

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 130 OF 2000**

COMMERCIAL BANK OF AFRICA LTD. PLAINTIFF

Versus

MOHANSONS FOOD DISTRIBUTORS LTD.

JASPAUL SINGH KANDHARI

PRITPAL SINGH KANDHARI DEFENDANTS

RULING

This is an application by the first defendant for stay of execution pending appeal.

The decision sought to be appealed against is the order of this court (Lady Justice Khaminwa) dated the 18th September 2003 allowing execution before taxation.

Relying on the averments in the supporting and further affidavits of Pritpal Singh Kandhari, Mr. Khagram argued that if stay is not granted the applicant will suffer substantial and irreparable loss. The assets it uses to conduct its business are likely to be attached and sold and that will lead to the collapse of its business and thus rendering its appeal nugatory. He also argued that the plaintiff is substantially secured by a charge of sh. 25,000,000/= registered in its favour against the applicant's property known as Title No. Mombasa/Block XXIV/57 which it should have realized before suing. Moreover, he further argued, the plaintiff is receiving income from the defendant/applicant through the receiver it has appointed and to allow execution to proceed will amount to double payment. He quoted a few authorities which I will deal with later.

The application is opposed. Mr. Mugambi for the plaintiff argued that the application is wholly unmeritorious. The decree the plaintiff seeks to execute arises from the judgment entered against the applicant on 25th September 2001 in respect of which no appeal has been preferred. The decree is for sh. 62,500,000/= which is well over the value of the charged property.

On the Applicant suffering substantial loss or its appeal being rendered nugatory Mr. Mugambi submitted that there is no evidence in court to show what loss the applicant will suffer. The Applicant has not exhibited a balance sheet or any other document to show its worth for the court to know that indeed its business will collapse if stay is not granted. The amount received from the receivers will be reflected in the application for execution and the issue of double payment does not therefore arise.

This application is fairly simple and straightforward. The plaintiff has a judgment against the applicant for sh. 62,500,000/= against which there is no appeal. How will execution before taxation cause any loss, leave alone substantial or irreparable loss, to the applicant? With or without taxation of the plaintiff's costs the applicant is still bound to settle the decretal sum. What the applicant is saying in short is that if the plaintiff is allowed to execute and recover the decretal sum before its costs are taxed or ascertained it will suffer loss. It would rather the costs are first taxed so that the plaintiff will execute for the whole sum at once.

I have read the authorities cited by Mr. Khagram. True they are pertinent on the issue of substantial loss and especially where the applicant's business is likely to collapse if stay is not granted. The authorities, however, deal with applications for stay in appeals or intended appeals on liability. The loss envisaged by Order 41 Rule 4, in my view, is where if the applicant's appeal is allowed he will not, due to

the impecuniosity or otherwise of the decree holder, be reimbursed.

In this case if the applicant's appeal succeeds all it will achieve is to postpone the applicant's day of reckoning and perhaps make its position worse by the accrual of interest on the decretal sum. Even if the Applicants intended appeal was against the judgment of sh. 62,500,000/= it would still not suffer irreparable loss. The plaintiff is a bank which would find no difficult in repaying that sum and even damages if the attachment would have resulted in the collapse of the applicant's business. I find no merit in the application and I therefore dismiss it with costs.

DATED this 11th day of February 2004.

D.K. MARAGA

Ag. **JUDGE**

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