

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

Civil Appeal 38 of 2002

AFRICAN HIGHLANDS & PRODUCE CO. LTD.....APPELLANT

VERSUS

COLLINS MOSETI ONTWEKA.....RESPONDENT

RULING

On the 29th of April 2005, this court dismissed the appeal filed by the appellant herein and upheld the decision of the trial magistrate which found the appellant liable to the respondent for breach of statutory duty of care and for negligence. The appellant was consequently ordered to pay general and special damages awarded to the respondent. The appellant was aggrieved by the said judgment of this court, and has duly filed a notice of appeal signifying its intention to file an appeal against the said judgment of this court to the Court of Appeal. The appellant has now filed a notice of motion under **Order XLI Rule 4 of the Civil Procedure Rules** seeking the grant of stay of execution of the decree of this court pending the hearing and determination of the appeal intended to be filed in the Court of Appeal.

The grounds in support of the application are stated on the face of the application. Three of the grounds stated are of particular relevance to this application. They are that; firstly, the respondent is a man of straw and would not be in a position to refund the decretal sum in the event that the appeal filed would be successful. Secondly, that the appeal would be rendered nugatory and the appellant prejudiced if stay of execution is not granted and thirdly that the decretal sum has been already deposited in a joint interest earning account pending the outcome of the appeal which has now already been decided. The appellant urged the court to let the said amount remain deposited as security pending the hearing and the determination of the appeal to be filed in the Court of Appeal. The application is supported by the annexed affidavits of C. K. Kibichiy and R. L. Kamau. The application is opposed. Charles O. Orayo has filed a replying affidavit opposing the said application for stay of execution. In essence, Mr Orayo has deponed that the appellant was using legal machinery to deny the respondent from enjoying the fruits of his judgment. He further deponed that the appellant had not adduced sufficient or any satisfactory reason that would enable this court grant it stay of execution pending the hearing and determination of the said appeal intended to be filed in the Court of Appeal.

At the hearing of the application, Mr Kamau, Learned Counsel for the appellant and Mr Orayo, Learned Counsel for the respondent basically reiterated the contents of the affidavits filed in support of their respective clients in their submissions. I have carefully considered the said submissions made. I have also read the pleadings filed by the parties to this application. The issue for determination by this court is whether the appellant has established that it is entitled to be granted stay of execution of the decree herein pending the hearing and determination of the appeal intended to be filed in the Court of Appeal.

Order XLI Rule 4(2) of the Civil Procedure Rules provides that: “No order for stay of execution shall be made under subrule(i) unless-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that 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.”

In the instant application, the appellant has argued that it would be unable to recover the decretal sum

if it succeeds on its appeal if the said decretal amount is paid to the respondent. The appellant submitted that the respondent was a man of straw. This submission by the appellant has not been seriously challenged by the respondent. Apart from stating that he was being denied a chance to enjoy the fruits of his judgment, the respondent has not stated that he would be in a position to refund the decretal sum were the appellant to be successful in the intended appeal to be filed in the Court of Appeal. I do hold that the appellant has established that it would suffer substantial loss if stay of execution is not granted. Its appeal would be rendered nugatory if stay is not granted.

Further, the respondent would not suffer any prejudice. The decretal sum ordered paid by the lower court is already deposited in an interest earning account in the joint names of the advocates for the appellant and the respondent. Since the appellant is challenging the finding of this court on liability, it is only fair that it be allowed to ventilate its appeal before the highest court in the land.

However I will order that the appellant deposits a further sum of Kshs 40,000/= in a joint interest earning account in the joint names of the advocates of the appellant and the respondent to cover further costs incurred on this appeal. For the reasons stated, I hereby issue the following orders:-

- (i) The decrees of this court and that of the lower court relating to the subject matter of this appeal are hereby stayed pending the hearing and determination of the intended appeal to be filed before the Court of Appeal.*
- (ii) The decretal sum ordered deposited in a joint interest earning account in the names of the advocates of the appellant and the respondent shall remain so deposited pending the hearing and determination of the intended appeal to be filed at the Court of Appeal.*
- (iii) The appellant shall deposit a further sum of Kshs 40,000/= in a joint interest earning account in the names of the appellant and the respondent being further security for costs pending the hearing and determination of the said appeal to be filed. The said further amount shall be deposited within twenty one (21) days of today's date in default thereof the stay of execution hereby granted shall lapse.*
- (iv) The respondent shall have the costs of the application.*

DATED at NAKURU this 22nd day of July 2005.

L. KIMARU

JUDGE