

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 329 of 2003

AWO SHARIFF MOHAMMED T/A

MOHAMMED INVESTMENTPLAINTIFF

VERSUS

ABDULKADIR SHARIFF ABDIRAHIM.....1st DEFENDANT

ABDINASIR ABDIRAHIM MOHAMMED T/A

A. S. ABDIRAHIM ENTERPRISES2ND DEFENDANT

RULING

Judgement was entered against the 1st Defendant on 16th February, 2006. Judgement amount was US\$200,000 and Kshs.800,000/= with interest at court rate from 5th June, 2003 until payment in full. The 1st Defendant filed a notice of appeal on 17th February, 2006. The 1st Defendant has now brought before court a Notice of Motion dated 2nd May, 2006. That Notice of Motion is brought under Order XLI Rule 4 of the Civil Procedure Rules. It seeks stay of the decree issued by this court on 16th February, 2006 and further seeks stay of all further proceedings pending the hearing and determination of the intended appeal. In granting stay of execution the court is governed by Order XLI Rule 4(2) of the Civil Procedure Rules. Deciding on such an application the court is guided by the principle that the applicant should show that he will suffer substantial loss unless stay is granted. Such an application also should be made without delay and the Applicant should offer security. As a whole in considering the submissions brought before court and affidavit evidence the Plaintiff and 1st Defendant the parties have engaged themselves in accusations of financial want of each other by bringing various issues before court. The 1st Defendant in support of the application stated that the Plaintiff has various debts with banks and various institutions and stated that the Plaintiff's properties have been sold by those banks in exercise of their statutory power of sale and that the banks were now following the Plaintiff for the shortfall of those sales. He concluded that if he is ordered to pay the Plaintiff the amount of the decree which he has assessed at Kshs.16 million he would suffer substantial loss because the Plaintiff would not be in a position to refund the same. He described himself as a businessman, who previously was a civil servant but retired in July, 2004. It ought to be noted that the Plaintiff and 1st Defendant know each other well and indeed that they have close relationship through marriage. In further affidavit by the 1st Defendant, 1st Defendant stated that the Plaintiff's only means life of livelihood in form of a company had been the subject of a Winding Up cause in this court and that at interlocutory stage the court had placed the Company under Receiver Manager. This is the case of **Feisal Shariff Mohammed v Al Noor Exhibitions Ltd. Winding up Cause No.5 of 2005.**

The Plaintiff in response to the 1st Defendant's affidavit evidence denied having any financial problems with the bank. He stated that he recently borrowed from Barclays Bank Kenya Ltd. Kshs.35 million. He denied that he had at all transferred any of his properties to his relatives. He described himself as a

prominent transporter and a businessman, a devoted family man conscious of his private and public duties as a citizen of the Republic of Kenya. He further stated that he had no unsettled decree against him in favour of anyone. The Plaintiff then went through a category of list of assets that he owns which would be sufficient to repay the decretal amount if the appeal of the 1st Defendant was successful. The Plaintiff stated that the properties that the 1st Defendant has stated that he owns at least two of those properties are listed in the 'Ndung'u report' as having been obtained illegally and that there is every likelihood that the Government will revoke those titles. He concluded that the only immovable property that the 1st Defendant owns would not be able to fetch the amount of the decree herein.

I have considered the rival arguments presented before the court, the affidavit evidence and oral submissions. It is sometimes difficult merely on affidavit evidence to know where the truth lies in a case such as this one where there are sharp differences on what each party owns and what debts each party might have. In reaching a decision on the application before court it is important that I would balance the opposing rights the first being that the Plaintiff needs to have an assurance that he would not be deprived of the fruits of his judgement. On the other side the 1st Defendant needs also to be assured that if he does appeal he would be able to recover the amount he might pay in satisfaction of the decree herein. Having followed the arguments of the parties my understanding of 1st defendant is that he is not saying that he does not have the amount of the decree but that rather his concern is that he may not have a return of his money if his appeal does succeed. If that be the case in order to protect his position and in order to give assurance to the Plaintiff the court is of the view that the amount stated in the 1st Defendant/Applicant as being the amount of the decree, ought to be deposited in interest earning account in the names of the advocates representing the Plaintiff and 1st Defendant. Before concluding this ruling it is important to make a finding on the Plaintiff's argument that the 1st Defendant's application is *res judicata*. The 1st Defendant had on 27th February, 2006 made an application to stay garnishee proceedings and to set aside the order of Garnishee Nisi. That application was heard and a ruling was delivered by the Honourable Mr. Justice Ransley (now retired) and his ruling was dated 9th March, 2006. In that ruling the Judge set aside one of the orders granted in the garnishee proceedings and dismissed the other prayers of the 1st Defendant. I have considered that application and the Judge's ruling and I do not find that it makes the present application *res judicata*. That application dealt only with the issue of garnishee proceedings and not the issue of execution of the decree. I therefore, reject the argument presented by the Plaintiff's counsel in that regard. The court therefore, will order as follows:-

- (1) The Defendant is hereby granted stay of execution of the decree herein pending appeal.**
- (2) Such stay is conditional on the 1st Defendant opening a joint account in the names of the advocates representing the Plaintiff and the 1st Defendant and depositing in the said account Kshs.16 million within 2 (two) weeks from this date hereof.**
- (3) In default of condition No.(2) above the stay granted in (1) above shall be discharged.**
- (4) For the avoidance of doubt the garnishee proceedings pending herein shall be suspended and if condition No. (2) is not fulfilled by the 1st Defendant the same can proceed to be entertained by this court.**
- (5) The costs of the Notice of Motion dated 2nd May, 2006 shall abide with the pending appeal of the 1st Defendant**

MARY KASANGO

JUDGE

Dated and delivered this 15th day of December, 2006.

MARY KASANGO

JUDGE