



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL COURTS
CIVIL CASE 1039 OF 2001

BARYAN WALTER SHEPARDPLAINTIFF

VERSUS

MICHAEL VLADIMIR NICHOLAS SETON.....DEFENDANT

RULING

The defendant has come to court by a Notice of Motion dated 10th September 2004.

The defendant has come under Order 41 Rule 4 and Order 50 Rule 1 of the Civil Procedure Rules seeking stay of execution pending appeal.

Much argument was made by both parties on whether the defendant's appeal has a good chance of success. I think in this regard I am persuaded by the words of Justice R. Nambuye in **HCCC No. 169 of 2002 (MACHAKOS) KENYA NATIONAL CHAMBERS OF COMMERCE – 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”.

Since I am in agreement with those words I will not proceed to examine whether the appeal has high chances of success. I shall confine myself to the provisions of Order 41 rule 4 of the Civil Procedure Rules.

The defendant's counsel argued that the defendant wished to go to another court, I presume Court of Appeal on this matter. I dare say that is an undoubted right that the defendant has.

Defendant counsel said that the amount due to the plaintiff on the draft decree was 378, 461. 38 U.S D. This, counsel said, the defendant denied owing the plaintiff and having that in mind counsel said that it would be punitive to ask the defendant to pay. This would particularly be so if the plaintiff, who the defendant alleges is not a Kenyan citizen, was to leave the country.

Defence counsel said that there is nothing to show that the plaintiff had investments in Kenya other than his employment at KWS and on the converse the defendant, she argued, was 'grounded' in Kenya, was Kenyan citizen and a share holder in two companies at Wilson Airport and would offer to deposit his passport in this court as security.

The defendant, according to his counsel's argument is aggrieved by the rate of interest awarded to the plaintiff and also the award of the principal amount. Counsel relied on the case of **PAMELA MARY KIKUMU and FRANCIS MWANZA MULWA C. A. NO. NAI 201 of 2001**. In this case the Court of Appeal granted stay on the basis that the rate of interest awarded by the high court had not been prayed

for in the Plaintiff.

The defence's other authority was the case of **SOUTH NYANZA SUGAR COMPANY LTD and SAMUEL OSEWE OCHILLO C. A. NO NAI 79 of 2003**. The court of appeal granted a stay because the respondent was unable to show ability to refund the judgment sum. That also was the ratio of the other authority of **WESTMONT POWER KENYA LTD – V – BOSLEY FREDRICK & MOHAMED ALI T/A CONTINENTAL TRADERS & MARKETING C.A. NO NAI 135 OF 2003**.

The cases of **BUTT – BENT RESTRICTION TRIBUNAL (1982) KLR page 417 and NEW STANLEY HOTEL LTD – V – ARCADE TOBACCONISTS LTD (1986) KLR page 757** were where the applicant had large sums to pay and the court was of the view that to disallow stay would render the pending appeal nugatory.

In response to the above submissions the plaintiff's counsel attacked the grounds on the face of the application on the basis that they were addressing the rule 5 (b) of the Court of Appeal rules.

Plaintiff argued that it was also not sufficient for the defendant to say that he stands to suffer substantial loss without substantiating it with the assets he owns, which if he had to use to pay the decretal amount would lead him to bankruptcy. It was also wrong, counsel argued, for the defendant to argue that because the Plaintiff was in employment he ought not to benefit from the judgment he was awarded hereof.

Counsel also said that the argument that the decretal amount is substantial should be looked at on the basis that the nature of the dispute was substantial.

The Plaintiff relied on the case of **CARTER & SONS LTD – and – DEPOSIT PROTECTION FUND BOARD C A No 291 of 1997** wherein the judges quoted a portion from the case of **VISHARM RAVJI HALAI & ANOTEHR – v – THORNTON & TURPIN (1963) LTD C A NO NAI 15 of 1990**, which I think is useful to quote here: -

“The superior court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay.”

I have considered the arguments by both plaintiff and defendant and the affidavit evidence.

The defendant emphasizes that the plaintiff is a non-Kenyan and might go out of the country if the judgment amount is paid out to him.

Having regard to Section 109 of the Evidence Act the burden is on the defendant to prove that the plaintiff is not a citizen of Kenya. However the argument that the plaintiff might not refund the amount if the appeal is successful to my mind could be argued in the converse, that the defendant might not be in position to pay the plaintiff if the appeal does not succeed particularly when one considers that the defendant did not disclose his assets.

I am of the view that the defendant has failed to sufficiently prove in his submissions the substantial loss he would incur if stay is not granted. I am at the same time conscious of the fact that the decretal amount is huge by any standards.

In the exercise of my discretion I wish to balance the scale between the two parties and having done so I am of the view that the defendant ought to be granted conditional stay.

For that reason the orders of this court are: -

(1) That the defendant is granted stay of execution of the decree obtained herein on 25th

August 2004.

(2) That that stay is conditional upon the defendant providing a bank guarantee to the plaintiffs counsel to pay them the amount on the draft decree namely US \$ 378, 461. 38. if the intended appeal fails.

(3) That bank guarantee be provided within 30 days from todays date and in default the stay shall be vacated.

(4) That costs of the application are awarded to the plaintiff.

Dated and delivered this 27th October 2004

MARY KASANGO

AG JUDGE