

REPUBLIC OF KENYA

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

Misc Appli 64 Of 2006

OCCIDENTAL INSURANCE CO. LTD.....APPELLANT

VERSUS

DHANJI VAGHI & CO. LTD.....RESPONDENT

RULING

On the 16th December 2005 the court in Milimani CMCC NO.9078 of 2005 entered judgment in favour of the plaintiff after striking out the defendant's defence. The defendant being desirous of appealing against that decision filed an application in this court by way of Chamber Summons expressed to be brought under Order XXI Rule 22 (i) and Order XLI Rule 4 of the Civil Procedure Rules and Sections 63 (e) 65 and Section 3a of the Civil procedure Act seeking Orders of Temporary Stay of Execution pending appeal.

When this application came up for hearing Mr. Mutua for respondent raised a Preliminary Objection on the ground that the application is misconceived vexatious and otherwise an abuse of the process of the court as this court has no jurisdiction to entertain the application.

Mr. Mutua submitted that the jurisdiction of this court to stay execution pending the hearing of an appeal before it is vested under Order XLI Rule 4 (2) of the Civil Procedure Rules. No order of stay of execution shall be made under sub-rule I 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. (b) such security as the court orders for the performance of such decree or order as may ultimately be binding on him has been given by the applicant. Judgment was delivered on 16th December 2005 and this application was filed on 26th January 2006. This was unreasonable delay counsel referred the court to the case of *HALAL & ANOTHER VS. THORNTON & TURPIN (1963) LTD [1990] KLR 365* where the court held that the High Court's discretions to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security and the application must be made without unreasonable delay. He also referred the court to the provisions of Order XLI Rule 4(1) which provide that no appeal shall operate as a stay of execution under a decree or order appealed from except in so far as the court appealed from may order, but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

Miss Kimemia counsel for the defendant in opposition to the Preliminary Objection submitted that a Preliminary Objection is raised only on a point of law and not points of fact. The Preliminary Objection raised by the respondent goes to the facts rather than points of law.

The court has jurisdiction to entertain this application under Order XLI Rule 4 to grant Order of Stay of Execution on application since the respondent's Preliminary Objection goes to the facts and not points of law, the same cannot stand. On the issue of delay in bringing the appeal, counsel submitted that due to public holidays in the month of December the computation of time stretched the period up to 31st January

2006 and therefore the appeal filed on 6th January 2006 was filed within the statutory period. Miss Kimemia further submitted that the points raised by the respondent were improperly raised by way of Preliminary Objection. The points raised here could be argued in the normal manner.

In the case of **MUKISA BISCUIT CO. LTTD VS. WEST END DISTRIBUTORS LTD [1969] E.A. 696** at page 701 **SIR**

CHARLES NEWBOLD commenting on improperly raising of

Preliminary Objection had this to say:-

“There is an increase practice of raising points which should be argued in the normal manner quite improperly by way of Preliminary Objection.

A Preliminary Objection is in the nature of a demurrer. It raises a pure point of law which is argued on the assumption that all the other facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and confuse the issues. This improper practice should s top”

The issues raised in this Preliminary Objection are not purely on points of law. The same could be dealt with in the main application. The Preliminary Objection is therefore dismissed with costs.

Dated and delivered at Nairobi this 8th day of March, 2006.

J.L.A. OSIEMO

JUDGE