



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 888 OF 2001**

BEAT KOCH.....PLAINTIFF

VERSUS

MUKAWA HOTELS HOLDINGS LIMITED...DEFENDANT

RULING

By notice of Motion dated 25th March 2004 the defendant has come under Section 3 A of the Civil Procedure Act, and Orders XLI Rules 4, (1) and (2) of the Civil Procedure Rules .

The Defendant seeks a stay of execution herein pending the hearing and determination of the appeal from the judgment and decision of this Honourable court.

The submissions by defence counsel and the affidavit in support of the application bring out the following issues: -

- The defendant has filed a notice of appeal.
- That the plaintiff decree holder is a foreigner and does not reside within the jurisdiction of this Honourable court and has no known attachable within this jurisdiction.
- The defendant will suffer serious and substantial loss if the decree holder is paid the amount of US \$ 22, 000 and the defendant succeeds in its appeal.
- That the defendant is an established world class tourist hotel and it would cause embarrassment and distress to the clients if execution was levied.
- The defendant has deposited the equivalent in Kenya shillings, the decretal amount into court.

Defence counsel in response argued that the defendant had not filed a valid notice of appeal and has not shown arguable appeal. With respect, I am of the view that whether there is a valid notice of appeal or an arguable appeal is an issue that should be raised at the court of appeal. In this regard I am persuaded by the ruling of Justice Ringera, (as he then was) in **H C W C No 43 of 2000 IN THE MATTER OF GLOBAL TOURS & TRAVEL LTD** where in page 6 he stated

“However, whether they will pass serious scrutiny by the court of appeal is not for me to speculate and it is not necessary consideration at this stage”.

Justice R. Nambuye in H C C Misc No 169 of 2002 (MACHAKOS) KENYA NATIONAL CHAMBER OF COMMERCE – V – COUNTY COUNCIL OF MACHAKOS, the judge stated: -

“As regards the arguability or the success of the intended appeal this is a matter for the court of appeal.

The plaintiff’s counsel also argued that the defendant had failed to show that it will suffer substantial

loss, what they had shown it was argued was contingent loss but not immediate loss. He also argued that the Plaintiff's claim was for unfair dismissal and the defendant's appeal was intended to delay the Plaintiff's claim. Order 41 rule 4 (1) provides that a court for sufficient cause may order stay, but such stay should not in any event be granted unless the applicant can show that he will suffer substantial loss.

I am impressed by the defence argument that the plaintiff who is now out of the jurisdiction of this court and is indeed a foreigner might not repay the decretal amount if the appeal does succeed and the defendant would have difficulty in recovering the same out of this jurisdiction. This I am satisfied would lead to a substantial loss to the defendant.

I am on the view that stay should be granted on condition that the decretal amount is deposited in an interest earning account of both counsels.

The orders of this court are as follows: -

- (1) That the defendant is hereby granted stay of execution pending appeal.**
- (2) That the amount deposited by the defendant in this court being kshs 2, 476, 543. 70 be deposited in an interest earning account in the names of the firm of advocates representing the Plaintiff, on one hand, and firm representing the defendant on the other.**
- (3) That the costs of the application dated 25th March 2004 be the plaintiff's in any event.**

Dated and delivered this 27th day of October 2004

MARY KASANGO

AG JUDGE