



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

**Civil Case 516 of 2003**

**ALPHA KNITS LTD .....PLAINTIFF**

**V E R S U S**

**MEGHJI KANDI & COMPANY LIMITED .....DEFENDANT**

**R U L I N G**

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in the year 2006 and the long attendant recuperation. The delay is regretted.

On 25<sup>th</sup> May, 2006 decree was passed herein in favour of the Plaintiff for KShs. 10 million plus costs and interests. The Defendant has now come to court by notice of motion dated 16<sup>th</sup> June, 2006 seeking an order to stay execution of the decree pending hearing and determination of an appeal to be lodged. The application is brought under rule 4 of Order 41 of the Civil Procedure Rules (the Rules). Notice of appeal was duly lodged under the Court of Appeal Rules on 5<sup>th</sup> June, 2006; for purposes of this application, therefore, there is an appeal. See sub-rule (4) of rule 4 aforesaid.

The application is brought upon the grounds that the proposed appeal will raise substantial issues of fact and law and has overwhelming prospects of success; that the Defendant would suffer great hardship if it were to meet the decree; and that the Defendant would suffer substantial damage in the event of execution and its appeal rendered nugatory. There is a supporting affidavit sworn by one KAMLESH SOMCHAND SHAH who is a director of the Defendant.

The Plaintiff has opposed the application as set out in the replying affidavit sworn by one DIPAK GULABSHAND BID, a director of the Plaintiff, filed on 26<sup>th</sup> June, 2006. The grounds of objection emerging therefrom are, that no evidence has been placed before the court of any substantial loss that the Defendant might suffer; that the application is actuated by bad faith; that there is no proper basis for denying the Plaintiff the fruits of its judgment; that no security has been offered by the Defendant; that this being a money decree, the Defendant's appeal will not be rendered nugatory merely on account of paying the decree; and that the Plaintiff has sufficient means to refund the decretal sum to the Defendant should the appeal succeed.

I have considered the submissions of the learned counsels appearing, including the many cases cited, most of them irrelevant to the issues before the court. In order for the application to succeed, the following conditions must be met:-

1. There must be sufficient cause for granting stay of execution (sub-rule (1) of rule 4 aforesaid).
2. The court must be satisfied that substantial loss may result to the Defendants unless the order is made (sub-rule (2) (a)).
3. The application must have been made without unreasonable delay (same paragraph).
4. The Defendant must give such security as the court orders for the due performance of such decree or order as may ultimately be binding on it (sub-rule (2) (b)).

The decree was passed on 25<sup>th</sup> May, 2006. The present application was filed on 19<sup>th</sup> June, 2006. It was rightly conceded by learned counsel for the Plaintiff that the application has been made without unreasonable delay.

With regard to substantial loss, it is the Defendant's plea that if the decree is executed it will suffer extreme hardship, will be crippled and may have to close its business. The Defendant has not placed before the court its accounts so that the court may assess what detrimental effect payment of the decretal sum at this stage may have on its operations. It was incumbent upon the Defendant, having claimed that payment of the decretal sum will cripple it, to place before the court appropriate proof of that claim. There is none. There is no doubt that the decretal sum is substantial. But that term is relative; the amount may be astronomical to some, but be small potatoes to others. On what basis, then, does the Defendant plead that paying the decretal sum will cripple its operations? There is simply no evidence placed before the court to back that claim. I also note that there is no claim by the Defendant that the Plaintiff will be unable to refund the decretal sum in the event that the appeal succeeds. I am therefore not satisfied that the Defendant stands to suffer substantial loss if the order of stay is not made.

Regarding security, the Defendant has offered none; its learned counsel, MR. SEHMI, stated during arguments that the Defendant is not in a position to offer any security. He pleaded that the order of stay of execution be made without imposing the conditionality of security.

The main duty of the court in applications of this nature is to protect the interests of both parties. Where the decree-holder is to be prevented from immediately enjoying the fruits of his litigation, he must have some assurance that those fruits will be readily available to him should the judgment-debtor's appeal fail. On the other hand the judgment-debtor ought to be able to exercise his undoubted right of appeal without being unduly fettered by the decree; but I hesitate to add that there will usually be no such fetter in the case of a money decree.

In the present application, even though the Defendant has not satisfied the court that it stands to suffer substantial loss, I will, in exercise of my discretion, grant stay of execution of decree pending hearing and determination of its appeal in the interests of justice. However, this will be upon the condition that the Defendant, within 21 days of delivery of this ruling, deposits in an interest-earning account in the joint names of the advocates for the parties the principal sum awarded in the decree, that is, KShs. 10 million, in a reputable bank or financial institution. In default of such deposit, the stay of execution granted herein shall automatically lapse.

The costs of this application shall be in the intended appeal. If no appeal is lodged in the fullness of time, the Plaintiff shall have those costs. There will be orders accordingly.

**DATED AT NAIROBI THIS 15<sup>TH</sup> DAY OF AUGUST, 2007**

**H. P. G WAWERU**

**J U D G E**

**DELIVERED THIS 17<sup>th</sup> DAY OF AUGUST, 2007**