



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO.104 OF 2002**

RICHFIELD ENGINEERING LTD ..... APPELLANT

VERSUS

HARAKA ENGINEERING WORKS ..... RESPONDENT

**RULING**

It is apparent from the Memorandum of Appeal filed on 24th June 2002 that the learned Resident Magistrate in his judgment in Civil Suit No.3520 of 2001 did order the present Applicant to pay to the Respondent an amount of KSh.141,600/-. The Applicant felt aggrieved and filed an Appeal against the same decision. It has also filed this application dated 16th September 2002 seeking stay of execution of the decree and all the consequential process flowing from the same decision. Its main ground in support of the application is that the appeal it has filed is arguable because the learned Magistrate, according to the applicant, misdirected himself by relying on extraneous items to arrive at his finding. The same extraneous matters were that the assignment to supply the goods was urgent; that the assignment was done over Christmas vacation and that an invoice was sent a month later after negotiations had failed. Applicant gives another example of what makes the appeal arguable and that is that the learned Magistrate erred in relying on the oral evidence of PW.1 and failed to consider the evidence given by the applicant's witness. The other grounds for the application are that the appeal will be rendered nugatory if a stay of execution is not granted as the applicant may end up making payments which it justly ought not to make; that the applicant will suffer substantial loss if stay is not granted, and that the application has been brought without delay. There is an Affidavit in support of it which is sworn by the advocate for the Applicant and another affidavit sworn by one of the Directors of the applicant company. These two Affidavits were however in support of the original Notice of Motion. The same was amended but the amended Notice of Motion does not have any affidavits in support. That however is not fatal as there are on record the two affidavits I have referred to.

The Respondent opposed the application but I do not have any grounds of opposition in the file neither is there any Replying Affidavit in opposition to the application.

I have considered the application. The main thrust of the application is based on two allegations. First is the allegation that the appeal which is already filed is arguable. The second is that that being the case the results of the appeal would be rendered nugatory if stay is not granted. The third is that the Applicant would suffer substantial loss if the orders of stay are not granted and lastly that the Applicant has offered security in the form of a banker's bond.

Whether the appeal is arguable or not is a matter that the court can only decide upon properly if proceedings and/or judgment of the court below is availed to this court (in its appellate jurisdiction). As matters stand now there is no copy of judgment or of proceedings and it would be impossible for the court to have an informed opinion on whether the appeal is arguable or not. If I may venture to give example. The applicant says extraneous matters were relied upon to come to a decision by the Resident Magistrate. How do I find out that without the proceedings and judgment before me? In my humble opinion, when a party seeks stay of execution orders on grounds that the appeal he has filed is arguable, then he must avail the proceedings and judgment whether typed or not to enable the court peruse the same and make an informed decision on whether the appeal is arguable or not. As that was not done here, I cannot say that the appeal is arguable and in the same breath I cannot say that it is not arguable. I therefore cannot order

stay on that basis.

The next matter I need to consider is whether the outcome of the appeal if successful would be rendered nugatory. I do not think so,. This is a monetary decree. The amount awarded is KSh.141,600/-. Both parties accept this. In order that the outcome of the appeal may be rendered nugatory if the application is not granted, the Applicant needed to demonstrate that once the execution proceeds and the decretal amount is paid out, then even if it won the appeal, it would not get the money back together with interest on it. In the alternative, it needed to demonstrate that its business would suffer irreparably if the amount is paid and later he wins the appeal. All that the Applicant says through Brahmhatt's Affidavit is that it may suffer because the Respondent may "dispose of the applicant's tools of trade". Well it is now settled that tools of trade are not attachable. However, here all it says is that the Respondents may dispose of its tools of trade and consequently cause disruption of the applicant's business but it does not state in what way. It does not even state what business it is engaged in. Further, it does not state that the Respondent is "a man of straw" and will not refund the money if appeal went against it. I am not satisfied that the applicant has demonstrated that the appeal would be rendered nugatory if execution proceeded. The reasons, I have given when considering this aspect also cover the argument that the applicant would suffer substantial loss if the stay orders are not granted.

The Applicant states that it is ready to offer a Banker's Bond as security. That was said from the bar. However in Brahmhatt's Affidavit he says that "The Applicant's are willing to meet any terms as to stay of execution under Order 41 of the Civil Procedure Rules. I therefore understand the advocate's offer to mean particulars of the same terms. However such particulars should have come from the Applicant itself and not from the advocate.

I do feel that I am not satisfied that any proper grounds have been adduced for granting the orders. I will however stay the execution but I will do so upon condition. The decretal amount of KSh.141,600/- is to be deposited into an interest earning Bank Account in the joint names of the Advocates for the Applicant and the Advocate for the Respondent within 30 days from the date hereof. Provided that is complied with there shall be stay of execution till the appeal is heard and determined. There shall be stay for 30 days from the date hereof to facilitate the compliance with the same condition. I need not state that the execution shall proceed if the condition herein is not complied with. Costs of this application to the Respondent in any event. Orders accordingly.

**Dated and delivered at Mombasa this 3rd Day of October 2002.**

**J.W. ONYANGO OTIENO**

**JUDGE**