



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Case 320 of 1998

OMAR SHARIFF ABDALLA
PLAINTIFF

- Versus -

CORPORATE INSURANCE COMPANY LIMITED
DEFENDANT

Coram: Before Hon. Justice L. Njagi

Mr. Nanji for the Plaintiff/Respondent

Mr. Omondi for the Defendant/Respondent

Court clerk – Kinyua

R U L I N G

This is an application for stay of execution pending appeal. It is made by a notice of motion dated 23rd September, 2005, and brought under Order XLI rule 4, Order L rule 1 of the Civil Procedure Rules, and Sections 3A and 63(e) of the Civil Procedure Act.

The application is supported by the annexed affidavit of Ellen Wanjira Mwangi, a manager in the defendant company, Mombasa Branch. It is based on the grounds that –

- (a) Being dissatisfied with the court's judgment dated 29th July, 2005, the applicant has filed a notice of appeal in respect of the same.**
- (b) The intended appeal raises serious points and has a high likelihood of success.**
- (c) The plaintiff/respondent has no reliable business and is unlikely to be in a position to refund the decretal sum amounting to over Kshs. 12 million if the intended appeal succeeds.**
- (d) Unless stay of execution is granted, the intended appeal will be rendered nugatory.**
- (e) The application is filed without undue delay.**

(f) The defendant is willing to provide such security as the court may direct.

On 16th March, 2006, the plaintiff/respondent filed a replying affidavit sworn on the same date. He deposes that he has no objection to the said notice of motion being granted pending the determination of the defendant's intended appeal provided it deposits the decretal sum in an interest bearing account at a reputable bank in the joint names of the advocates for the parties herein.

At the hearing of the application, Mr. Omondi appeared for the applicant and Mr. Nanji appeared for the respondent. Mr. Omondi relied entirely on the supporting affidavit of Ellen Wanjiru Mwangi. He submitted that the application meets the grounds for grant of stay and prayed that the order be made unconditionally as there were no reasons to impose conditions.

Opposing the application, Mr. Nanji submitted that the court has no jurisdiction to order an unconditional stay of execution. He referred the court to some three authorities – **FALCON BAY LODGE (K) LTD. v. GURMUK SINGH t/a CENTRAL FURNITURE SHOP**, Mombasa HCCA No. 69 of 1990 (unreported); **TRUST BANK LTD. Vs MOHAMED BAKARI MBWANA**, Mombasa HCCC No. 80 of 1998 (unreported) **OMAR SALIM OMAR Vs OMAR ABDALLA HAMUD**, HCCA No. 115 of 2003 (unreported); and **BERNADATE NAMPIJJA Vs DIVECON LTD.**, Nairobi Civil Application No. NAI 93 of 1989 (unreported). Mr. Nanji then submitted that the applicants were not entitled to an unconditional stay as in ground (f) of their application they had already offered to provide such security as may be ordered.

Mr. Nanji further submitted that there was no material placed before this court to demonstrate that the defendant has a sound, firm and healthy financial base as alleged. He requested that the money be deposited in a joint interest earning account and submitted that a leading insurance company should not have any problem depositing the money in question into such an account.

In a short reply, Mr. Omondi prayed for adequate time to comply in the event the court decides that money be deposited.

I have considered the application and the respective submissions of counsel. The procedure governing stay of execution pending appeal is clearly set out in Order XLI rule 4 of the Civil Procedure Rules. This rule provides as follows:-

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings 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 ...”

In paragraph 4 of the supporting affidavit, Ms. Ellen Wanjiru Mwangi deposes that she verily believes that the defendant's intended appeal raises arguable points and that it is likely to succeed. That line of argument endears itself to the Court of Appeal pursuant to the Rules of that court. It is within the province of the Court of Appeal to pronounce whether an intended appeal raises arguable points. For the purpose of Order XLI rule 4(1) with which this court is concerned, the court has jurisdiction to grant a stay of execution for “sufficient cause”.

In the instant matter, the applicant alleges that if the decretal sum is paid out to the respondent before the appeal is heard and determined, and if thereafter the appeal succeeds, the impecunious circumstances of the respondent will not allow for him to refund the money paid to him, and, to that extent the appeal will be rendered nugatory. This allegation is not contested. Furthermore, the respondent is not opposed to a grant of stay of execution, provided that security is provided. In those circumstances, I think that there is sufficient cause for the grant of a stay of execution pending appeal.

However, we must not lose sight of Order XLI rule 4(2) as it is interwoven with rule 4(1). It is in the following words:-

“(2) No order for stay of execution shall be made under subrule (1) unless –

- (a) **the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has**
- (b) **been made without unreasonable delay; and**
- (c) **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.”**

With regard to paragraph (a), the decree which is the subject matter of this application was issued on July 29th, 2005. The application was filed on 26th September, 2005, which was three days short of two months. I don't consider that delay to be unreasonable.

I have already observed that the applicant contends that if the decretal sum is paid out to the respondent, he may not be able to refund the money if the appeal is successful. This contention is not challenged. I find, therefore, that if the order sought is not granted, and if the decretal sum is paid out to the respondent at this time, and if the appeal succeeds and the respondent is unable to refund the money, the applicant will certainly suffer substantial loss. In my view, the applicant has satisfied the requirements of rule 4 subrule (1).

As for subrule (2), Mr. Nanji submitted that by virtue of paragraph 10 of the supporting affidavit, the applicants are seeking an unconditional stay of execution and yet the court has no jurisdiction to grant a stay without security. Does the court have jurisdiction? Several authorities were cited in support of the contention that the court lacks jurisdiction to order a stay of execution without security. Let it suffice to refer to **FALCON BAY LODGE (K) LTD. v. GURMUK SINGH t/a CENTRAL FURNITURE SHOP**, Mombasa HCCA No. 69 of 1990, (unreported) in which Omolo J., as he then was, aptly summarized the point as follows:-

“... there is no jurisdiction in this court to order unconditional stay of execution. The applicant is bound to provide security for such stay ...”

One of the grounds upon which the application is made is that the applicant is willing to provide such security as the court may direct. This sentiment finds further support in paragraph 11 of the supporting affidavit in which the deponent states that the defendant/applicant is ready and willing to furnish security as the court may order.

In sum, I think that the best order to make in the interests of both parties is for the decretal sum to be deposited somewhere. That will ensure the preservation of the subject matter in dispute so that the rights of the plaintiff/respondent are safeguarded, and the appeal, if successful, will not be rendered nugatory.

I accordingly grant the applicant a stay of execution on condition that within 45 days of the date hereof, the applicant will deposit, in an interest earning account in the joint names of the parties' respective advocates at a reputable bank, the sum of Kshs. 11,730,440/80 together with interest thereon at the rate of 12% per annum from the 19th day of August, 2005, until the day the money is deposited, plus taxed and certified costs of the suit.

It is so ordered.

Dated and delivered at Mombasa this 8th day of September, 2006.

L. NJAGI

JUDGE