REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA, AT
MILIMANI COMMERCIAL COURT, NAIROBI
HCCC NO.1256 OF 2000

ROYLINE INVESTMENTS LIMITED……..PLAINTIFF

V E R S U S

CONVENTIONAL & EXOTIC

POWER GENERATORS LTD……..1ST DEFENDANT

DICKSON T. MUCHIRI…….2ND DEFENDANT

DICKSON T. MUCHIRI T/a

KIGS INTERNATIONAL……..3RD DEFENDANT

R U L I N G

By an application dated 16th July, 2004 by way of a chamber summons brought under O.XLI rules 1 and 4 of the Civil Procedure Rules, S.3A of the Civil Procedure Act and all enabling provisions of the law, the applicant seeks the following orders from the court-

1. THAT this application be certified as urgent

2. THAT service of this application be dispensed with and the same be heard ex parte in the first instance.

3. THAT this court do order a temporary stay of execution of the orders of C. Meoli, Deputy Registrar issued on 14th July, 2004 and the subsequent decree and consequential orders pending the hearing and determination of this application

4. THAT this Honourable Court be pleased to order stay of execution and/or proceedings pending the hearing and determination of the appeal to be lodged by the applicant herein.

5. THAT the costs of this application be provided for.

The application is based on the following grounds-

(a) The applicants have discharged their professional undertaking to the decree holder in full .

(b) The learned Deputy Registrar erred in failing to find that the applicant herein rendered legal services to the decree holder and that he owes them Ksh.565,900/=.

(c) The Deputy Registrar erred in failing to take into account part payments that had been received by the decree holder.

(d) The Deputy Registrar erred in holding that the applicant's (sic) had not shown sufficient cause for the dismissal of the decree holder's application for arrest and confinement to civil jail.

(e) The learned Deputy Registrar erred in law and fact in ruling that the arrest and detention of the applicant's (sic) should be effected.

(f) The applicant's (sic) have an arguable appeal with a probability of success.

(g) The applicant's (sic) have filed an appeal against the Registrar Order (sic) issued on 14th July, 2004.

(h) The appeal will be rendered nugatory the stay is not granted (sic).

The application is also supported by the annexed affidavit of PHILIP K. KANDIE, Advocate.

On July 21, 2004 the first respondent filed grounds of opposition dated 20th July, 2004. These are that-

1. There is no appeal filed by the applicants and the issues raised in the supporting affidavit of Philip K. Kandie are therefore irrelevant and should be disregarded by court.

2. The applicants have not demonstrated that they will suffer irreparable loss if stay of execution is not granted and a mere statement in the affidavit would not suffice.

3. The application is incompetent as the applicants have not complied with the provisions or O.XLI rule 1 of the Civil Procedure Rules and it should be dismissed with costs to the first respondent.

During the oral canvassing of the application, Mr. Kuria appeared for the applicant while Mr. Mungai appeared for the respondent. Mr. Kuria requested the court grant orders in terms of prayers 3, 4 and 5 as set out on the face of the record. He told the court that the issue was whether the services were rendered. He contended that the first applicant is now a judge of the High Court and the second applicant is an officer of the court. He then submitted that if the orders are not set aside, the damage to be suffered would be irreparable. He further referred to the affidavit of Philip K. Kandie showing that the applicants' undertaking was clearly satisfied. He also referred to an attached draft memorandum of appeal and two authorities – **ABOK JAMES ODERA T/A A.J. ODERA & ASSOCIATES v JOHN PATRICK MACHIRA T/A MACHIRA & Co., ADVOCATES**, Civil Application No.NAI. 166 OF 2001 (UR 88/2001) and **COTECNA INSPECTION S.A. v. HEMS GROUP TRADING CO. LTD**., Civil Application No. NAI. 303 OF 2000 (UR 145/2000). He thereupon urged the court to grant the orders as prayed.

The application is opposed. In his response for the respondent, Mr. Mungai argued that no reason was given as to why the applicants say that the professional undertaking had been satisfied. He contended that they are trying to set-off by affidavit while O.VIII rule 2 provides that they ought to bring a cross suit or another suit. Secondly, he submitted that whereas the application was brought under O.XLI rules 1 and 4, rule 1 (2) had not been complied with as the court must be satisfied that substantial loss might be suffered. Counsel then referred to A**BOK JAMES ODERA T/A A.J. ODERA & ASSOCIATES v.**

PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES, Civil Application No.166 of 2001 (supra) and submitted that this authority was not in tandem with the facts of this case. In that case the court found that the advocate concerned was not a man of straw whereas in the present one attempts to execute went begging because the applicants kept on saying that they don't have any property. Therefore, counsel submitted, it is not possible to execute in any other way except by committal to jail. In any event, the applicants have not given any security as required by rule 1 (2). Thirdly, if the order is set aside, then there will be no need to go to appeal. Counsel thereupon urged the court to dismiss the application with costs, and to allow execution to proceed.

In his reply, Mr. Kuria said that it was not disputed that there is acknowledgment of payment, and that legal services have been rendered. He then submitted that the respondent's intention is egoistic and intended to harass officers of the court, otherwise there is no justification for committing them to jail. An alternative solution could have been found. Counsel then urged the court to invoke S.3A, set aside the Registrar's orders, allow the application and grant the orders as prayed.

After hearing both counsel, I note that the first ground upon which the application is based is that the applicants have discharged their professional undertaking to the decree holder in full. This statement is not factually correct. The court record shows that as of 6th May, 2004, a sum of Ksh.503,545.00 was still outstanding upon the decree and, together with interest, cost of execution and court collection fees the total sum would have stood at Ksh.567,920.00. It is not correct, therefore, for the applicants to allege that they have discharged their professional undertaking in full. They have not done so.

The second ground taken by the applicants is that the learned Deputy Registrar erred in failing to find that the applicant herein (sic) rendered legal services to the decree holder and that the latter owes them Ksh.565,900.00. Traced from the date of the professional undertaking, the total amount owed by the applicants is as stated in the preceding paragraph hereinabove. I agree with the learned Deputy Registrar that any matters touching upon and concerning a set-off cannot be canvassed at this stage, and in the casual manner adopted by the applicants. We are here concerned about a professional undertaking given for a definite and specific sum of money. This does not allow for any "**ifs**" or "**buts**". I also agree with Mr. Mungai for the respondents to this application that the procedure for set-off is expressly provided for in the Rules, and therefore these should be followed to the letter.

The third ground is that the Deputy Registrar erred in failing to take into account part payments that had been received by the decree holder. Again, going solely by the court record, this statement is not factual. In computing the amount due and payable as of 6th May, 2004, the computation took into account that a total sum of ksh.700,000.00 had been paid on five different occasions between 31st March, 2003 and 11th March, 2004. The only amount which is not included in the figure of Ksh.700,000.000 is a sum of Ksh.27,000/= which was received by the first respondent herein "**from Royline Investments Ltd through Kandie Kimutai & Co., Advocates, being part payment**." This amount was paid on 7th May, 2004 which was one day after the total sum payable to the decree holder had been computed. Even when it is taken into account, it does not make a substantial dent on the amount still outstanding and unpaid against the professional undertaking.

Grounds (d) and (e) upon which the application is based are only fit as grounds of appeal, and the matter before the court is not an appeal. In the same breath, one may observe that ground (f) invokes a formula which is found only in the Rules of the Court of Appeal and which need not be entertained at this level. For the purposes of this court, it is enough for an applicant to demonstrate sufficient cause in order to obtain an order of stay pending appeal without necessarily establishing that one has an arguable appeal with a probability of success.

In grounds (g) and (h), the applicants state that they have filed an appeal against the Registrar's order issued on 14th July, 2004, and that the appeal will be rendered nugatory if the stay is not granted. I must hasten to say that there is no evidence before this court that any appeal has been preferred against the Registrar's order hereinabov referred to. There is on record a draft memorandum of appeal, but that is all there is. A draft memorandum of appeal is only a draft, and unless and until it is filed, it does not ripen to an appeal. Indeed, prayer for order No.4 in the application seeks a stay of execution and/or proceedings

pending the hearing and determination of "**the appeal to be lodged by the applicants herein**." Prayer for order No.4 and ground (g) upon which the application is based are therefore contradictory of one another and I find that no appeal has been filed. In the event, there is no appeal to be rendered nugatory.

Order XLI rule 4 (2) is in very clear language. It states, inter alia-

"No order for stay of execution shall be made under subrule (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."

It cannot be gainsaid that this application was duly made without unreasonable delay. However, the applicants have not demonstrated to the satisfaction of the court that substantial loss may result unless the order of stay is made. The totality of all the above observations is that the application by chamber summons dated 16th July, 2004 has no merits and it is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 14th day of October 2004

L.NJAGI

JUDGE