



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1950 of 2000

ALIBHAI SHARIFF & SONS LTD..... PLAINTIFFS

VERSUS

TECHNICAL TRADING COMPANY LTD.....DEFENDANT

RULING

This is an application primarily under Order XLI Rule 4 of the Civil Procedure Rules. It is seeking one substantial order that execution of the decree in this suit be stayed pending appeal.

The grounds for the application are that a Notice of Appeal has been filed and if execution is not stayed the applicant’s appeal will be rendered nugatory and the applicant will suffer irreparable loss and damage. There is an affidavit in support of the application sworn by one Ashwin A. Bhogaita a director of the applicant company. To this affidavit several exhibits have been annexed including a copy of the Notice of Appeal, a letter to the court seeking copies of proceedings and judgment and correspondence exchanged between the Advocates with respect to the decree and costs.

The Respondent opposes the application on the primary grounds that it is in active trade and has been in such trade for numerous years and can repay the decretal sum in the event that the intended appeal is decided in favour of the applicant and that there is no evidence that substantial loss will result to the applicant unless stay is granted.

I have carefully considered the application, the affidavits by both parties, the annexures to the said affidavits, the submissions by both counsels and the cases cited. Having done so, I take the following view of the matter. For the applicant to succeed in this application it had to satisfy the conditions set in Order XLI Rule 4 of the Civil Procedure Rules. Under the rule I am required to consider first whether there is sufficient cause to warrant stay of the execution and such order cannot issue unless

(a) I am satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without inordinate delay and;

(b) Such security as I may order for the due performance of such decree or order as may ultimately be binding on the applicant has been given by the applicant.

To show sufficient cause, the applicant has argued that the proposed appeal will be rendered nugatory should the decretal sum have to be paid forthwith as the applicant will suffer immense loss of capital and funds in paying out this sum. The applicant further argues that the appeal raises serious important legal and triable issues and it ought to be given an opportunity to canvass the appeal before execution is levied.

In my view, whether the intended appeal is arguable or not is not a consideration in an application for stay. I will therefore say no more on the merits or demerits of the intended appeal.

The decree herein is a money decree. In the affidavit filed in opposition to this application, the respondent's Managing Director has deponed that the respondent company has been in active trade for numerous years and can repay the decretal amount in the event that the intended appeal succeeds. The applicant has not disputed that averment. Its concern is that it will suffer immense loss of capital and funds in paying out the decretal sum. In my view that is not enough. Temporary loss of capital and funds per se would not in my view constitute sufficient cause and does not of itself amount to substantial loss. Clearly therefore, the intended appeal cannot be rendered nugatory if the execution proceeds and the appeal succeeds.

On the issue of delay, the applicant moved to court for stay on 13.3.2006. This was about three months after the judgment intended to be appealed against. In the circumstances of this case the three months delay is unreasonable especially in view of the fact that on the delivery of the judgment the applicant sought a 30 days stay of execution and did nothing at the expiry of the 30 days.

The last test is that of security. The applicant has offered to pay the decretal sum together with interest and costs in an interest earning account in the joint names of the Advocates of both parties till the appeal is heard. This offer is attractive. But the respondent has a judgment in its favour. Its financial position is sound and has means of repaying the money in the event that it ultimately loses in the intended appeal. In the premises, I see no reason why the respondent should be deprived of the fruits of the judgment passed in its favour.

I would adopt the following observations of the Court of Appeal in **Joseph Kahugu Wakari –vs- Barclays Bank of Kenya Limited & Another: Civil Application No. Nai 237 of 1998 (UR):**

“... 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 a stay of execution of decree.

We do not see how the appeal, if successful, will be rendered nugatory. The respondent is a sound bank.”

The applicant in the case at hand in my view is in the same position as the applicant in the above Court of Appeal application. I have already found that the applicant's intended appeal if successful will not be rendered nugatory.

The upshot of all the above is that this application dated and filed on 13th March, 2006 is without merit and is dismissed with costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2006.

F. AZANGALALA

JUDGE

28.4.2006

Ruling read in the presence of: Shah for the applicant and Ngatia for the respondent.