

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Appeal 67 of 2005

G. ISSAIAS & COMPANY (K) LIMITED APPELLANT

VERSUS

KIPLIMO TIGOI KAPLELEI RESPONDENT

R U L I N G

This is an application made by the Appellant under the provisions of Order XLI, Rule 4 for, inter alia, an order of stay of execution of the decree in Eldoret, Chief Magistrate's Court Civil Case No. 111 of 2003. In the said suit, the Principal Magistrate Mr. W. N. Njage delivered a Judgment on 20th June 2005 in which he found in favour of the Respondent as against the Appellant.

Judgment was entered against the Appellant for a total sum of Kshs. 656,000/= together with costs. The Appellant's application for stay of execution pending appeal was first made before the trial Court on 13th October, 2005. The said court in a ruling delivered on 20th December 2005 declined to grant the orders. By then, the Appellant had already filed this Appeal on 30th June, 2005.

The Appellant now has made this application invoking this court's appellate jurisdiction. The appellant claims that it will suffer immensely if execution proceeds and the same would render the appeal nugatory. The Respondent opposed this application arguing that the appeal has no merits. He submitted that he is a businessman dealing in hides and skins and also a tea farmer who can refund the decretal sum in the unlikely event that the appeal succeeds. That the Appellant's appeal will not be rendered nugatory. The Respondent also produced evidence that he owns a developed commercial property in Nandi Hills which earns rental income.

I have considered the application herein, the affidavits by both parties and the submissions by Counsel. I have read the judgment of the trial Court and appreciate that there were many intricate issues which were argued. The total decretal sum consists of special damages. The amount is fairly substantial considering the nature of the claim and the facts in the case. It is an amount that can affect the financial position of any company or individual. In the circumstances it was incumbent on the Respondent to demonstrate that he would be in a position to refund the entire decretal sum in the event that the appeal is successful. He made some attempt but his affidavit did not bring out exactly his true financial status.

It is appreciated that the Respondent is entitled to the fruits of judgment. However, if there is an appeal then he must be ready to refund the decretal sums which may have been paid out in the event the appeal is successful. If this does not happen then the Appellant would suffer substantial loss. The Respondent must therefore give some degree of reasonable assurance that such loss will not take place.

In the premises, I am not satisfied that the Respondent has given such a reasonable degree of assurance to the extent of the entire decretal sum. It is noted that the Appellant conceded that it had received a sum of Kshs. 200,000/= from the Respondent which it was willing to refund. The court also has taken into account the fact that in the event the appeal succeeds there is likelihood that the Appellant would be expected to refund the said sum.

Considering all the foregoing I am of the view that this court ought to strike a balance to protect the interests of both parties. The Court has also taken into account that the Appellant is willing to give

security for the entire decretal sum.

Doing my best, I do hereby grant prayer 3 of the Chamber Summons dated 23rd December, 2005 ON CONDITION that the Appellant pays a sum of Kshs. 300,000/= out of the decretal sum to the Respondent within a period of 30 days from the date hereof. The Appellant shall deposit the balance of the decretal sum of Kshs. 356,000/= together with any agreed or taxed costs in a joint interest earning account to be held by the Advocates for the Appellant and the Respondent pending the hearing and determination of the Appeal. The sum of Kshs. 356,000/= shall be paid or deposited into such an account within the next 45 days from the date hereof. The agreed or taxed costs shall be paid or deposited into the said account within 15 days of such agreement or taxation. Costs of this application shall be in the appeal.

Dated and delivered at Eldoret this 21st day of December 2006.

MOHAMMED K. IBRAHIM

JUDGE