

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

Civil Appeal 865 of 2005

ACROSS AFRICA SAFARIS LIMITED.....APPELLANT

VERSUS

MUSA MATU RIUNGA..... RESPONDENT

R U L I N G

The Notice of Motion herein, filed on 29/3/06, under Order 41 Rule 4 (1) & (2) seeks stay of Execution of the Decree in CMCC No. 1745/04 pending the appeal herein.

The application is supported by an Affidavit by J.S. Vohra, a director of the appellant/applicant company, and is on the grounds that the applicant has offered security; but is apprehensive that if the decretal sum is paid prior to the appeal and the appeal succeeds, the appellant will not be able to recover the same from the beneficiaries/dependants.

In opposition, the Respondent – the Administrator of the Estate avers that he is a person of means capable of refunding the money if the appeal succeeds; and in any case, the substantial portion of the decretal sum is for investment in an interest earning account, thus it will be readily available if the appeal succeeds. He further avers that the appeal has no chance of success, since the Respondent called 4 witnesses, as opposed to none called by the appellant, to prove liability.

I have carefully considered the pleadings and the submissions by both parties, and have reached the following findings and conclusions:

Before an order of stay is granted the appellant/applicant must comply with all the tenets of Order 41 Rule 4 (2) of the Civil Procedure Rules.

On the basis of the above requirements and the affidavit evidence before me, the appellant/applicant have not met all the tenets of the law. This is more so with respect to substantial loss that the appellant would suffer if the execution proceeds prior to the appeal, and the appeal succeeds.

To begin with, there seems to be unexplained misconception on the part of the appellant that the decretal sum will be paid to the dependants/beneficiaries. The beneficiaries are not parties to the case. The Respondent – not the beneficiaries – is the administrator of the estate for the benefit of the dependants. That administrator has sworn an Affidavit, attaching title deeds, to show that he is a person of means, capable of refunding the sum in the event of the appeal succeeding. In any case, in that Replying Affidavit, it is evident that the large portion of the decretal sum is for investing, not distribution: for the beneficiary/dependants. Thus, it still would be available in case the appeal succeeds.

To reiterate, the Respondent to whom the decretal sum is payable is a person of means, and he is not the beneficiary referred to in the application for stay.

I must point out that a successful litigant must not be kept at bay from enjoying the fruits of his judgment, without good case. In my view, no such cause has been shown here.

The notion that the appellant, by depositing even the total decretal sum in court will meet the tenets of Order 41 Rule 4, is fallacious. Such money will still not be accessible to the beneficiaries herein, and that

is exactly what violates their right to the enjoyment of the fruits of their successful litigation at the Lower Court.

I have had a cursory perusal of the grounds of appeal and the proceedings and judgment of the Lower Court. And without delving into the merits or otherwise of the appeal, the evidence on record militates against the appellant. The appeal has very slim chance, if at all, of success.

For all the above reasons, this Court rules as under:

1. Dismisses the Notice of Motion herein and declines to grant stay of execution pending appeal.
2. Orders that the appellant/applicants herein do pay the costs of this application.

DATED and delivered in Nairobi, this 19th Day of July, 2006.

O.K. MUTUNGI

JUDGE