

REPUBLIC OF KENYA

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

Civil Appeal 257 OF 2007

BLOWPLAST LIMITED.....APPELLANT

V E R S U S

ISHMAEL MAINARESPONDENT

R U L I N G

This is an application (notice of motion dated 4th May, 2007) by the Appellant for stay of execution of decree of the lower court pending disposal of the appeal herein. It is brought under Order 41, rule 4 of the Civil Procedure Rules. Under sub-rule (1) of that rule, the appellate court may consider an application for stay of execution, and may make such order thereon as may to it seem just. Under sub-rule (2) of the same rule, no order for stay of execution may be made 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.

I have read the two affidavits sworn in support of the application as well as the replying affidavit. I have also considered the submissions of the learned counsels appearing, including the cases cited. In applications of this nature what the court should endeavour to do is to secure the interests of both parties in the best way possible to enable the appellant to pursue his appeal without the danger of it being rendered nugatory and also to ensure that should the appeal ultimately fail, the fruits of the respondent's judgment will be readily available to him. I will therefore not dwell on the technicalities raised during arguments.

The Appellant apprehends, on reasonable grounds, that it may not be able to recover from the Respondent the decretal sum in the event that its appeal succeeds; the Appellant has stated categorically that the Respondent is a man of straw. In response the Respondent has not at all made any effort to rebut this; he has not shown his means, something that would be peculiarly within his knowledge. I am therefore satisfied that the Appellant stands to suffer substantial loss unless the order of stay is granted. I am also satisfied that the application has been made without unreasonable delay.

The Appellant has already provided appropriate security by depositing in court KShs. 159,500/00 towards the decretal sum as ordered by this court on 9th May, 2007.

I will in the event grant the stay of execution sought. The same shall remain in place pending disposal of the appeal or the further order of the court. The sum of KShs. 159,500/00 deposited shall remain so deposited until disposal of the appeal or until the further order of the court. There will be orders accordingly.

DATED AT NAIROBI THIS 7TH DAY OF DECEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 7TH DAY OF DECEMBER, 2007