum in the event of it succeeding in its appeal. An order of stay of execution of decree is therefore in the interests of justice.

The application has been brought without unreasonable delay. The Appellant is also prepared to give such security as the court may order for the due performance by it of the decree that may ultimately be binding upon it should its appeal fail. Both counsels appeared to agree in their submissions that should the court grant stay of execution of decree, an order for the Appellant to deposit the decretal sum in an interest-earning account in a reputable bank or financial institution in the joint names of both advocates on record for the parties would serve the ends of justice.

In the event, therefore, I will allow the application. There shall be an order of stay of execution of decree pending hearing and disposal of the appeal. This shall be subject to the condition that the Appellant does, within twenty-one (21) days of delivery of this ruling, deposit in an interest-earning account the decretal sum, which for the purposes of this order is hereby placed at KShs. 750,000/=. The said account shall be opened in the joint names of the advocates on record for the parties who shall agree on the bank or financial institution in which to open the account.

Costs of this application shall be in the appeal. There shall be orders accordingly.

DATED AT NAIROBI THIS 24TH DAY OF APRIL 2007

H.P.G. WAWERU

JUDGE