



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 268 OF 1995

SHAMSHUDIN MITHOOWANI PLAINTIFF

Versus

AVON MARKETING SERVICES “K” LTD. 1ST DEFENDANT

AVON RUBBER COMPANY (K) LTD. 2ND DEFENDANT

RULING

By a Notice of Motion dated the 8th December 2003 the defendants (Applicants) have applied under Order 41 Rule 4(1) of the Civil Procedure Rules for stay of execution pending appeal. In the same Notice of Motion the Applicants have **alternatively** applied under order 20 Rule 11 for payment of the decretal sum by monthly instalments of Sh. 200,000/=. The Notice of Motion is supported by the affidavit of Paul Mutunga, the financial accountant of the Applicants.

The judgment sought to be appealed against was given by Justice Ouna on the **28th March 2003** but left the issue of **“the exact figures to be worked out by the Deputy Registrar and the parties”**. The Deputy Registrar worked out the figures on the 9th May 2003. For an application for stay of execution under Order 41 to succeed the applicant has to:-

1. Show the intention to appeal by filing a Notice of Appeal in accordance with the Court of Appeal Rules.
2. Show sufficient cause for granting stay and this includes showing that the appeal will be rendered nugatory if stay is not granted
3. Make the application without unreasonable delay; and 4. provide security for the due performance of the decree if the appeal is ultimately dismissed.

Rule 74 of the Court of Appeal Rules requires that a party wishing to appeal against any decision of the High Court has to file a Notice of Appeal within 14 days. In this case the Applicants were supposed to file the Notice of Appeal by the 11th April 2003. They filed it on 16th April 2003. Mr. Jengo for the Applicants argued that the judgment of the court cannot be said to have been delivered on the 28th March 2003 as the figures were not worked out by the Deputy Registrar until the 9th May 2003. I do not accept this argument for two reasons. One, if that was the case then the Notice of Appeal should have been filed after 9th May 2003. Secondly, the Applicants, according to their Notice of Appeal intent to appeal “against the whole” judgment of Justice Ouna “given on the 28th day of March 2003” and not against the figures as worked out by the Deputy Registrar. For these reasons I find that the Applicants have not given a Notice of Appeal under the Court of Appeal Rules as required by Order 41 Rule 4(4) of the Civil Procedure Rules.

This application has also been filed after unreasonable delay. Judgment was delivered on the 28th March 2003 and the figures worked out on 9th May 2003. This application was filed on 15th December 2003. The Applicants have not given any explanation at all for this delay.

As regards security I find the Applicants argument to be selfdefeating. This is what is stated in the affidavit sworn by Paul Mutunga in support of the application:-

“12 THAT the defendants are willing to provide security by sustaining the prohibitory orders against the transfer of their assets already obtained by the plaintiff pending the hearing and determination of the appeal.

“THAT the aforesaid parcels of land are by themselves mortgaged and or charged to various financial institutions as per the attached copies of correspondence ...”

This is not the kind of security a serious applicant seeking the exercise of the courts discretion in his favour, offers.

On substantial loss or the appeal being rendered nugatory if stay is not granted, the applicants were fairly economical in their averments. They were content with their Advocates' submission, totally unsupported by any evidence or details, that if they pay the decretal sum, now amounting to over Sh. 2,000,000/=, their manufacturing business will collapse and the clarion averment that if stay is not granted **“the defendants will not only suffer substantial loss but [that] the same will also be irreparable”**.

I find that the Applicants are not serious with their application for stay and I dismiss it with costs.

I will now consider the alternative application for payment by instalments. In the case of **Alidina Vs Alidina [1961] E.A. 565** in which an application for payment by instalments was made under similar provisions like our Order 20 Rule 11 of the Civil procedure Rules, Law J (as he then was) said this at page 566:-“

... the courts discretion to order payment of the decretal amount by instalments is one which must be exercised in a judicial and not an arbitrary manner. ... the powers given to the court should be exercised with a due consideration for the interests of the creditor as well as those of the debtor”.

On the same page Justice Law further stated:

“The onus is on the defendant to show that he is entitled to indulgence under this rule. It is for the defendant to show sufficient cause for indulgence being shown to him ...”

The matters which should be considered by a court in deciding whether or not “sufficient reason” exists are:

- (a) the circumstances under which the debt was contracted,
- (b) the conduct of the debtor,
- (c) the financial position, and

(d) the bona fides in offering to pay a fair proportion of the debt at once.

In this case the Applicants have applied that **“this court be pleased to order a stay of execution of the judgment herein to allow the defendant to settle the decretal amount with monthly instalments of Sh. 200,000/= without further interest till payment in full.”**

If they are forced to pay the whole sum at once, the Applicants argued, their business will collapse or go under. They did not give their financial position for consideration by the court. They have however paid Sh. 650,000/= to the plaintiff as a sign of good faith on their part. I have considered that. I have also considered the interests of the plaintiff decree holder. This is a claim for terminal benefits in respect of employment which was terminated several years ago. If I allow the applicants to pay by monthly instalments of Sh. 200,000/= it will take about a year to pay the whole sum. That will not be fair to the plaintiff.

The Applicants want me to order a waiver of further interest on the balance of the decretal sum. They have not given me any basis for that prayer. They are not able or ready to pay the decretal sum at once and yet they do not want to pay further interest. They cannot have their cake and eat it. I reject that prayer. To be fair to both parties, I grant the alternative application to pay by instalments and order that the Applicant shall pay the balance of the decretal amount with interest thereon by monthly instalments of Sh. 500,000/= with effect from the 30th January 2004 and thereafter on the 30th day of each succeeding month at court rates until payment in full and final settlement is made with the usual default clause.

In the result I dismiss the Applicants application for stay of execution pending appeal. I however allow the alternative application for payment by instalments as stated herein above. The plaintiff shall have the costs of this application.

Dated and delivered this 15th day of January 2004.

D.K. Maraga

Ag. JUDGE