

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Appeal 90 of 2006

HENKEL CHEMICALS APPELLANT

VERSUS

PHILIP KIPROP SAINA RESPONDENT

RULING

The Applicant has brought this application under inter alia, the provisions of Order XLI, rule 4 seeking an order of stay of execution of the judgment delivered in Civil Suit No. Eldoret CMCC No. 1447 of 2004 on 13th June, 2006 together with the decree and orders consequential therefrom pending the hearing and determination of Eldoret High Court Civil Appeal No. 90 of 2006.

The Chief Magistrate's Court in the aforesaid suit delivered its judgment on 13th June, 2006 in favour of the Respondent awarding him a sum of Kshs. 186,000/= plus costs. The costs were subsequently assessed at Kshs. 28,965/=. The Applicant had filed an application for stay of execution in the Subordinate Court but it was struck out.

The Applicant claims that the appeal would be rendered nugatory unless the stay sought is granted. That it will suffer irreparable loss and damage. It is alleged that the Plaintiff is a man of straw and may not be in a position to refund the decretal sum in the event the appeal is successful. The Applicant submitted that it is willing to offer security for the satisfaction of the decree by depositing the entire decretal sum in a joint interest earning account or in to court.

On his part, the Respondent asserts that it is entitled to the fruits of judgment and the application is intended to delay his enjoyment thereof. The Respondent has offered to accept one half of the decretal sum be withheld and deposited in a joint account with a reputable bank pending the hearing of the appeal. The other half be released to the Respondent.

I have considered the application and the rival submissions. I have also considered the provisions of the law. During the hearing of the application, it came out that the Respondent sued as Administrator for the Estate of his father who died in a motor accident which gave rise to the suit in the Subordinate Court. The Respondent did not file a replying affidavit and the court is unable to determine his foresaid status or that of the Estate of the deceased. What is clear is that it is possible that any amounts of the decretal sums which may be paid out may be distributable to the beneficiaries of the Estate of the deceased. The Respondent ought to have assisted the court by supplying all material facts about the Estate's financial status.

In the circumstances, the apprehensions of the Applicant is understandable. In fairness to both parties, I am of the view that the entire decretal sum ought to be secured and held in an escrow or joint trust account in the names of the Advocates for the parties.

I do hereby therefore grant prayer (b) of the application dated 28th November, 2006 ON CONDITION that the Applicant deposits the entire decretal sums including the costs in a joint escrow account to be opened in the joint names of the parties' Advocates with the Housing Finance Company of Kenya (HFCK). The Applicant shall deposit the said sums into the said joint account within 21 days of the opening of the joint account. The said joint account shall be opened on or before 15th January, 2007 considering the onset of the Holidays. Liberty to apply is given to both parties. Costs of the application

shall be in the appeal.

Orders accordingly.

Dated and delivered at Eldoret this 19th day of December, 2006.

M. K. IBRAHIM

JUDGE