



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 833 of 2000**

**JOSEPH RADING WASAMBO .....PLAINTIFF**

**VERSUS**

**THE STANDARD LIMITED .....DEFENDANT**

**RULING**

The Standard Ltd. (“**the Defendant**”), being dissatisfied with the judgment and decree of Kubo, J dated the 11<sup>th</sup> July 2005 in the total sum of K.sh. 1,450,000/= filed a Notice of Motion dated the 16<sup>th</sup> August 2005 on the 17<sup>th</sup> August 2005 (“**the Defendant’s Application**”) seeking a stay of execution of that judgment and decree pending the hearing and determination of the intended appeal against the same.

The Defendant’s Application, premised upon the grounds set forth therein and supported by the affidavit dated the 16<sup>th</sup> August 2005 of Mrs. Nelly Matheka, the Group Company Secretary of the Defendant, first came up for hearing on the 18<sup>th</sup> August 2005 before Nyamu, J who not only certified it as urgent but also granted orders, *ex parte*, staying execution of the said judgment and decree pending the hearing of the Defendant’s Application but on the condition that the Defendant do deposit into court the sum of K.sh.600,000/= within 21 days of the order (which condition the Defendant duly fulfilled).

Even before the Defendant’s Application was heard *inter partes*, Joseph Rading Wasambo (“**the Plaintiff**”), moved the court by way of a Notice of Motion dated the 7<sup>th</sup> September 2005 and filed on the 9<sup>th</sup> September 2005 (“**the Plaintiff’s Application**”) in which the Plaintiff sought orders to set aside the *ex parte* orders of Nyamu, J granted on the 18<sup>th</sup> August 2005 upon the three grounds stated therein supported by the Plaintiff’s own affidavit sworn on the 7<sup>th</sup> September 2005. The Defendant in opposition to the Plaintiff’s Application, filed a Replying Affidavit on the 16<sup>th</sup> September 2005 sworn by Mrs. Nelly Matheka on the 15<sup>th</sup> September 2005.

Both the Defendant’s and the Plaintiff’s Applications were heard together by consent of the parties and are the subject of this Ruling.

In his submissions and relying on the Court of Appeal decision in Butt v Rent Restriction Tribunal [1982] KLR 417, Mr. Imende, learned counsel for the Defendant, urged that the Defendant’s Application be allowed not only because the Defendant had well satisfied the three conditions precedent for the granting of an order of stay of execution as set out in Order 41 rule 4. (2) (a) and (b) of the Civil Procedure Rules but also because there was no overwhelming or other hindrance to dissuade the court from exercising its discretion in favour of the Defendant.

Mr. Thangei, learned counsel for the Plaintiff, on the other hand, contended that the Defendant had not at all satisfied the court that substantial loss may result to the Defendant unless the order of stay is made. He argued that the Defendant's Application must fail not only because the Defendant had not furnished adequate security as envisaged under Order 41 rule 4. (2) (b) of the Civil Procedure Rules but also because the Plaintiff should not be deprived of the fruits of his judgment without just cause particularly as the decree herein is a money decree. Learned counsel referred me to various judicial authorities including the decision in Kenya Shell Ltd. v Benjamin Karugu Kibiru and Ruth Wairimu Karuga (1982-88) 1 KAR 1018.

Having considered both the Defendant's and the Plaintiff's Applications in conjunction with the submissions of both learned counsel, I am satisfied that the Defendant brought its Application without any undue delay. I would also have no reason to interfere with the order of Nyamu, J in enhancing the sum deposited into court as security for the due performance of the decree or order as may ultimately be binding on the Defendant.

I now turn to the other condition the Defendant must fulfill in order to succeed on its Application. In support of ground (vi) of the Defendant's Application, Mrs. Matheka in her said affidavit dated the 16<sup>th</sup> August 2005 deponed in paragraph 9 thereof thus —

"9. THAT I verily believe that if execution proceeds, the Appellant will suffer substantial loss as the Respondent may not be able to repay the decretal amount if the same is paid to him in view of the fact that it is a substantial sum and in view of future uncertainties of life".

In the Kenya Shell case (supra), the Court of Appeal held that it was not enough for an applicant merely to state that the decretal amount is substantial and that the applicant would suffer loss if the money was paid — "**the applicant should show the damages it would suffer if the order for stay is not granted**". In the Defendant's Application before me, and apart from the averment in paragraph 9 of Mrs. Matheka's said affidavit, there is no other evidence whatsoever as to what "**substantial loss**" the Defendant stands to suffer nor has Mrs. Matheka explained the basis of her belief that "**the Respondent may not be able to repay the decretal amount ...**"

In Carter & Sons Ltd. v Deposit Protection Fund Board and Two Others (Civil Appeal No. 291 of 1997 (unreported)), the Court of Appeal reiterated this court's discretion under Order 41 rule 4 of the Civil Procedure Rules thus —

**"In our view, the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. A party is expected to prefer an appeal only when there are strong reasons for doing so.**

**It is helpful at this stage to remind ourselves that what we have before us is an appeal from the superior court from an order granting a stay arising from an application made to the superior court under Order XLI rule 4(2) of the Civil Procedure Rules and the judge has the power to grant a stay within the four corners of the said rule. An appeal is not automatically to operate as a stay of execution and the right of a decree – holder having been determined by a competent court it is not fair that he should be deprived of the fruits of his decree mainly because the judgment – debtor prefers an appeal. The court, however, has a discretion to grant a stay provided the conditions prescribed in the sub-rule are satisfied. It will, therefore, be seen that the discretion vested in the superior court under Order XLI rule 4 of the Civil Procedure Rules is not unfettered. On the other hand, an application for stay of execution can be made to this court under rule 5(2) (b) of the Rules of this Court and this Court's discretion under that rule is wide. This Court is at liberty to consider the application made to it and make such order thereon as may, to it, seem just. Not so with the superior court under Order XLI of the Civil Procedure Rules as is the position in the instant proceedings."**

As can be seen from this passage, my discretion under Order 41 rule 4 (2) of the Civil Procedure Rules is not unfettered and must be exercised judiciously and within the four corners of that rule and not otherwise.

On the evidence before me, I am not satisfied that the Defendant has established that substantial loss would ensue to it from a refusal to grant a stay. Consequently, the Defendant's Notice of Motion dated the 16<sup>th</sup> August 2005 and filed on the 17<sup>th</sup> August 2005 fails and it is ordered that the same be and is hereby dismissed with costs to the Plaintiff. I further order that the sum of K.sh. 600,000/= deposited into court pursuant to the orders made on the 18<sup>th</sup> August 2005 be refunded to the Defendant forthwith. It follows that the Plaintiff's Notice of Motion dated the 7<sup>th</sup> September 2005 and filed on the 9<sup>th</sup> September 2005 succeeds and I accordingly hereby grant orders in terms of prayer No. 1 thereof setting aside and vacating the temporary order of stay granted on the 18<sup>th</sup> August 2005.

Orders accordingly.

Finally, and the foregoing orders notwithstanding, the Defendant having already filed a Notice of Appeal on the 22<sup>nd</sup> July 2005 is still at liberty, by virtue of Order 41 rule 4. (1) of the Civil Procedure Rules, to apply for a stay of execution to the Court of Appeal under rule 5 (2) (b) of the Rules of that Court.

Dated and delivered at Nairobi this Twenty-fourth day of March, 2006.

P. Kihara Kariuki

Judge