



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 368 of 2001

DR. DANIEL CHEBUTUK ROTICH.....1ST
PLAINTIFF

VERSUS

MORGAN KIMASET CHEBUTUK

(Minor suing through his father and next

friend DANIEL CHEBUTUK ROTICH).....2ND PLAINTIFF

RULING

This is an application for stay of execution pending the hearing and determination of an appeal. The applicant filed a notice of appeal on 4th May, 2005 but has not yet filed the memorandum of appeal.

The application was made on the grounds that the applicant stood to suffer substantial loss unless the order sought was granted. The applicant further stated that the application had been made without unreasonable delay and that it was ready and willing to furnish any security that the court may direct.

The application was supported by an affidavit sworn by Khalid Ali Jaffer Hassan, the applicant's Regional Manager, East Africa. He said that the respondents had threatened to levy execution of the decree herein.

The respondents had on 27th April, 2005 obtained judgment in their favour in the sum of Kshs.978,861/- plus interest and costs which had since been taxed at Kshs.202,125/-. Mr. Hassan deposed that if stay was not granted, the applicant would have to pay the entire decretal sum and that would adversely hamper the applicant's ability to discharge its onerous financial obligations and the applicant would suffer substantial loss because the respondents had no known tangible assets and if the appeal was successful, it would be difficult to recover the decretal sum. He also stated that the second respondent was a minor suing through the first respondent and in the event that the appeal succeeded, there was likelihood that the minor would not be in a position to repay. The deponent further stated that if execution was levied, the applicant would suffer substantial loss and prejudice because its business would be disrupted and its reputation in the Airline Sector adversely and permanently dented.

The respondent's counsel filed a replying affidavit and the first respondent filed a supplementary affidavit to his counsel's affidavit.

The first respondent stated that he was a senior lecturer and head of publishing and media studies department at Moi University and that he was a man of means, capable of refunding the decretal sum if he was so ordered. He said that his gross salary was about Kshs.110,000/- per month and enjoyed additional

staff and overtime allowance of about Kshs.50,000/- per month. He further stated that he was the chairman of a leading internet service provider, Kenyaweb.com as well as a shareholder in several local companies. He was also living in his own house at Eldoret and it was worth Kshs.2.5 million and also owned a pick up and a saloon car worth Kshs.600,000/- and Kshs.450,000/- respectively.

Mr. Gai for the respondents stated in his affidavit that on 27th April, 2005 when the court gave its judgment, the applicant prayed for stay of execution for a period of 30 days and the same was granted and a further stay for a similar period of time was granted by the taxing officer yet no appeal had been filed. He said that sixty days had lapsed from 5th May, 2005 when the notice of appeal was filed and no application had been made to extend the time for filing the intended appeal. He also deposed that the applicant was not likely to suffer substantial loss if the order sought was not granted as the applicant was an international organisation which operated world wide and its operations could not be adversely affected by paying the decretal amount as awarded to the respondents. Mr. Gai also stated that there had been inordinate delay of four months in filing the application for stay of execution and that delay had not been explained at all.

I have carefully considered the application before me, the affidavits filed and the submissions made by both counsel for parties herein. The court in considering an application such as the one before me, is guided by the provisions of Order XLI Rule 4(2) of the Civil Procedure Rules. The court has to consider whether there is sufficient cause to warrant a stay of execution, whether the applicant will suffer substantial loss if stay is not granted, whether there has been unreasonable delay in making the application and whether the applicant is willing and able to provide such security as the court may order; see ***HALAI & ANOTHER VS THORNTON & TURPIN*** (1963) LTD [1990] KLR 365.

The first issue which I have to consider is whether the applicant has satisfied this court that he is likely to suffer substantial loss unless the order is granted. The decretal amount is Kshs.1,327,276/- or thereabout. The applicant did not say that it is unable to pay that kind of money. It merely stated that the decretal sum was substantial and the balance of convenience weighed in favour of the applicant. The issue cannot be resolved on a balance of convenience as is the case when a court is considering an interlocutory injunction application and is in doubt as to whether the applicant has established a ***prima facie*** case with a likelihood of success or whether he will suffer irreparable loss. It is not enough for an applicant to merely state that it is likely to suffer substantial loss, it must make effort to demonstrate how the same is likely to occur. Disruption of business and loss of reputation can only be suffered if stay of execution was refused and the applicant refused to pay or became unable to pay and auctioneers had to move in to carry out execution. “***Substantial loss***” is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and the applicant is therefore forced to pay the decretal sum. An order requiring a poor judgment debtor to pay, say, Kshs.100,000/- may have very serious harmful consequences to him if he has to pay that amount whereas a different judgment debtor may easily pay a decretal sum of Kshs.1,000,000/- with little or no consequence to its operations.

It is doubtful whether the applicant’s operations would be severely affected if it paid the decretal amount. The applicant stated that the respondents may not be able to refund the decretal sum if it was paid to them and the appeal succeeded. The first respondent denied that and swore an affidavit to prove that he was a man of means. All the documents that he attached to his affidavit were uncertified copies of the originals thereof. With respect to his property known as **ELDORET MUNICIPALITY/BLOCK 9/1546**, the first respondent did not attach a certificate of an official search and a valuation report thereof. These would have been necessary in proof of ownership and the value of the property. The same can also be said of the two motor vehicles which the first respondent referred to. Nothing was said of the second respondent who is a minor.

Mr. Gai argued that there was no valid appeal which had been filed because more than 60 days had lapsed from the date when the said notice of appeal was filed and he sought to rely on the provision of Rule 81 of the Court of Appeal Rules. That argument can only be raised in the Court of Appeal. From the provisions of Order XLI Rule 4(4), it is clear that for the purposes of Rule 4, an appeal to the Court of Appeal is deemed to have been filed when under the rules of that court notice of appeal has been given.

The decree herein was issued on 7th June, 2005 and ruling on taxation of costs was delivered on 5th August, 2005. The application for stay of execution was filed on 30th August, 2005. In my view, there was no inordinate delay in filing this application.

The applicant's counsel told the court that his client was prepared to deposit the decretal sum in an interest earning account in the joint names of the advocates or deposit the same in court. Alternatively, he stated that the applicant could provide a bank guarantee or an insurance bond from a reputable insurance company. On the other hand, the respondents' counsel submitted that if the court was inclined to grant a stay, it should order that a substantial portion of the decretal sum be paid to the respondents.

Taking all the relevant issues into consideration, I am inclined to grant conditional stay of execution on the following terms:-

(a) That the applicant pays to the first respondent a sum of Kshs.250,000/- within the next ten (10) days from the date hereof.

(b) That the balance of the decretal sum be deposited in an interest earning account in a reputable bank in the joint names of the advocates for the parties herein and the said deposit shall be made within fourteen (14) days from the date hereof.

The applicant shall bear the costs of this application.

DATED, SIGNED AND DELIVERED at Nakuru this 21st day of October, 2005.

D. MUSINGA

JUDGE

21/10/2005

Ruling delivered in the presence of Mr. Gai for the respondents and Mrs Wanderi holding brief for Mr. Kisaka for the applicant.

D. MUSINGA

JUDGE

21/10/2005