



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Suit 21 of 1998**

**SAID HAMADI SHAMISI .....PLAINTIFF/APPLICANTS**

**- V E R S U S -**

**MUSTAFA MOHAMED MJAHD .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**COACHLINE LIMITED ..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**DIAMOND TRUST (K) LTD. .... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

This is an application for stay of execution pending appeal to the Court of Appeal against the decision of this court (Mwera J) striking out the plaintiff's suit as against the third defendant. What is sought to be stayed is the execution of the order for costs awarded to the third defendant following the striking out of the claim against it.

The application is as usual brought under Order 41 Rule 4. Sub-rule (2) of that Rule declares that: -

“No order of stay of execution shall be made under sub rule (1) unless –

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that 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 provision has been telescoped by the applicant in this application. The order of costs the execution of which is sought to be stayed was made on the 24<sup>th</sup> February 2005 and the costs themselves were taxed on 31<sup>st</sup> October 2005. This application was not brought until the 25<sup>th</sup> June 2007, about two years after taxation.

The Respondent argued that the Applicant has been indolent and that the application is a reaction to the execution process. I entirely agree with that argument as the Applicant filed this application after his goods had been attached.

Other than stating that if stay is not granted he will suffer substantial loss, the Applicant has not stated how that loss will be incurred. It is not enough to merely repeat the words of the subrule. For the court to exercise its discretion in favour of an applicant in such an application he must demonstrate how the loss he alleged will be suffered. Even when he has done that and the court is satisfied that the loss is reparable execution will not be stayed.

In this case the amount of costs sought to be recovered is in the region of shs. 500,000/-. That is not a sum the third defendant, a bank, will have any difficulty in repaying if the Applicant's appeal is allowed.

The third and equally important requirement that the applicant is supposed to satisfy before he is granted stay is the offer of security.

In his application and the affidavit in support the Applicant has not mentioned the term "security" let alone making any offer in that respect. This application has no merit and is accordingly dismissed with costs.

DATED and delivered this 11<sup>th</sup> day of July 2007.

D.K. MARAGA

JUDGE