



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Case 440 of 2002

**HAGGAI OMONDI OKETCH TAMBO t/a TAMCON CONSULTING ENGINEERS.....
PLAINTIFF**

VERSUS

**MOSES MAC OWITI
.....DEFENDANT**

RULING

The Defendant failed to obtain an order of the court to set aside the dismissal of its application dated 16th March, 2005. The Defendant has filed a Notice of Appeal against that decision and has sought copies of the proceedings. He has now moved the court by way of Chamber Summons dated 25th April, 2006 seeking stay of execution pending appeal. In his supporting affidavit the Defendant stated that this court delivered a ruling on 16th March, 2006 dismissing his application dated 16th March, 2005. That on 24th March, 2006 the Plaintiff extracted a notice to show cause why the Defendant should not be arrested. The Defendant in that supporting affidavit enumerated various grounds upon which he was of the view that his appeal would succeed. He said that now faced with an order for arrest and committal to civil jail would suffer substantial loss if the same was not stayed. That if that order for warrant of arrest is not stayed his appeal would be rendered nugatory. He further stated that he is unable to raise the decretal amount in the sum of Kshs.1,531,174.30 but he was willing to deposit in court his original title No. North Sakwa/Nyawita/2166 which is valued at Kshs.1.5 million. This title he said could be security in satisfaction of the decree herein. In opposition to the application the Plaintiff swore an affidavit in reply. The Plaintiff stated that he has been unable to execute the decree herein because of the various objections proceedings which has been raised by the Defendant. He denied that the Defendant had shown that he would suffer substantial loss if stay was not granted. That the Defendant should have on 10th May, 2006 shown cause rather than making this present application for stay. He further deponed that the Defendant is known to him since they have several business dealings with each other. That he was aware that the Defendant is a chairman of Come to Africa Safari Limited a tour company and that further he is the proprietor of Mara Hippo Safari Lodge situated in Masai Mara. Consequently he was of the view that the Defendant is able to furnish adequate security by depositing the decretal amount either in court or in joint accounts with the Plaintiff. He further stated that the property the Defendant seeks to deposit in court is undeveloped ancestral land in Bondo District Nyanza Province. That in any case such a security cannot be easily realized by the Plaintiff if the intended appeal is dismissed. The Plaintiff stated that he is an

engineer practicing in Nairobi and that he has the capacity to make full restitution to the Defendant if his intended appeal does succeed. The Plaintiff attached his audited financial reports for the years 2004 and 2005. For that reason he concluded by saying that the Plaintiff should not be denied the enjoyment of the fruits of his judgement. In a supplementary affidavit sworn by the Defendant, the defendant repeated that he is unable to make a cash deposit or to give a bank guarantee as alleged by the Plaintiff. He said that the companies that had been cited by the Plaintiff as belonging to him were separate legal entities to himself. That the property he seeks to deposit in court is a valuable security that even banks would readily accept the same as security. The oral submissions by the Defendant's counsel he started by saying that the Defendant had shown sufficient cause why stay should be granted. He said that the Defendant had a right of appeal under Order XLII Rule 1(1)(h) of the Civil Procedure Rules. He therefore, said that the Defendant in filing the intended appeal was exercising his statutory right of appeal. The Defendant relied on the case of **New Stanley Hotel Limited v Arcade Tobacconists Limited [1986] KLR** and relied on the following portion:-

“It follows therefore if any real security were to be taken I might find myself depriving the defendant of his right of appeal and I would be most unhappy in doing that, particularly where the point involved is as difficult as I found it to be, cover red, so far as I could trace, by no direct authority and requiring an assessment by the court of the manner in which equity was to operate”.

In addition to that authority the Defendant relied on the case of **Halai & another v Thornton & Turpin (1963) Ltd. [1990] KLR** and quoted the following passage:-

“Thus, the Superior court's discretion 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. The application must, of course, be made without unreasonable delay”.

The Defendant's counsel stated that the aforesaid authority supported the Defendant's contention that he will suffer substantial loss if stay is not granted because the Notice to show Cause required him to pay the decretal amount or be committed to civil jail. He submitted that the Plaintiff had not demonstrated his ability to pay the decretal amount if the appeal is successful. For that reason the defendant would suffer loss if stay is not granted. The Defendant relied on the case of **Central Bank of Kenya v Kamal Z. Shah & another HCC. MISC. Application No.427 of 2000** where the court found that substantial loss under Order XLI Rule 4 envisaged a situation where the respondent might fail to repay and an appeal is successful. The Plaintiff's advocate in oral submission submitted that the decree was a monetary decree and being so the Defendant ought to have shown that the Plaintiff cannot refund the same. That the Plaintiff had annexed statements of accounts in a business where he is the sole proprietor and those statements were showing that the Plaintiff's company was making profits. The Plaintiff relied on the case of **Diamond Trust Bank Kenya Ltd. V Peter Mailanyi & 2 others HCCC No.177 of 2002** where the court relied on the findings of a case of **Patani & another v Patani [2003] KLR 518** as follows:-

“No prejudice would be caused to the applicants in the event that the intended appeal is successful as the respondent would have no difficulty in refunding the decretal amount”.

The Plaintiff's counsel faulted the Defendant for failing to show the income he earned even if it is to be believed that he is not the proprietor of the companies that the Plaintiff had stated in the replying affidavit. Plaintiff submitted that security under Order XLI is mandatory and it therefore, ought to be adequate. Plaintiff was of the view that the property offered by the defendant was inadequate as a security.

The court has indeed confirmed that the Defendant has filed a Notice of Appeal and has applied for the proceedings to enable him to file the intended appeal. Whether or not the Defendant has a good appeal is not for this court to consider. This court is guided by Order XLI Rule 4 of the Civil Procedure rules. The Defendant has deponed that he is unable to raise the decretal amount in this case but in so stating failed to proof what livelihood and what income he is earning presently. The Plaintiff did allude to some companies that the Defendant is said to be the proprietor. Although the Defendant denies the same and

pleaded that those companies are limited liability companies it was necessary for the Defendant to show his financial standings perhaps by annexing bank statements so that the court can confirm what he has deponed to. The property which the Defendant seeks to give as security for the decree hereof is indeed undeveloped property and although it is said to have 300 mature trees I do accept the argument raised by the Plaintiff that those trees could be cut down even before the appeal is heard and thereby affect the value of the property. There is no way this court would be able to guard against such cutting down of trees. The valuation report clearly states that in reaching the value of Kshs.1.5 the valuer did consider the value of those mature trees.

I am of the view that the Defendant has shown sufficient cause why stay should be granted in view of the fact that he is challenging the dismissal of an application to set aside a dismissed application. That dismissal was due to non-attendance of his advocate. The Plaintiff to support his contention that he is able to repay the decretal amount if the appeal is successful attached statements of account of his company for the year 2004, 2005. It would have assisted this court in making a conclusive decision that the plaintiff is in a position to repay the Defendant if current bank statements were annexed to the replying affidavit.

Having considered the submissions made before me and affidavits sworn by the parties, I am of the view that the Defendant's application lacks transparency on available finances that the Defendant has. Such lack of transparency leads this court to draw an inference that the Defendant may very well have the finances to either pay the decretal amount or provide security in monetary terms. On the other side the Plaintiff has failed to provide bank statements to prove its present financial standings which would have assisted the court to determine the capability of the Plaintiff to repay the decretal amount if the appeal was successful. In reaching my decision over the Defendant's application I am of the view that the Defendant should be granted stay but on condition of the Defendant depositing the decretal amount in a joint interest earning account in the names of the advocates in this matter. In summary therefore, the orders of the court are that:-

- 1. The Defendant is hereby granted stay of execution of the judgement hereof pending the hearing and determination of the Defendant's appeal to the Court of Appeal.**
- 2. Such stay granted in 1 above is conditional on the Defendant's providing the decretal amount within 30 days which shall be deposited in an interest earning account in the names of the advocates of the parties failure to provide the decretal amount as aforesaid will automatically discharge stay of execution.**
- 3. The costs of the Chamber Summons dated 25th April, 2006 shall abide with the appeal.**

MARY KASANGO

JUDGE

Dated and delivered this 26th October, 2006.

MARY KASANGO

JUDGE