

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 279 OF 1999

DOSHI & COMPANY (HARDWARE) LTD. PLAINTIFF

VERSUS

NIAZONS KENYA LIMITED DEFENDANT

RULING

The defendant seeks orders of stay of judgment granted on 8.11.2001 in favour of the plaintiff, pending appeal. The grounds relied on are that the appeal has good chance of success and that the plaintiff consented to a stay and should not now be heard to object. It is also said that the claim is substantial.

The plaintiff claims shs.5,869,047.90 being amounts for goods sold and delivered to the defendant which is a substantial claim by any standards. Notice of appeal is already filed. These are the only grounds put forward by the applicant saying that execution shall render the appeal nugatory. Mrs. Gor for respondent has taken objection on the provisions of procedure invoked by the applicant. She says application should fall under Order 41 rule 4 and should be by Notice of Motion and not Chamber summons as is the case here.

Order XXI rule 22 (1) is not applicable saying that the provisions is for the situation where decree has been sent to another court to execute. On these objections I agree that rule 21, 22 is not applicable but the application falls under Order 41 rule 4 however since this matter was brought on the two provisions I find that the use of Chamber Summons rather than Notice of Motion is not fatal to this application.

As to the merits of the application the provisions of Order 41 rule 4 requires that sufficient cause be shown why decree should be stayed. Merely filing an appeal does entitle the applicant to a stay.

Also substantial loss must be shown and the applicant must furnish security for the payment of the amount that may be found due. In this case no substantial loss is shown. That the amount of decree is substantial is not substantial loss considering the claim is for goods sold and delivered. The respondent says that the appeal has no merit and if it was to succeed the respondent has not been shown to be a man of straw. He can repay the money. I find the application filed without delay judgment having been made only on 8.11.2001. I am of the view that the applicant has not shown any sufficient cause to warrant an order for stay . In the case of Kenya Shell v. Karuga Court of Appeal referred said (Platt JA) "that substantial loss is the cornerstone of the jurisdiction to grant order of stay". In this case no substantial loss is shown the amount of Shs.5,869,047.90 is for goods sold and delivered and the payment of the price cannot be said to be substantial loss. For above reasons application is dismissed with costs.

Dated this 5th day of July 2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE

Mr. Gor

Mrs. Gudka holding brief