



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO 168 OF 2004**

**AMERICAN LIFE INSURANCE CO. (K) LTD ..... APPELLANT**

**VERSUS**

**DAVID OYATTA ..... RESPONDENT**

**RULING**

This is an application under Order XLI Rule 4 of the Civil Procedure Rules (hereinafter referred to as “the Rules”). In it, the Appellant seeks to stay the proceedings in RMCC No 1329 of 2003 pending the hearing and determination of this appeal.

The matters leading to the application are straightforward. The Respondent filed the suit in the Lower Court seeking Judgment for Kshs.904,000/= against the Appellant. He also sought interest on that sum and costs. The Appellant entered appearance and filed defence to the action. Later, the Appellant applied to amend its defence. Its application was rejected by the Lower Court. The Appellant was aggrieved by the decision of the Lower Court and appealed to this court, hence this appeal. In the meantime, the Appellant filed an application in the Lower Court seeking the same order it now seeks before me. That application was also refused.

At the hearing of the application, Mr. Saende, for the Appellant, argued that if the proceedings in the Lower Court were not stayed and this appeal succeeded judicial time would have been wasted. He referred me to two cases of this Court. In the first case, that is, ***Commerce Bank Ltd vs Kukopesha Ltd Milimani HCCC 336 of 2000***, the Hon. Mr. Justice Ibrahim in dealing with a similar application was of the view that if a stay of proceedings was not granted, the proposed appeal would be rendered nugatory. He allowed the application in the interests of justice. In another case, that is ***Shantilal Vaghisha & Another vs Nyanza Spin ning & Weaving Mills Ltd Milimani HCCC No 1675 of 2001*** the Honourable Mr. Justice Azangalala, also dealing with a similar application adopted the same view.

Mr. Ngatia, for the Respondent, was of a completely alternative view. He argued that a party making an application under Order XLI of the Rules must establish that he stands to suffer substantial loss if his application is refused. This, he said, had not been shown by the Appellant. He attacked the authorities cited by the Appellant’s Advocate on the ground that they had been decided contrary to the requirements of the Rules. In his view, the Judges of this Court who decided the cases I have mentioned were wrong in basing their decision on the ground of “interest of justice” rather than considering whether the Applicants in those cases has shown that they stood to suffer substantial loss if their applications for stay of proceedings were denied. In support of his argument, Mr. Ngatia relied on three Court of Appeal decisions, namely ***Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd & Another Civil Application No Nairobi 50 of 2001 (29 of 2001 UR)*** ; ***The Standard Ltd & Others vs Wilson Kalya &***

***Simon Lilan T/A Kalya & Co Advocates Civil Application No Nairobi 369 of 2001 (196 of 2001 UR) ; and David Mor ton Silverstein vs Atsango Chesoni Civil Application No Nairobi 189 of 2001*** . In those cases, the Court of Appeal in dealing with applications under Rule 5 (2) (b) of the Court of Appeal Rules for an injunction or an order of stay pending appeal stated that an Applicant for such an order must satisfy to the Court that:

**(a) his intended appeal is an arguable one. That is that his intended appeal is not frivolous; and**

**(b) unless the court grants an order for stay to him, his intended appeal, if successful, will be rendered nugatory.**

The Judges of Appeal held in those cases that such an Applicant is obliged to prove both requirements before he can obtain the order for injunction or stay.

In the three cases in the Court of appeal, the Applicants sought to stay proceedings in the superior court on the ground that if proceedings in the superior court went on that would render their appeals nugatory. In the **Standard** case, the Appellants sought to stay assessment of damages pending the hearing and determination of their appeal. In rejecting their Counsel’s submission that their appeal would be rendered nugatory the Court of Appeal said as follows:

***“If the High Court proceeds to assess damages ... that alone would not render the success of this appeal nugatory. If the appeal succeeded, the order to be made would automatically render the proceedings in the High Court unnecessary but an appropriate order for costs would remedy that.”***

That statement followed a similar one made by the Judges in the **Silverstein** case which itself followed the **Kenya Commercial Bank** case.

I have considered the rival submissions made by the Counsel and I take the following view of the matter.

Order XLI Rule 4 (1) of the Rules states as follows:

***“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order ...”***

Order XLI Rule 4 (2) sets out conditions which must be fulfilled to entitle one to an order for stay of execution. It is curious that that sub-rule does not apply the same conditions to an application for stay of proceedings pending appeal. What are the conditions for stay of execution pending appeal? To answer this question, I can do no more than reproduce the contents of Order XLI Rule 4 (2) of the Rules:

***“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 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.”***

As I have said earlier, it is curious that Order XLI of the Rules which deals generally with applications for stay of execution and proceedings did not apply the conditions for stay of execution to applications for stay of **proceedings**. I am unable to comprehend the wisdom of the Rules Committee for doing so but the fact that it did so cannot escape the mind of this court. Did they intend to set strict conditions for stay of execution? Yes, they did. Since they did not apply the same conditions to applications for stay of proceedings is any ones guess. In my view, they did not want to apply the same strict principles to applications for stay of proceedings. They left that to the wisdom of the court. It was, therefore, incorrect

for Mr. Ngatia to argue, as he did, that the Appellant before me was bound to show that he stood to suffer substantial loss. No such obligation was placed upon him by the Rules.

However, the fact that the Rules Committee left the matter of stay of proceedings to the court does not imply that the court will decide the same on caprice. The court is always bound to decide cases before it on sound judicial principles, and exercise its discretion judiciously.

I have considered the Rule under which the Court of Appeal decided the cases I have alluded to earlier. That Rule gives that court wide discretion on the matter but that court has over the years outlined the principles upon which the Court may exercise of its discretion. Having said this, I am left with one question to decide. Will the Appellant's appeal be rendered nugatory if his application for stay is refused?

It is very hard to see how the Appellant's appeal would be rendered nugatory if the proceedings in the Lower Court are stayed. Mr. Saende's argument that if the proceedings in the Lower Court are allowed to go on, and his client's appeal succeeds, there would have been a waste of judicial time. This is a sensible argument but the law is not, as was pointed out in the **Silverstein** case, always concerned with sense. The proceedings in the Lower Court may continue and even be determined but if the Appellant were to succeed in its appeal the proceedings in the Lower Court will be rendered unnecessary and the court hearing the appeal may make an appropriate order for costs to remedy that situation.

But as the Court of Appeal said in **Silverstein** case and it is worth repeating here that this Court is not laying down any principle that no order for stay of proceedings will ever be made. Each case must depend on its own facts.

Finally, Mr. Ngatia also argued that the Appellant's application was contrary to a consent order entered into earlier but I do not propose to go into this aspect as nothing useful will be achieved thereby. I, therefore, dismiss the Appellant's application dated 14th April, 2004 with costs.

Dated and delivered at Nairobi this 27th day of May, 2004.

**ALNASHIR VISRAM**

**JUDGE**