



IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLICATION NO. 438 OF 2003

KENYA SHIELD SECURITY LIMITEDPLAINTIFF

V E R S U S

DISMAS MAUTI SANGAE1ST DEFENDANT

ATTORNEY GENERAL OF KENYA2ND DEFENDANT

FAMILY LIFE CONSELLING ASSOCIATION OF KENYA.....3RD DEFENDANT

JAMES MUNDIA4TH DEFENDANT

R U L I N G

The application by way of Notice of Motion dated 28.4.2003 seeks temporary stay of execution pending interpartes hearing of the application and leave to file appeal out of time. The Applicant intends to appeal against Mrs Omondi, Senior Resident Magistrate's judgement of 24.1.2003. The Magistrate awarded Kshs.153,389/- in damages for malicious prosecution and the Applicant feels aggrieved. However, he was late in filing memorandum of appeal due to over sight of advocate.

On 17.4.2003, proclamation of attachment was executed. Mr. Nyakyangane for the Respondent opposes this application relying on his own affidavit saying there is no appeal already filed, the Applicant has not shown any substantial loss that would accrue if execution is carried out.

I have heard both counsels and read the affidavits. It is in the case admitted by the applicant that the advocate omitted to file the appeal in time. It is generally accepted that subject to certain factors, the omission or negligence of an advocate should not be met in the client. I feel therefore, that leave should be granted.

As for stay, the rule of application is that the Applicant should show that there would be substantial loss if stay is not granted. Substantial loss exists in various forms so in this case, I see that the Applicant having already deposited the decretal amount, has already removed the said amount from his use and to me, that is a loss if in addition the execution is imposed.

Platt J.A. said in SHELL OIL CO. LIMITED vs. KABIRU (1981-82) 1 KLR that substantial loss exists in various forms. I have further looked at the proposed grounds of appeal and I am satisfied that the appeal is not frivolous. The principle is that appellant if successful should not have the result of his appeal rendered nugatory.

For these reasons, I grant leave and order that appeal be filed and served in 14 days and further that there be stay.

No order as to costs.

DATED at Nairobi this 23rd day of May 2003

A.I. HAYANGA

JUDGE

Read to Mr. Nyandieka for Respondent

No appearance for Respondent.

23.5.2003