



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL 141 OF 2005**

**FREIGHT IN TIME LIMITED.....APPELLANT**

**VERSUS**

**IMAGE APPARELS LIMITED.....RESPONDENT**

**RULING**

This is an application stated to be brought under Sections 3A and 63 of the Civil Procedure Act (Cap 21), Order XLI Rules 4 (1) and 6 and Order L Rule 1 of the Civil Procedure Rules (hereinafter referred as “the Rules”) and enabling powers conferred by the law. In it, the Appellant seeks for stay of execution of the orders of the lower court made on 9th March, 2005 pending the hearing and determination of its appeal. The matters leading to the application are unpleasant. It is difficult to say who is to blame for that situation but it is extremely terrible in this day and age that court files and documents should disappear causing great inconvenience and grief to litigants and the process of justice. I will state the brief history of the case.

The Appellant instituted an action in the lower court claiming Judgment for Kshs.2,507,063/=. It is admitted in an affidavit sworn on 8th December, 2004 by one Ramesh Shah, one of the Directors of the Respondent Company, that Summons to Enter Appearance were served upon the Respondent “around the month of August/September 2004”. There was no appearance filed and it appears that the Appellant then applied for Judgment in default of the appearance. For some reason which is not extremely clear, the request for Judgment was refused. Again, it is also not clear whether things changed but the next thing to happen was that the Appellant put execution into gear which went as far as attachment of some goods. The Respondent then made an application to the lower court seeking several orders but the one relevant to the decision of the application before me was an application for an order for the release of the attached goods. That application was successful and it is the one which prompted this appeal.

The thing that makes this case unpleasant is the fact that at some stage, the original record of the lower court appears to have been lost. There is no indication that the same has ever been traced. So it was extremely difficult to make a proper decision in the circumstances especially when the contending parties took positions that were diametrically opposed on the main issue in controversy, namely whether there was or there was no decree upon which the execution in issue was based. That is indeed the issue which will be canvassed on the hearing of the appeal and the less I say on it at this stage the better lest I prejudice the appeal.

Presently, my task is to decide whether this is a proper case in which to stay the order of the lower court which is the subject of the appeal pending its hearing and determination.

The provisions of the law which guide the jurisdiction of this court in deciding an application for stay of execution pending appeal is found in Order XLI Rule 4 (2) of the Rules. That Rule provides as follows:

***“No order for stay of execution shall be made under sub rule (1) unless –***

***(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and***

***(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”***

The main reason why the Appellant seeks to have the order of the lower court stayed is because of an allegation that there was risk that the Respondent intended to move out of the jurisdiction of this court. However, there was no concrete evidence to show this. The order of the lower court appealed from only required the release of the attached goods and if the Appellant were to succeed in its appeal, there appears to be nothing which would prevent it from attaching those goods again. I do not therefore think that the Appellant risks to incur substantial loss if the order for stay is refused. On this finding alone, I see no reason to go into the aspect of security or any other matter.

I, therefore, dismiss the Appellant’s application dated 14th March, 2005 with costs.

Dated and delivered at Nairobi this 15th day of June, 2005.

**ALNASHIR VISRAM**

**JUDGE**