



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

**Civil Appeal 673 of 2007**

**FERDINARD MWANGO T/A BEACH**

**AIR TOURS & SAFARIS.....APPLICANT**

**Versus**

**TOURISM PROMOTION SERVICES LTD**

**T/A SERENA HOTELS.....RESPONDENT**

**JUDGMENT**

The Notice of Motion dated 6<sup>th</sup> August 2007 is brought pursuant to Order 41 Rule 4, L Rule 1 Civil Procedure Rules and S. 3A Civil Procedure Act. The Applicant Ferdinard Mwangi t/a Beach Air Tours & Safaris seeks an order of stay of execution of the decree obtained by the Respondent, Tourism Promotion Services Ltd. T/a Serena Hotels on 16<sup>th</sup> April 2007 pending the hearing and determination of the Appeal No. 673/07.

The Application is premised on the Affidavit of Ferdinard Mwangi and grounds found on the face of the Application.

The grounds are inter alia – that the Applicant has fully paid the principal amount; that the Respondent will execute for the amount which is already paid; that the appeal has high chances of success and will be rendered nugatory if stay is not granted.

The Applicant deposed that judgment was entered against him on 26<sup>th</sup> February 2007. He sought review of the decision on 10<sup>th</sup> April 2007 but on 31<sup>st</sup> July 2007 the Magistrate dismissed the said Application. Photocopies of the proceedings in the Lower Court were exhibited (FM 2). The Applicant also exhibited a reconciliation account which shows that what was claimed was less than what was due. That the Applicant will suffer irreparably as his business will suffer in the upcoming peak season.

In opposing the Application, the Respondent filed grounds of opposition; that the said Application is not in the interest of justice and is an abuse of the court process; that the Application is incompetent, misconceived and bad in law and that it lacks merit is frivolous and vexatious.

Mrs Okulo who urged the Application on behalf of the Respondent argued that the Applicants had failed to satisfy the requirements of Order 41 Civil Procedure Rules, that if stay is not granted the

Applicant will suffer substantial loss, that the Application has been brought without delay and they have security offered for the due performance of that decree. Mrs. Okulo submitted that none of these requirements have been alluded to. Counsel relied on the following cases:-

**(1) HCC 394/02 SOUTHERN CREDIT BANKING CORPORATION V ANDREW LETEIPA SUNKULI & ANOTHER;**

**(2) LEE MUTHOGA V HABIB ZURICH FINANCE (K) Ltd. 3008/1984 and**

**(3) HC 1950/00 ALIBHAI SHARIFF & SONS LTD V TECHNICAL TRADING CO. LTD.**

These decisions dealt with requirements to be satisfied by a party before grant of stay pending Appeal.

Order 41 Rule 4 Civil Procedure Rules under which the Application was brought provides as follows:

**“Order 41 (1) No Appeal or second Appeal shall operate as a stay of Execution proceedings under a decree or order appealed from except in so far as the court appealed from may for sufficient cause, order stay of execution of such decree or order.....”**

**4(2) No order for 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 what has been given in by the Applicant”**

I have considered all submissions, affidavit of the Applicant, grounds annexures and the cases cited. For an order of stay pending appeal to issue the Applicant should satisfy the court that:-

(1) substantial loss will result if an order of stay is not made;

(2) That the Application was made without delay;

(3) That the security that the court may order for the due performance of the decree will be binding on the Applicants;

On the question of substantial loss, the Applicant submitted that he will suffer irreparably as the peak season of his business is coming up and that in any case he has paid the sums claimed.

Mrs. Okulo urged that the Applicant had not shown that the Respondent was a person of straw who cannot repay in the event execution proceeds. It was upto the Applicant to show that if execution proceeds and the Applicant is successful on Appeal, the decree-holder, Serena Hotels, the Respondent herein, cannot be able to repay.

In the ALI SHAH CASE, Justice Azangalala quoted the Court of Appeal’s decision in JOSEPH KAHUGU WAKARI V BARCLAYS BANK OF KENYA

CA 237/1995, where the court observed:

“there must be substantial reasons for grant of stay of execution. It is not enough to say that the Applicant will be burdened financially. That is the natural consequence of a judgment entered against him. It is also not enough to say that the fact of filing of the proposed appeal entitles an Applicant to stay of execution of decree.”

In this case, I find that the Applicant has not demonstrated that he will suffer substantial loss which

cannot be made good in the event the appeal succeeds. It is not enough for the Applicant to say that they have paid or that the Applicant will suffer loss because of the peak season that is due or that an appeal is filed.

On the issue of delay, the judgment was entered on 26<sup>th</sup> February 2007. The Applicant applied for review on 16<sup>th</sup> April 2007, about 2 months after the entry of judgment. Infact one of the reasons why the Magistrate declined review was because of inordinate delay. However, after dismissal of the review application, the Applicant moved fast and filed this Application within 6 days. The delay from 16<sup>th</sup> April 2007 to 31<sup>st</sup> July 2007 was due to the pendency of the review Application before the lower court and cannot be blamed on the Applicant. I would hesitate to find that there was inordinate delay in bringing this Application for stay.

Thirdly, the last test is that of security. The Applicants never made any offer for security. In fact the Applicant never made reference to that aspect.

The Applicant having failed to show that he will suffer substantial loss and since the Respondent is a well established company with sound business all over the world, that is able to repay in the event the appeal succeeds, I see no reason why the Respondent should be denied the fruits of his judgment. The appeal will not be rendered nugatory and I therefore find the Application dated 6<sup>th</sup> August 20+07 unmerited and is dismissed with costs to the Respondents.

Dated and delivered this 29<sup>th</sup> day of August 2007.

R.P.V. WENDOH

JUDGE

Present:

Mr. Ng'eno for Applicant

Mr. Njogu holding brief for Mrs. Okulo for Respondent

Daniel: Court Clerk