

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 92 of 2007

JOSEPH KIGARA WAMBIRU.....1ST APPELLANT

ALICE NDUTA both trading as JUPITER ELECTRICAL

AND MECHANICAL CONTRACTORS.....2ND APPELLANT

AND

NATIONAL BANK OF KENYA.....RESPONDENT

RULING

By this Notice of Motion brought under Order XLI Rule 4 (2) of the Civil procedure Rules and Section 3A of the Civil Procedure Act the Applicants seek orders for stay of execution of the decree and judgment of the subordinate court dated 25th January 2007 pending the hearing and determination of Appeal. The application is based on the grounds that (a) the judgment was entered on 25th January 2007 against the Appellants jointly and severally for a sum of Shs302,000 plus costs and interest at 7% per month; (b) the Appellants being dissatisfied with the entire judgment appealed against the same (c) the Appellants did on the 23rd February 2007 move the subordinate court for orders of stay of execution pending appeal but the application was dismissed with costs (d) the Appellants stand to suffer substantial loss if stay is not granted (e) the application has been brought without undue delay (f) the Appellants are ready and willing to abide with any terms that the court may impose for granting the orders sought.

The application is also supported with an affidavit sworn by Joseph Kigara on 24th April 2007 upon which the Applicant rely entirely. The application is opposed by the Respondent who has filed a replying affidavit sworn by Ian Mgenyi on 27th April 2007 in which it relies entirely.

The application is made under Order XLI Rule 4(2) which reads:-

“(2) No order for stay of execution shall be made unless

(a) the court is satisfied that substantial loss may result to the Applicant unless the order is made and the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

This courts discretion is fettered by tree conditions. Firstly the Applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the Applicant must furnish security. And the application must of course be made without unreasonable delay.

The application for stay of execution is made under Order XLI Rule 4 (2) of the Civil procedure Rules 4 (2) of the Civil procedure Rules and this court’s discretion under that order is unfettered. It is wide and while the court will take into account matters like substantial loss the Applicant may suffer unless a stay is granted, provisions of adequate security and expeditious filing of the application, this court is not prevented from granting stay of execution where no substantial loss is established and no security is

forthcoming, if it seems just to the court for such order to be made upon application.

Indeed in the **NATION NEWSPAPERS LTD VS. MOHINDER SINGH KAMBO CIVIL APPLICATION NO.88 OF 1987**, the Court of Appeal found that the Applicant had not demonstrated that it would suffer a substantial or any loss unless execution was stayed. But what the court did in that case was to consider what to be taken into account as I have said herein above.

In this application the Applicant is willing to provide security and the application was made without undue delay. Accordingly, for the reasons I have given above, there shall be a stay of execution of the decree in **CMCC NO. EJ 1023 OF 1998** pending the determination of the appeal therefrom on condition that the Applicant deposit the judgment sum in an interest earning Joint Account. If the said sum is not deposited within third days from the date of this order the Respondent to be at liberty to execute the decree. The costs of and incidental to this application shall abide the result of the intended appeal. So I order.

Dated and delivered at Nairobi this 20th day of July 2007.

J.L.A. OSIEMO

JUDGE