

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MISC. APPLICATION CASE NO. 1206 OF 2002
IN THE MATTER OF AN APPLICATION FOR STAY PENDING APPEAL

ABERCROMBIE & KENT LIMITED.....APPELLANT/APPLICANT

PATRICK M. MUIRURI.....RESPONDENT

RULING

This is an application by way of Notice of Motion brought under rule 4(1) of O. XLI of the Civil Procedure Rules and Sections 65, 796 and S.3A of the Civil Procedure Act and all enabling provisions of the law by the unsuccessful defendant in Milimani CMCC No. EJ454 of 2001, Messrs Abercrombie and Kent Ltd. for Stay of Execution of the Court's judgement made in favour of the plaintiff therein, Patrick M. Muiruri for Shs.276,204/05 on the grounds inter alia that the applicant would suffer substantial loss if the decree is executed as the respondent is a man of no ascertainable means. The application is however strenuously opposed on the grounds inter alia that the appeal was incompetent as no leave had been obtained before it was filed and that he was not a man of straw as he was an employee of a reputable company.

On the affidavit evidence, it appears that on 8th October, 2002, the respondent obtained judgement for Shs.276,204/05 consisting shs.70,169/05 for unpaid leave, shs.131,567/= unpaid salary and shs.74,472/= balance of unpaid incentive commission. As the applicant was dissatisfied with the said judgement, it filed this application while still preparing to file the appeal. By the time this matter was heard on 21st November, 2002 the appeal had been lodged a few days after the period allowed had expired. According to the supporting affidavit, it was contended that the applicant had no means of repaying the decretal amount and was also about to leave the jurisdiction of this court. Consequently, the decretal amount should be deposited in an interest earning account. On his part, the respondent deponed that he was employed as a service Engineer Administrator by Kencell Communications Limited and was in receipt of salary of Shs.115,953.00 and would be able to refund the decretal amount in the unlikely event of the appeal succeeding. He also denied that he was about to leave the jurisdiction of this court for any length of time.

Mrs. Gathara conceded that the appeal had been filed out of time and that she was in the process of seeking extension of time. In her view the appeal had good chances of success as the trial court had misdirected itself on law and that the applicant would suffer substantial loss if stay is not granted. In her opinion the respondent had not shown that he was of any substance as he had not produced evidence of property owned or bank statements. To support her submissions, she referred the court to **C.A. No. 411 of 2001, Murathe Vs. Prudential Bank Limited (unreported)** in which stay was granted to the applicant for a judgement of over Shs.7.0 million as the applicants' political life would have been ruined if execution had proceeded before the appeal.

Mr. Imanyara strongly opposed the application. He stated that as leave had not been obtained before the appeal was filed out of time, there was no valid appeal pending and that the appeal also appeared to be only against part of the judgement. He further submitted that the applicant would not suffer any substantial loss as the amount could not cripple its operations that would not be difficult to recover it from the respondent who was employed and was in receipt of a reasonable salary. To support his submissions, he referred the court to a number of authorities, whose decisions appeared to turn on whether or not it had been shown that the applicant would suffer substantial loss either through ability to sustain its ordinary business in spite of payment or in recovery in the event the appeal is successful.

In the instant case, the applicant does not fear loss through ability to sustain payment. In fact it proposes to deposit the money in an interest earning account of the advocates of the parties or in court. What it appears to fear is only that it may not be able to receive back the sum in dispute of nearly shs.300,000/-. On this account, it is observed that the applicant is employed by a reputable company and is in receipt of a fairly high salary of over shs.100,000/-. If the applicant is therefore successful, the

respondents could repay the decretal amount by instalments. As there is no evidence against this ordinary cause of events, I see no reason why the applicant should expect substantial loss from such a small amount which it can take in its stride.

In view of the above, I am not satisfied that the applicant would suffer any substantial loss if the decretal amount herein was paid and I hereby dismiss this application with costs.

Orders accordingly.

Delivered at Nairobi this 27th day of November, 2002.

G.P. Mbito

Judge