REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

Civil Case 2047 of 2000

WILFRED ODHIAMBO MUSINGO……..…....……PLAINTIFF

VERSUS

HABO AGENCIES LIMITED……..DEFENDANT

R U L I N G

This is an application by the Defendant which is expressed to have been brought pursuant to the provisions of Order 49 rule 5 of the Civil Procedure Rules, as read together with Section 3A of the Civil Procedure Act. The following are the prayers sought by the applicant:-

1. **THAT this application be certified urgent and be heard ex parte in the first instance.**

2. **THAT there be a stay of execution of decree herein pending the hearing and determination of the application.**

3. **THAT time in which the Defendant could have filed an appeal against the ruling and order of the Deputy Registrar (Mrs Meoli) given herein on 27th July 2005 be extended.**

4. **THAT the draft Memorandum of Appeal annexed hereto be deemed to be duly filed.**

5. **THAT the costs of this application be provided for**."

When canvassing the application, Mr. Keyonzo, advocate for the defendant informed the court that when the Plaintiff had caused a Notice To Show Cause to issue, in the process of execution, the defendant objected to the said Notice. It did so on the basis that there was a stay of execution pending the hearing and determination of an appeal which was pending before the Court of Appeal. However, the learned Deputy Registrar overruled the objection, on 27th July 2005.

But, it is the defendant's contention that the court did not make any formal ruling on the objection. Instead, the court is said to have adjourned the Notice To Show Cause to 22nd August 2005.

The defendant contends that when it commenced its submissions, (on 22nd August 2005), the court told it that the issue being raised had already been adjudicated upon. Consequently, the court held that the defendant had failed to show cause. That decision did not find favour with the defendant, and therefore it lodged an appeal within seven (7) days of 22nd August 2005.

As at the date of lodging the appeal, the defendant held the view that the ruling in contention, was the one made on 22nd August 2005. But, when the appeal came up for hearing on 6th September 2005, the Hon. Azangalala J. held that the ruling being appealed against was dated 27th July 2005; and not 22nd August 2005. Therefore, as the appeal had been filed late, and without leave of the court, it was struck out. Following the striking out of that appeal, the defendant now asks the court to grant it leave to appeal against the decision of the Deputy Registrar, dated 27th July 2005.

It is contended that the issue which is sought to be raised in the appeal is an important one. The point is that the High Court had granted an order for stay of execution pending the hearing and determination of the appeal before the Court of Appeal.

The first appeal was withdrawn by the appellant, who is the defendant herein. But the said defendant also says that it did obtain leave to file a new appeal, and that the said new appeal was Civil Appeal No. 124 of 2004. In the meantime, one-half of the decretal amount was to be held in a joint account by the advocates of the two parties in this case.

The defendant says that notwithstanding the withdrawal or striking out of the earlier appeal, the order for stay of execution did not lapse, as there is now a new appeal, in place. It is the defendant's submission that the withdrawal or striking out of the earlier appeal was not a bar to this application, as the said earlier appeal had not been determined on merit.

In response to the application, the Plaintiff urged the court to dismiss the same, as it was founded on an affidavit based on falsehoods. The Plaintiff says that both parties did give their respective submissions on the objection which the defendant raised on 27th July 2005. The objection was in relation to the Notice To Show Cause, on the grounds that there still subsisted an order for stay of execution.

After giving due consideration to the said objection, the court is said to have made a ruling, in which it overruled the objection. At the time of the said ruling, Mr. Keyonzo advocate was present, on behalf of the defendant, whilst Mr. Tiego Advocate was present for the Plaintiff. In the circumstances, the Plaintiff expresses the view that the defendant's advocate must have heard the ruling. He therefore ought not to make an allegation, to the effect that he did not hear the ruling.

I have perused the record of the proceedings before the learned Deputy Registrar, Mrs Meoli, on 27th July 2005. It is evident that Mr. Keyonzo did raise an objection. His stated position was that there was a consent order for stay of execution pending appeal. The said order was conditional upon the payment of one-half of the decretal sum, and the defendant is said to have made the said payment. Therefore, as far as the defendant was concerned, the court ought not to allow the defendant to proceed with the process of execution.

At that time, the plaintiff pointed out that the appeal had been struck out on 8th December 2003. The defendant conceded that the appeal had been struck out, but insisted that the orders for stay were still in force.

In her considered ruling, the learned Deputy Registrar held that following the striking out of the appeal, the stay order lapsed. She then directed that the Notice To Show Cause would be heard on 11th August 2005.

The court records show that on 11th August 2005, the defendant's stated position was that the plaintiff should take the money which was held in the joint account;

"**If the plaintiff was of the view that the stay lapsed, he should have money paid to his client via an application, before trying to attach any assets**."

Whilst, the ruling by the Deputy Registrar is very clear indeed, there is no way that I can tell for sure, whether or not Mr. Keyonzo, advocate, heard it being delivered. He says that he did not, while Mr. Tiego

advocate says that the defendant's advocate would have only himself to blame, if he ignored the ruling.

To my mind, it is difficult to envisage the advocate, Mr. Keyonzo, not hearing the ruling. Had it perhaps been a very long ruling, one might be inclined to believe that the advocate might have missed out on some aspects of it. But the ruling by Mrs Meoli, on 27th July 2005, was not long. Secondly, it was directly on the only issue which had been raised by the defendant. One would therefore expect counsel to have been keen enough to receive the verdict thereon.

However, Mr. Keyonzo has sworn an affidavit in which he deposes that he did not hear the learned Deputy Registrar deliver a formal ruling on 27th July 2005. In the circumstances, even though I might have some doubts about what was said in the said affidavit, there is no basis in law or fact upon which I can conclude that Mr. Keyonzo did hear the said ruling. Furthermore, I hold the view that if Mr. Keyonzo actually did hear the verdict, it would have been strange for him to have made the statement he made on 11th August 2005, in the words cited in excerpt above. Why would he have been talking of what the Plaintiff's belief was, in relation to the question of the order for stay, if indeed he had already heard the court make a decision on the issue?

Mr. Tiego, advocate submitted that the defendant should have asked the learned Deputy Registrar, on 11th August 2005, to give it time to appeal against the ruling of 27th July 2005. Instead, the defendant is said to have attempted to show cause why the plaintiff should not be allowed to attach its assets.

It is true that the defendant did attempt to show cause why its assets should not be attached. But should it have asked for time to appeal against the ruling of 27th July 2005?

In my considered view, if the defendant did ask the court for time to appeal against the decision made on 27th July 2005, that would imply that its advocate was fully aware of the said ruling. Yet, the said advocate has already told the court that he did not hear the ruling being delivered. His explanation was that the learned Deputy Registrar had only indicated that she shared the views which had been expressed by the plaintiff's advocate. That explanation, in the affidavit of the defendant's advocate is consistent with the position he has taken in this mater.

The next point taken up by the plaintiff was that the affidavit of Mr. Keyonzo was fatally defective, on the ground he did not depose that he had authority to swear it.

Although it is true that the said affidavit does not contain an averment that the deponent thereof did have the requisite authority to swear it, the plaintiff did not take up an objection to the said affidavit as a preliminary issue. Instead, the plaintiff first sought to disprove the contents of the affidavit, as is clear from the contention that it is founded on falsehoods. Having chosen that route, I hold the view that the plaintiff has decided to challenge the application on a substantive basis, rather than on technicalities.

It is my considered view that every party is entitled to challenge the application by any other party, in such manner as he deems appropriate. Thus, a respondent could dwell on the technicalities or alternatively deal with the substance of the application. Of course, the respondent is not obliged to choose between technicalities and substance. He might oppose the application on the basis of both technicality and substance. But, if he should choose to dwell on technicalities, which may well determine the application, it is best that the said issue be taken up as a preliminary objection.

If I were to strike out the affidavit of Mr. Keyonzo advocate, as I have been invited to do, by the plaintiff, it would imply that it would not be available to the applicant. Similarly, the said affidavit would not be available for criticism by the plaintiff. Yet, as I have already said herein, the plaintiff begun his submissions by seeking to disprove the contents of the said affidavit. In the circumstances, although the affidavit may otherwise have been amenable to being struck out, I decline to strike out. This decision is informed by the provisions of Order 18 rule 7 of the Civil Procedure Rules, which reads as follows:-

"**The court may receive any affidavit sworn for the purpose of being used in any suit**

notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in form thereof."

The other point taken by the plaintiff was that, in any event the defendant could only have objected to the Notice To Show Cause by way of a Notice of Motion. Having failed to do so, the plaintiff is said to have no legal basis for challenging the Notice To Show Cause now.

On that issue, I choose to express no views whatsoever. I believe that any views that I express on that issue may make it awkward for the judge who will ultimately hear and determine the defendant's appeal.

Now, I revert to the orders sought by the defendant. First it seeks an order for stay of execution "**pending the hearing and**

determination of this application."

In other words, the very moment the court will have heard and determined the application dated 27th September 2005, there would be no orders for stay of execution. Therefore, even if I were to grant prayer 2, as prayed, it would lapse, as soon as I finished reading this ruling. As, on 28th October 2005, I had already given an order staying execution until today, I hold that there is no need for the court to grant another order whose purport and effect would be the same as that which has already been given.

Meanwhile, as regards prayer 3, I hold the considered view that the issue sought to be canvassed in the intended appeal is an important point of law. In other words, parties ought to be told, in no uncertain terms, whether or not an order for stay of execution lapses when an appeal is struck out, notwithstanding the fact that subsequent to the striking out, the applicant filed a new appeal.

But, then again, has a new appeal been filed yet? The defendant says it has been filed. However, even though it says that a Memorandum of Appeal was annexed to the application, none was so annexed. That omission attests to the sloppy manner in which counsel appears to have treated this application. But, I nonetheless find that the point of law needs to be addressed by an appellate court. It is only for that reason that I deemed it prudent to extend the time for the defendant to file its appeal against the Ruling by the learned Deputy Registrar, Mrs Meoli, on 27th July 2007. Accordingly, the defendant is hereby directed to file and serve its Memorandum of Appeal within the next TEN (10) days.

In the meantime, in the light of the plaintiff's application dated 30th September 2005, I have noted that on 11th August 2005, the defendant was not averse to having the money held in the joint account at Housing Finance Company of Kenya Limited, released to the plaintiff. It is therefore understandable why the defendant did not put up a spirited fight against the plaintiff's application. I therefore direct that the proceeds of the Fixed Deposit Account No. 300-0002655, in the name of "**Asige Keverenge Anyanzwa AND Ogonji & Tiego Advocates**"ousiH be released forthwith to the plaintiff. However, the plaintiff is required to execute and file in court, within the next SEVEN (7) days, an undertaking to repay the said sums, to the defendant, in the event that ultimately, the court should hold that the defendant was not liable to the plaintiff.

The costs of the applications dated 27th September 2005 and 30th September 2005 are awarded to the plaintiff. This is because the plaintiff's application was successful. And, whilst the defendant's application was also partially successful, the need for extension of time to lodge an appeal was occasioned by the failure of the defendant's advocate to hear the ruling when it was first delivered by the court.

Dated and Delivered at Nairobi this 24th day of November 2005.

FRED A. OCHIENG

JUDGE