

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 179 OF 2004

SHAWAZ TEXTILE MILLS LIMITED APPELLANT

VERSUS

JOHN NDIRANGU KIMEU RESPONDENT

RULING

In this application, made under Order 41 Rule 4 of the Civil Procedure Rules, the Appellant/Applicant seeks to stay the execution of the Judgment of the lower court at Milimani in CMCC No 7713 of 2003 pending the determination of this appeal.

Both liability and quantum are in issue in this appeal. At this time, the Applicant seeks stay of execution, arguing that it stands to suffer substantial loss if stay is not granted, as it would be unable to recover the funds in the event of a successful appeal. It has submitted that the Respondent has no ability to refund the sum.

The Respondent, on the other hand, has deponed that he is in farming business and that he would wish to invest the decretal sum in his business. However, he has failed to disclose his assets or demonstrate in any way that he would be able to refund the Judgment amount in the event he loses the appeal. Of course, the primary burden is on the Applicant to show that the Respondent is impecunious, and would not be able to repay the sum. However, the Applicant having deponed about its fears of the Respondent's inability to refund the amount, the Respondent could have rebutted the same with information on his assets, which information is within his knowledge and could have been given with ease.

The function of the court, in a stay application "is to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required" (See *Gitahi vs Warugongo (1988) KLR 621*). Here, in this case before me, the Respondent has deponed that he actually wants to invest the decretal sum in his business. That would be a highly risky proposition, and the Court would certainly not be seen to be "even handed" in protecting the interests of both the parties.

So, then, how should this Court protect the interests of both the parties, which is indeed the guiding principle in an Order 41 Rule 4 application of this nature?

For the Applicant to succeed in this application he must demonstrate to the satisfaction of this Court that substantial loss will ensue if the Order is not granted; that he has filed this application without delay; and that he is willing and able to give such security as is ordered by the Court for the due performance of the decree. That is the plain reading of the Rule, and the onus is on the applicant to satisfy all the conditions through his deposition, and not through bold statements from the bar.

The Applicant's promptitude in filing this application cannot be faulted. He did so within about two months of the Order appealed against. He has undertaken to provide such security as is ordered. And, whether he will suffer substantial loss if the Order was not made, I believe he would, as I have outlined before. There is simply not enough material before this Court in the Replying Affidavit to demonstrate that the Respondent will be able to refund the decretal sum should the appeal succeed.

Accordingly, in an attempt to balance the interests of both the parties, I shall allow this application for

stay of execution on condition that the Applicant shall deposit the entire decretal sum in this Court within the next 21 days to be held as security pending the hearing and determination of this appeal. Those shall be the orders of this Court. Costs shall be in the cause.

Dated and delivered at Nairobi this 8th day of December, 2004.

ALNASHIR VISRAM

JUDGE