



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL APPEAL NO 49 OF 2002**

**KWA HOLA PHARMACY.....APPLICANT**

**VERSUS**

**COPY CAT COAST LTD.....RESPONDENT**

**RULING**

The application was brought under order 41 rule 4(1) of the Civil Procedure Rules and section 3A of Civil Procedure Act. The applicant sought for a stay of execution and a temporary injunction to restrain the Decree Holder from executing his decree until the hearing and determination of the appeal. The application is supported by an affidavit sworn by the proprietor of the applicant firm on 22.3.2002.

The relevant appeal was filed on 27.3.2002 against a decree of the lower Court in Mombasa Resident Magistrate's Court Civil Case No 2367 of 1997 in a judgment dated 14.3.2002. Documents annexed to the affidavit in support of the application were the copy of Memorandum of Appeal and the Proclamation of Attachment confirming that execution of the decree intended to be stayed is in advance stage. The judgment or ruling of the lower court which is being appealed from was not annexed. Nor was the decree being executed or the plaint and defence filed in the lower Court. The Proclamation of Attachment shows that the total sum due under the warrant is Kshs 43,786/50. The properties proclaimed would easily be valued to the sum of Kshs 150,000/-.

Grounds upon which this application is based are given as –

- a) The appellant has preferred an appeal.
- b) That the intended appeal will be rendered nugatory if the execution of the decree proceeds further.
- c) That it is in the interest of justice that a stay is granted to enable the parties deliberate on all matters on merit.

The provisions of order 41 rule 4(1) clearly indicate that the Court before which an application for stay is being considered, will order for such stay if sufficient cause is shown to it and/or if it is just to make such an order. However, the Court making such order of stay shall not make such order unless it 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 and unless such security as the Court will consider reasonable for the due performance of the decree or order may have been given by the applicant. This Court has under the said order jurisdiction to grant a temporary injunction restraining the Decree-Holder from executing the decree until the appeal is determined. It is our view however that the principles governing the stay or such injunction are the same and it is to them that I now turn.

Before I consider the substantive grounds upon which this application is brought, however, I note that no

information was given to this Court as to whether or not the applicant first applied for the stay sought herein to the Court from which the relevant appeal is preferred. The order under which this application is brought requires that application for stay need first be made to that Court and if it is refused, it would then be made to this Court to which the appeal is preferred. In the case of *Paul Ndeti Musya v Mohamed Abdulrahim*, Mombasa HCCC No 147 of 2001 decided recently by me I was confronted by the question as to whether an applicant for stay could file his application directly in this Court without first making the application to the Court from which the appeal is preferred. In that case the applicant strongly argued that an applicant who did so had no right of being heard by the appellate court and that his application was due to be thrown out outrightly. I ruled there that an applicant who filed his application in the appellate court without first seeking the stay in the Court from which the appeal is preferred could be heard and could be granted the relief. I based my decision on the fact that the imperative provisions which earlier made it mandatory for the applicant to first and foremost apply to the Court from which the appeal was preferred had been removed by the amendment contained in Legal Notice No 36 of 2000.

In coming to that conclusion, however, I did not lay down a rule that applicants for stay should ignore the first part of that rule. The proper practice is that the first application should first be laid in the Court that issued the decree or order appealed from. This should continue to be the practice. My ruling should therefore be understood to mean that for good reasons which should be brought to the attention of the appellate court while considering the application, such appellate court has jurisdiction and discretion to grant the stay upon the settled principles even if the applicant for the stated good reasons, had not first applied for such stay to the Court of first instance.

In this application however, the applicant did not explain whether or not it applied to the lower Court and if not, why it did not do so. It is my view that the now established practice of applying to the Court from which the appeal is preferred should be adopted where there are no impediments so to do. Applications for stay to the Court to which the appeal is preferred should be only done on special circumstances which must be explained to the satisfaction of the Court during the prosecution of such an application.

In this application no such good reasons were given nor did the applicant bother to explain any ground for coming to this Court directly. In view of the fact that granting of relief sought herein is discretionary and in view of the fact that I am not persuaded that the applicant had good grounds for coming to this Court directly, I would exercise my discretion against him and refuse his prayer on this ground alone.

If I am wrong however, I would wish to consider this application on other discretionary grounds.

It was argued by other applicant that its various goods have been proclaimed to be auctioned soon unless this Court grants a stay. The applicant did not show that the respondent if the goods are sold and paid to it cannot be able to pay back if the appeal finally succeeds, or that the chances of recovery of the proceeds of execution from the respondent are remote. It only argued that its appeal has high chances of success. It referred this Court to the Memorandum of Appeal. However, as indicated hereinbefore, no copy of proceedings or judgment or even decree of the lower Court was attached to this application. It is not therefore possible to know the nature of the lower court's case. The applicant did not explain why the proceedings, the decree or the judgment was not attached, as those documents would be the ones to enable this Court get insight to the real case of the applicant and to understand genuinely or whether or not the said grounds of appeal have substance that would show or make the appeal arguable or one with chances of success. As stated in the case of *Nyakiba William Moruri v Jane Kemunto Nyakiba*, in Court of Appeal Civil Application No 79 of 1999 (UR 30/99) at pg 3:-

“..... It is the responsibility of the applicant to establish that he has an arguable appeal. That cannot be done unless and until he places before us sufficient material to enable us determine that point ..... Save for the application and judgment of the Superior Court, there is no record of the proceedings before the Superior Court. The importance of the proceedings, ..... .. is that the intended two main attacks against the judgment of the Superior Court, would lack merit if this Court had the record of the proceedings and evidence adduced in the Superior Court. Evidence that would show that the applicant has other sources of income ..... But, as argued..... this Court in the absence of the

evidence ..... cannot come to any conclusion ..... and thereby reach the finding that this would be a point worth canvassing an appeal .....

In Mombasa HCCC No 147 of 2001, which I decided recently and to which I made reference hereinabove, I ruled that attaching the mentioned documents particularly the proceedings and judgment appealed from may not be imperative and appeared technical and not fatal if not done. I however therein clearly stated that the applicant who fails to do so, does it at his own risk and to his detriment as the success or failure of his application for stay may substantively depend on it. In this case in the absence of proceedings and judgment, there is no material before me upon which I can decide whether or not the applicant's appeal is a good appeal or that it may have good chances of success or that it has arguable issues. Accordingly this application would similarly fail on this ground.

Having come to this conclusion I find no obligation to consider in detail other principles upon which a stay of execution is usually decided. I however note that the decretal sum is only about Kshs 43,000/-. The applicant is a firm worth over a million worth of stock and equipment. The equipment proclaimed to be auctioned could be worth over Kshs 150,000/-. The applicant could easily salvage the equipment and drugs by settling the decree and continue to process its appeal instead of wasting a lot of funds making applications such as this which are not meritorious and which are time consuming. The interruption that can be brought by the sale of the proclaimed equipment and drugs itself would be greater than making effort to settle the decree and then proceed with the appeal.

This application has really no merit and is shortsighted on the part of the applicant. Be that as it may, however, I am only inclined to make the following order, for what it is worth:-

Orders:

1. Stay of execution is hereby granted on condition that the applicant within 7 days hence, deposits in a savings bank account to be opened and to be operated by the counsel of both parties with no authority of withdrawal until this Court makes appropriate orders to that effect, a total sum of Kshs 50,000/-.
2. If the applicant complies fully with the above order, then the process of execution to be totally rescinded forthwith; and if the applicant fails to fully comply with the above order, the stay to cease forthwith and the respondent to be at liberty to proceed with execution without any impediments.
3. Costs of this application to the respondent in any event.

**Dated and delivered at Mombasa this 17th day of April , 2002**

**D.A ONYANCHA**

**JUDGE**