



Editorial Note

CIVIL PROCEDURE

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO 716 OF 2003

JOHNSON MWIRUTI MBURU APPELLANT

VERSUS

SAMUEL MACHARIA NGURE RESPONDENT

RULING

This is an application for stay of execution of the judgment/decree in CMCC No 5061 of 2002 Milimani pending the determination of an appeal filed in this court on 23rd October, 2003.

The grounds relied on are set out in the body of the application and also in the affidavit in support. These are that the applicant has an arguable appeal and that the appeal would be rendered nugatory if an order for stay is not granted. The applicant's counsel did say in his submissions that the applicant is prepared to deposit the entire decretal amount in the joint names of the respective advocates until the determination of the appeal.

Briefly the facts are that on 25th September, 2003 the lower court did enter judgment in favour of the respondent against the applicant for the sum of Kshs 450,000/- as general damages and Kshs 1,980 as special damages plus costs and interest. It was a running down matter.

The application is opposed on the grounds set out in the Grounds of Opposition dated 9th February 2004 filed on 10th February 2004. The grounds are that the application has no merit, it is misconceived, bad in law and is otherwise an abuse of the court process. In addition no sufficient reasons have been given to warrant grant of the orders sought and that the application is aimed to further delay the respondent from enjoying the fruits of the judgment.

In her submissions the respondent counsel stated that the respondent is not a man of straw but there was nothing by way of affidavit evidence to support this. The learned counsel claims that there are no chances of the filed appeal succeeding.

On the other hand the applicants are apprehensive that the respondent might not be able to refund the decretal amount awarded should the applicant's appeal become successful.

On the basis of the memorandum, although the court cannot at this stage probe further the grounds raised are not frivolous. The respondent has not shown that he would be in a position to refund.

Before making an order staying execution of the judgment, the court is mindful of the factors it must take into consideration. These are:-

- (i) that substantial loss may result to the applicant
- (ii) that the application was made without unreasonable delay
- (iii) that the applicant has furnished adequate security for the performance of the decree.

In respect of the above factors see the case of **NEW STANLEY HOTEL v ARCADE TOBACCONIST LTD 1986 KLR 757**. One of the factors is that this is a money decree and the decree holder should ordinarily be allowed to enjoy the fruits of his judgment, the appeal notwithstanding.

However on this, I have considered the case of **KENYA SHELL v KABIRU & ANOTHER [1986] KLR 410** – see holdings 2 to 4 for the principles to consider and the unreported case of **COTECNA INSPECTION SA v HEMS GROUP TRADING CO LTD CA 303/2000** unreported where the Court of Appeal in an application involving a money decree had to consider the possible inability of the respondent company failing to refund the moneys. The court went on to grant a stay although a substantial money decree was the subject matter.

In the circumstances of this case I find that substantial loss could result to the applicant in view of the possible inability of the respondent to pay.

I find that the application was made without unreasonable delay and in view of the offer to deposit the decretal amount I consider this also qualifies the applicant in respect of the final requirement concerning adequate security for the performance of the decree.

In the light of the above the application must succeed and an order of stay is accordingly granted in terms of prayer 3 of the application provided that the entire decretal amount is deposited in an interest earning joint account in the name of the advocates for the parties within the next 10 days. However should the advocates fail to agree the applicant is ordered to make a direct deposit into court of the entire decretal amount within the same period failing which this order shall automatically lapse and the respondents shall be at liberty to execute the decree.

It is so ordered.

DATED and delivered at Nairobi this 7th day of May 2004.

J G NYAMU

JUDGE