



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION – MILIMANI
CIVIL CASE NO. 1857 OF 2001**

GURSHARAN SINGH BRAR

T/A KINAL SAW MILLS :::PLAINTIFF

VERSUS

MATHEW OSEKO ::: DEFENDANT

RULING

This Chamber Summons is expressed to have been brought under the provisions of Order XXI Rules, 18,22 and 91 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act Cap.21 and all other enabling provisions of the Law. It primarily seeks stay of execution of the order made on 9th May 2005 pending the hearing and determination of an intended appeal and the Court of Appeal Civil Application Number Nai 48 of 2005 (26/05 UR). The application is supported by an affidavit by the Applicant Mathew Oseko and is based on the following main grounds that:

- 1) The Applicant has filed an appeal against an order of this Court setting aside a judgment against him on terms.**
- 2) The Court of Appeal varied the terms set by this Court.**
- 3) The Applicant was unable to comply with the terms set by the Court of Appeal and has sought extension of time to comply with the same in the Court of Appeal Civil Application Number 48 of 2005 (26/05 UR)**
- 4) The said application and appeal are pending hearing before the Court of Appeal and unless a stay is granted the said Application and appeal will be rendered nugatory.**
- 5) The Applicant has appealed against the order of 9th May 2005 declining the application for stay of execution.**
- 6) Unless a stay is granted the Applicant will suffer substantial loss and damage.**

Although the Applicant has not invoked Order 41 Rule 4 of the Civil Procedure Rules, it is clear that that is the only way he could have invoked the Court’s jurisdiction. I will therefore consider the Applicant’s application as having been made under the said provisions of the Civil Procedure Rules.

The grounds upon which an order of stay of execution can be made pending an appeal to the Court of Appeal are stated in the said Order 41, Rule 4(2) of the Civil Procedure Rules. They are that:-

1) The Applicant must establish a sufficient cause;

2) The Court must be satisfied that substantial loss would ensure from a refusal to grant stay;

3) The Applicant must furnish security;

It is also a condition for the grant of stay under these provisions that the application must be made without unreasonable delay. The Applicant has sought stay of execution of the order against him three times in this Court and once in the Court of Appeal. On 26th October, 2004, I allowed the Applicant's application to set aside an ex-parte judgment entered against him and all consequential orders on condition that he deposits in Court Kshs 1,668,551.25 within 45 days from the date of the ruling. He has appealed against the said ruling. Pending the said appeal the Court of Appeal granted him stay on condition that he deposits Kshs 1.0 million within 45 days of the ruling given on 17th December 2004. He did not comply. He again applied for stay of execution to this Court which application was dismissed on 9th May 2005. He is back again and has repeated the same grounds save for the statement regarding an intended appeal against the ruling of 9th May 2005. In my view the reference to the intended appeal is not serious and its primary purpose is to form the basis for the application under Order 41, Rule 4 of the Civil Procedure Rules.

Despite the view I have taken of the intended appeal, I have considered the material that has been placed before me and I am afraid the only condition the Applicant has satisfied under Order 41 Rule (4) (2) is that he has made this application without unreasonable delay. He has not shown that he will suffer substantial loss or that if he succeeded on appeal the Respondent would not refund any payment made by him in the threatened execution. He has of course not attempted to show that he can furnish security for the due performance of the decree. It is therefore clear that all the requirements for the grant of stay of execution pending appeal have not been met.

I have however, been told from the bar that the Applicant is now ready to comply with the order of the Court of Appeal regarding the deposit of Kshs 1.0 million and all that remains is the Court of Appeal's decision on his application to enlarge the time granted on 17th December, 2004 regarding the deposit of the Kshs 1.0 million. On this basis I will grant a limited stay of execution. The order of this Court therefore is that the Applicant is granted a stay of execution pending the hearing and determinations of the Court of Appeal Civil Application Number Nai 48 of 2005 (26/05 UR). This stay is granted on condition that the deposit ordered by the Court of Appeal is indeed made on or before the 25th day of May 2005 failing which this application will stand dismissed.

The Respondent shall have the costs of this application.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2005

F. AZANGALALA

JUDGE