



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**APPELLATE SIDE**

**CIVIL APPEAL NO. 232 OF 2002**

**OSCAR KARUGA BEAUTTAH .....APPELLANT**

**VERSUS**

**UKWELI VIDEO PRODUCTION .....RESPONDENT**

**R U L I N G**

It is inappropriate for a litigant to come to court for the exercise of its discretion and at the same time give it conditions for that exercise. This gives the court that such litigant is not serious in whatever he is seeking.

In any case, this being an application for a temporary injunction, the court would expect it to be based on, and to satisfy the condition set out in the case of *Giella Vs Cassman Brown and Company Limited [1973] E.A.*, namely:-

- (a) the establishment of a prima case with the probability of success;
- (b) irreparable injury which cannot otherwise be compensated by an award of damages; and
- (c) in case of doubt, on a balance of convenience.

In the appeal subject to this application, it is admitted the appellant filed a statement of admission of the claim in the lower court and that he either offered to pay the defendant by instalments but that the respondent has not accepted them for being too low or that similar application was made in the lower court but refused.

In case of the former, then the likelihood of success of the appeal hangs in the balance and that if that condition is not so satisfied then I am not sure the order sought can be granted.

In case of the latter, this court has a discretion under order XLI Rule 6 of the Civil Procedure Rules and that in compliance of that rule, this court granted the injunction on 29.5.2002 on terms that the applicant deposits into this court the entire decretal amount into court.

The matter was mentioned on 12th June 2002 when parties asked for time to negotiations as to settlement of the dispute and on another mention date (26/6/2002) they could not agree on what instalments the applicant could pay. While the applicant wanted to settle the debt by monthly instalments of Kshs.15,000/= the respondent wanted a down payment of half the decretal amount before agreeing on what other instalments could be made.

The applicant declared through counsel, he was unable to raise the half.

The impression declared through counsel, he was unable to raise the half. The impression given by this turn of events was that the applicant wanted to go by the statement of admission in defence and to pay the decretal amount to the respondent.

This is why I said the likelihood of success of the appeal in such circumstances appears remote, hence failure on the part of the applicant to satisfy an essential condition for the grant of an interlocutory injunction.

And with the first condition unfulfilled there is the second condition. The decretal amount sought is quantifiable and in fact known I do not see how in the circumstances it can be said the applicant the applicant will suffer irreparable loss or injury which cannot be compensated by damages if the appeal succeeds.

Even if the negotiations entered into by the parties related to depositing of security into court, there is no provision in law such security to be made by instalments. Sorry, but I think the applicant does not seem to acknowledge the seriousness of this matter and seems only to be buying time.

The issue of whether or not the applicant paid the decretal amount to the respondent is not very clear but what I must note is that he has already admitted in this application having made part payment of the same to the respondent since the decision was made in the lower court.

This certainly means he acknowledges the debt as still outstanding.

Delivered and dated this 25th day of July, 2002.

**D.K.S. AGANYANYA**

**JUDGE**