

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

Civil Appeal 218 of 2004

CAPITAL FISH (K) LTD APPELLANT

VERSUS

WILLIAM MOSE GECHIKO RESPONDENT

RULING

The applicant was the defendant in Kisii CM CC.NO.26 OF 2003 seeks court to issue a stay of execution of that court decree until the hearing and determination of this appeal.

Court was told that after judgment was entered by the lower court applicant applied for stay in that court. The lower court granted the stay on 29/9/04 on condition that the decretal amount be deposited in an interest earning account in the joint names of Advocates of both parties. Applicant stated that he was not able to deposit the money within the 21 days given because his insurer released the Cheque late and the Respondents advocate rejected the cheque when sent to him. He said this application was brought without undue delay and that the applicant has an arguable appeal. It was also deponed and submitted that the respondent is a man of straw and if paid and appeal succeeds he cannot refund the money.

Application was opposed by Mr. Ochillo who submitted that the applicant should have gone to the lower court and ask it to extend time within which he could comply with the order. He did not do so and as such he ignored a lawful court order.

Mr. Ochillo also took issue with the affidavit sworn by counsel saying that he should not have sworn on facts. The applicant should have sworn the affidavit. Lastly it was submitted that the appeal has no chances of success as the decree was based on Cap 236 L. O. K. He referred the court to S.25(1) of that Act.

I have carefully considered the application and the submissions.

Order 44 rule 4(1) CPR clearly provides that a party can make an application for stay in an appellate court even if he had made another in the court which made the decree appealed against and notwithstanding if his application in that lower court was allowed or rejected. The applicant therefore had a right to make this application even if he had been granted an order of stay in the lower court which he did not comply with. He explained why he did not comply with the lower court's order. He told court that his insurer was late in releasing the cheque. This is a plausible reason which was not challenged. This application was made soon after that.

As for the issue of whether the appeal is arguable. I am satisfied this was so. The applicant disputes the award given and if S.25 (1) of Cap 236 is applicable is an issue to be canvassed during the appeal.

Award was for shs.93,000/=. This is not very little money in the light that the Respondent even in his evidence in the lower court did not say what he do. It is doubtful if he can be able to refund the amount if it is paid to him and the appeal succeeds.

In the circumstances I find application is reasonable. I allow the same and order that the stay of execution of Kisii CM CC No.26 of 2003 until the appeal is heard and determined on condition that the applicant do deposit the decretal amount and costs, if already assessed, into an interest earning account into the joint names of both counsels within 15 days.

The applicant will also pay costs of this application.

Dated 13th day of April 2005

KABURU BAUNI

JUDGE

cc. Mobisa

Mr. Soire H/B for Mr. Nyakundi for Applicant.

N/A for Respondent.